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Antitrust Scrutiny of Private Equity: On the Horizon or in the Rearview Mirror?

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What the final days of the Biden administration portend for private equity enforcement in Trump 2.0

During the final days of the Biden administration, the Antitrust Division of the Department of Justice (DOJ) and the Federal Trade Commission (FTC) issued a flurry of enforcement actions, updated guidelines and settlements in an attempt to capstone an aggressive four years of antitrust enforcement. Among these were two notable cases involving alleged violations of antitrust laws by private equity firms: the DOJ's lawsuit against KKR & Co. for alleged breaches of reporting requirements under the Hart-Scott-Rodino (HSR) Act,[1] and the FTC's proposed settlement with Welsh Carson, Anderson & Stowe XI, over claims of an unlawful roll-up strategy.[2]

In the KKR suit, the DOJ alleges that the firm failed to submit complete and accurate premerger filings on at least 16 occasions between 2021 and 2022. The DOJ's complaint seeks civil penalties, among other relief. In response, KKR filed a countersuit,[3] seeking a declaratory judgment that it did not violate the HSR Act, that the agencies' interpretations of the law are unconstitutionally vague, and that the fines sought by the DOJ are excessive and unconstitutional. While the outcome of the suit is unclear under the new administration, the allegations are a useful indicator of how the DOJ has interpreted the requirements of the HSR Act in recent years.

The FTC's investigation into Welsh Carson centered on allegations that the firm had engaged in an anticompetitive "roll-up scheme" in connection with its portfolio company's acquisition of anesthesia practices in Texas. While the settlement does not include monetary penalties, Welsh Carson agreed to measures aimed at preventing future anticompetitive behavior. The Welsh Carson settlement is useful as a predictor of future enforcement actions. As current FTC Chair Andrew Ferguson explained in his concurrence, "[T]his case is an ordinary application of the most elementary antitrust principles," and so we can expect the FTC would pursue similar cases under the Trump administration.

KKR's alleged HSR Act violations

The DOJ's complaint against KKR alleges repeated violations of the HSR Act. The HSR Act requires companies to notify antitrust regulators and observe a mandatory review period, typically 30 days, before completing transactions that exceed certain monetary thresholds. This process involves submitting detailed information about the parties, the transaction and key documents – such as analyses of competition, markets and market shares – to facilitate the regulators' review. Noncompliance with these requirements or failure to provide the necessary documentation can result in significant penalties, currently up to $53,088 per day of violation, though in the past, the DOJ has typically sought substantially less than the maximum penalty in HSR violation actions.

Filed on January 14, 2025, in the US District Court for the Southern District of New York, the DOJ's complaint accuses KKR of a "systemic" disregard for the HSR Act's requirements, claiming that KKR's actions reflect a "culture of noncompliance" and "threaten[] the integrity of the U.S. premerger review process." Specifically, the DOJ alleges 16 violations of the HSR Act in 2021 and 2022, potentially resulting in fines, which, at the time of filing the complaint, exceeded $650 million based on the maximum statutory penalties.

The DOJ seeks a decree that KKR's conduct was in violation of the HSR Act, that KKR pay the US "the substantial civil penalties authorized by the Act," and that it receive such other equitable relief as the court deems appropriate. The DOJ also is seeking "disgorgement, plus interest, to eliminate the unlawful financial gains reaped by KKR as a result of its illegal consummation of certain Transactions," which would be an extraordinary remedy if granted, both because the DOJ's authority to seek disgorgement is legally uncertain, and the agency does not allege that the underlying transactions themselves violated the antitrust laws.

The DOJ's allegations fall into three main categories:

1. **Failure to submit required documents:** KKR allegedly failed to provide transaction-related documents, known as "Item 4(c) and Item 4(d)" documents, for at least 10 deals. The DOJ alleges that KKR failed to search the files of certain directors or officers for relevant documents and provided inadequate training to employees involved in collecting responsive documents.
2. **Altering documents:** KKR is accused of modifying documents after they were "shared … with KKR's officers and directors" but before submitting them to regulators, in at least eight deals. The DOJ emphasized that the "document alterations were not inadvertent or accidental; rather, KKR deal teams deliberately altered these documents before they were submitted in HSR filings."
3. **Missed filings:** KKR reportedly failed to file HSR notifications before closing two transactions, later submitting corrective filings.

In response to the DOJ's complaint, KKR filed a countersuit, targeting the DOJ, US Acting Assistant Attorney General Doha Mekki and the FTC. KKR's complaint characterizes the DOJ's actions as "agency overreach" without legitimate grounds. Citing the HSR Act and the Statement of Basis and Purpose enacting the statute, KKR argues that the HSR Act "requires only the inclusion of documents that are 'necessary and appropriate' … to determine whether such acquisition may, if consummated, violate the antitrust laws," and that it is "only obligated to provide Defendants a 'reasonable number of genuinely important documents' to investigate whether the transaction may impact competition."

KKR's countersuit seeks a declaratory judgment that it did not violate the HSR Act, asserts that the DOJ's interpretations of the HSR Act are unconstitutionally vague, and claims the proposed fines are "draconian and grossly disproportionate." KKR also notes it cooperated with the DOJ's investigation for nearly three years and accuses the DOJ of filing its complaint as a "last-minute effort" before a leadership transition to "make an example of KKR and thereby chill merger and acquisition activity … ."

Regarding the alleged violations of the HSR Act, KKR contends they are "immaterial, based on good-faith interpretations," and "inconsequential and inadvertent." While KKR does not dispute many of the factual details, it challenges the DOJ's interpretation of compliance standards.

Welsh Carson settlement over roll-up strategy

The FTC's administrative complaint and its proposed settlement with Welsh Carson marks the conclusion of a prolonged legal battle with the private equity firm that began in federal court. In September 2023, the FTC filed a complaint in a Texas federal district court against both Welsh Carson and its portfolio company, U.S. Anesthesia Partners (USAP), alleging that USAP's acquisitions created a monopoly on anesthesia services in parts of Texas, enabling price hikes, and that Welsh Carson had orchestrated this strategy. Although the court allowed the case against USAP to proceed, it dismissed claims against Welsh Carson in May 2024, citing its minority interest in USAP and limited board representation.

In the administrative complaint filed simultaneously with the proposed settlement, the FTC alleges that Welsh Carson's practice of consolidating smaller competitors reduced competition unlawfully, providing Welsh Carson monopoly power over anesthesia services in certain markets, and that it used that monopoly power to increase the prices for anesthesia services above competitive levels.

Under the proposed consent agreement, Welsh Carson will be required to reduce its involvement in its portfolio anesthesia practice accused of anticompetitive behavior, obtain prior approval before future investments in anesthesia practices nationwide, and provide notice for certain transactions involving other hospital-based physician practices nationwide.

Then-FTC Chair Lina Khan hailed the settlement as "a valuable blueprint for future Commission orders involving financially sophisticated actors." She noted that reports "suggest that markets across the economy have been rolled-up through serial acquisitions and other stealth acquisitions," and that "[m]uch of the modern focus on serial acquisitions has concerned private equity firms' use of the 'buy-and-build' strategies, where a portfolio company buys a firm, often the market leader, and then 'rolls-up' smaller competitors using the private equity firm's money and acquisition expertise."

Ferguson, then a commissioner and now FTC chair, concurred with the complaint and proposed consent order, but took issue with the suggestion that private equity firms were somehow different than other economic actors.

“That Welsh Carson is a private equity firm is irrelevant,” Ferguson stated, concluding that there is “no reason for the Commission to single out private equity for special treatment.”

What to learn as we look ahead

The actions taken against KKR and Welsh Carson mark the culmination of an active four years by the DOJ and FTC, characterized by heightened scrutiny of private equity. This period has seen investigations into roll-up strategies, healthcare acquisitions and serial transactions across industries, alongside the introduction of revised HSR rules requiring greater disclosure of minority interests and partial acquisitions – key areas of concern for private equity firms. Under Trump, private equity firms should expect to continue to face scrutiny under the antitrust laws, but such scrutiny should align with that applied to all other investor types, such as strategic acquirors. The DOJ and FTC will apply the traditional framework, assessing whether mergers and acquisitions are likely to substantially lessen competition and whether conduct is harming, or will harm, consumers.

While the fate of the DOJ’s lawsuit against KKR is uncertain, it offers valuable lessons for private equity firms:

- First, it is critical to train employees on the requirements of and compliance with the HSR Act.
- Second, when submitting an HSR filing, it is important to ensure that searches are robust and done in good faith.
- Third, companies should be careful about modifying documents after they have been circulated broadly within an organization.

Notes

1. *United States v. KKR & Co., Inc., et al.*, No. 1:25-cv-00343, Compl. (SDNY, January 14, 2025).
2. *Welsh, Carson, Anderson & Stowe XI, L.P.*, FTC Matter/File Number 201 0031 (January 17, 2025).
3. *KKR & Co. GP LLC v. Doha Mekki, et al.*, No. 1:25-cv-00096, Compl. (DDC, January 14, 2025).

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Key Contacts

Sharon Connaughton Washington, DC	sconnaughton@cooley.com +1 202 728 7007
Megan Browdie Washington, DC	mbrowdie@cooley.com +1 202 728 7104
Jeremy Morrison Washington, DC	jmorrison@cooley.com +1 202 776 2177

Julia R. Brinton Washington, DC	jrenehan@cooley.com +1 202 962 8364

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