

## The Anti-Competitive Nature of Private Equity Collaboration: Legal Risks and Mitigation

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On June 11, 2014, Bain Capital Partners LLC (“Bain”) and Goldman Sachs Group Inc. (“GS”) agreed to settle for \$121 million a lawsuit which claimed that Bain and GS colluded to keep prices down in leveraged buyouts (See *Dahl v. Bain Capital Partners LLC*, 937 F.Supp.2d 119 (D. Mass. 2013)). The Bain and GS settlement and the pending trial involving the remaining defendants in the *Dahl* lawsuit is a reminder to private equity groups that attempts at collaboration and involvement in club deals may be viewed through an anti-competitive lens, opening up private equity firms to potential liability.

### The *Dahl* Case

The plaintiffs in *Dahl* filed claims under the Sherman Antitrust Act, alleging that the defendant private equity firms engaged in an overarching conspiracy through the suppression of prices and agreements between the defendants to not jump each others’ deals. The defendants rejected such claims, stating that each defendant acted not out of agreement, but through their own independent actions.

The Court, in its March 13, 2013 ruling on a motion for summary judgment, found that private equity firms do have legitimate reasons and justifications for collaborating with other private equity firms, such as spreading the risk of the acquisition and the pooling of financial resources. However, while dismissing most of the claims against the defendants, the Court allowed the plaintiffs to proceed with the argument that the defendants had an agreement to not jump each others’ deals, and such an agreement did not arise out of independent interests but

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rather a code of conduct among the private equity firms. If such an agreement was found to exist at trial, the defendants would likely be in violation of the Sherman Antitrust Act. Multiple emails supported the plaintiffs' claim, with private equity firm executives stating that "KKR has agreed not to jump our deal since no one in private equity ever jumps an announced deal" and "club etiquette prevail[ed]." Such emails created the crux of the plaintiffs' case. Such emails also highlight the importance of understanding how emails could be misinterpreted without context aiding their understanding and therefore used as evidence.

### **The Risks of Collaboration**

While no new law has come out of the *Dahl* case, the settlement and pending trial show that risks exist when private equity firms collaborate. Although joint bidding and clubs deals are not illegal *per se*, such collaborations walk a thin enough line that certain actions may be seen as anti-competitive and result in lawsuits or Department of Justice investigations. It is important to note that antitrust claims usually involve treble damages, which allow plaintiffs to recover a multiple of their damages claimed. With the possibility of such a high amount of damages (the plaintiff's counsel in the *Dahl* case sought damages upwards of \$10 billion), it is likely that plaintiffs will be more likely to sue, and private equity firms will be incentivized to settle to avoid the possibility of a devastating verdict.

When collaborating with other private equity firms, such as entering into arrangements that bar private equity firms from bidding individually or jumping deals, firms must be cognizant of the apparent risks and take appropriate precautions. For example, the earlier in the bidding process a joint bidding agreement is formed, the less likely such an agreement will be found to be anti-competitive. Furthermore, if a private equity firm is unaware of a potential deal before being approached by another firm and signs an agreement to not jump the deal so that it can receive information on the deal for a potential joint bid, such an arrangement likely would not be viewed as anti-competitive. In contrast, an arrangement that involves competing firms for a deal standing down so that a specific firm can win, with the winning firm returning the favor by standing down on other deals, will most likely be deemed anti-competitive.

Overall, private equity firms need to be aware of the possibility of anti-competitive investigations and lawsuits occurring when firms collaborate. As such, firms should document their reasons for standing down or not pursuing a deal, and be ready to show how their actions came about through independent decision making and not pursuant to an overarching agreement or arrangement. When agreeing to bid jointly or to not jump deals pursuant to an information sharing arrangement, firms need to consider the time at which such an agreement is made (the earlier in the bidding process the better) and whether the firm which agrees to not jump the deal could have pursued the deal alone or would have had the opportunity to do so. While the law is unclear as to how far private equity firms can collaborate, risks of anti-competitive action being taken against firms do exist and firms must be wary of these arrangements.

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