Opinion **Inside Business**

Private equity moves into the antitrust spotlight

Top US enforcer wants more scrutiny of ‘roll up’ acquisitions which build dominant market shares

JAMES FONTANELLA-KHAN

Jonathan Kanter of the US Department of Justice said a fuller assessment of buyout firms’ deals was ‘top of mind’ © Stephen Voss/FT

James Fontanella-Khan 10 HOURS AGO

For the private equity groups that now control so much of the US economy, America’s top antitrust enforcer has a clear message: expect more scrutiny.

Over the past decade or so, the likes of Blackstone, KKR and Apollo have expanded into even bigger corporate and industrial juggernauts, owning companies seemingly across every sector of the economy from retail stores to dating apps. At the same time, they have created a financial ecosystem as key lenders to each other.

Now the head of the US Department of Justice’s antitrust unit Jonathan Kanter wants more checks on such power, in particular how they “roll up” acquisitions in a sector, building market share through a series of deals.

He told the Financial Times in a recent interview that a fuller assessment of buyout firms’ deals was “top of mind”. Kanter is concerned that roll-ups create too much market power, benefiting those who work for the investment funds at the detriment of Main Street.

The 48-year-old speaks with the knowledge of an insider. He is a former antitrust lawyer at Paul Weiss, which counts many top private equity groups among its client list.

“Sometimes [the motive of a private equity firm is] designed to hollow out or roll up an industry and essentially cash out,” Kanter said. “That business model is often very much at odds with the law, and very much at odds with the competition we’re trying to protect.”

The expansion of the buyout groups is eye-popping. Private equity firms announced a record 14,730 deals worth $1.2tn globally last year — that is nearly double the previous high in 2007. Employees at buyout firms pocketed $23.4bn for their work — significantly more than their investment banking pals operating on Wall Street.

Critics say the increasing market share of private equity groups in some industries has given them power to control prices and labour costs in ways that are often not in the best interests of consumers and workers.

Laura Alexander at the American Antitrust Institute said private equity firms have been “talented at finding regulatory cracks . . . they are particularly adept at exploiting reporting thresholds and reporting requirements for antitrust review”.

In the past, private equity houses — or financial buyers as they are known in the industry — had actually been seen as a solution for the antitrust problems of big corporations, or strategic acquirers, which were the main concern of competition watchdogs.

“The world was divided into financial buyers and strategic buyers, and the antitrust agencies typically focused most of their time and effort on strategic buyers,” said Rick Rule, a top antitrust lawyer at Rule Garza Howley and former colleague of Kanter at Paul Weiss.

“Private equity should now be aware that divide no longer necessarily exists, because there’s an awareness that even traditional antitrust problems can come up in the context of big private equity companies, particularly as they buy multiple players in the same space.”

The healthcare sector is an example. Buyout deals in the industry ballooned from about $42bn in 2010 to $120bn in 2019 and many essential services, including emergency room services, mental health clinics and dentistry are now in the hands of private equity.

In many areas, prices have gone up and the quality of care has deteriorated, according to multiple studies. The newspaper industry is another sector where private investment firms have expanded their footprint and drawn criticism, with concerns of cost-cutting at the expense of journalism.

However, if Kanter and Lina Khan, who leads the Federal Trade Commission, want to tackle concerns about market power, they face probable legal battles and difficult ones at that.

They are essentially seeking a shift in approach from focusing heavily on consumer welfare standards — where size does not matter as long as prices remain competitive — to a model that also includes limiting companies from having too much market power.

James Keyte, director of the Fordham Competition Law Institute, said the agency's reinvigorated focus on private equity and industry roll ups will not easily result in tangible enforcement victories or sectoral change.

"Unlike the EU and UK, antitrust remedies in the US require the agencies to go to court and win cases under existing statutes and case law interpretation. And under current case law, this will be a tall order, no matter how laudable are the agency's goals or how passionately they are pursued," he said.

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