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KNOW WHAT TO DISCLOSE AND DISCLOSE IT

The importance of submitting critical documents in premerger filings.

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In January 2025, the US Department of Justice (DOJ) filed a complaint against KKR & Co. Inc. (KKR), alleging systematic violations of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR Act). The HSR Act requires parties to transactions that satisfy monetary thresholds to provide premerger filings to the DOJ and the Federal Trade Commission. These filings enable the authorities to evaluate potential anticompetitive effects before the implementation of certain mergers.

By way of background, KKR is one of the largest and most sophisticated private equity firms in the United States and handles numerous high-stake mergers and acquisitions, many of which require premerger filings under the HSR Act.

According to the DOJ's complaint, KKR repeatedly flouted these requirements. The DOJ alleges that KKR failed to make complete and accurate premerger filings in at least 16 instances, omitting critical documents that assess competition, which deprived the DOJ of being able to assess the anticompetitive effects of the transactions properly.

The DOJ is seeking more than \$650-million in civil penalties and, notably, the DOJ's request for relief also includes structural relief (that is, the potential for divestitures is possible).

The DOJ's complaint makes serious allegations against KKR, for example, it states that:

- "KKR's own employees suggest a culture of noncompliance with the [HSR Act] that pervades its investment businesses. One KKR partner explicitly instructed a subordinate to 'revise [a chart] for HSR purposes', and the subordinate followed that instruction by deleting material relating to 'Competitive Behaviour' in a presentation deck analysing KKR's contemplated acquisition", and "one KKR deal team member described to a colleague her



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approach to these requests: 'I've always been told less is more'."

- "KKR provided inadequate training to employees involved in collecting responsive documents and certifying HSR filings. At times, KKR deal teams failed to search the files of certain directors or officers for relevant Item 4 documents in preparing HSR filings."
- "The omitted documents included statements related to potential post-merger price increases as a result of a reduction in competition. The omitted documents also described the competitive landscape as a

'two-player market', ... as the 'biggest' and 'closest and most formidable competitor'. KKR's sanitised HSR filing hid KKR's expectation that the planned merger of Emsi and Burning Glass would be 'the killer combination' and provide KKR with an 'opportunity to ... create the undisputed category leader' and a 'scaled category killer' in the market."

- KKR has filed a lawsuit in the US District Court for the District of Columbia, asserting that the DOJ's complaint lacks merit and accusing the agency of weaponising ambiguous guidance. KKR claims the alleged "filing errors" were immaterial to antitrust reviews.

WHAT THIS MEANS FOR SOUTH AFRICAN COMPANIES

This case reiterates the underlying principle of understanding which documents are legally required to be disclosed to a particular authority evaluating a merger. This principle is equally applicable under South African competition law when parties notify a merger to the Competition Commission (Commission). In South Africa, penalties can also be severe for noncompliance given that the competition authorities are empowered to revoke their decision to approve a merger if the Commission's decision was based on incorrect information for which a party to the merger is responsible. In essence, this means that the failure to provide complete and accurate information may ultimately lead to the merger being forced to unwind.

Having a deep understanding of and adhering to each jurisdiction's specific disclosure requirements is critical. Intentional or inadvertent noncompliance presents significant reputational damage for firms and the potential for authorities to scrutinise future transactions that ordinarily would pass muster without much intervention. To mitigate risks and to facilitate a smooth and efficient mergers and acquisitions (M&A) process, firms should consider proactively providing training to their employees and seek expert legal advice at the outset of an M&A process to ensure documents are prepared and disclosed in a legally compliant manner. ●

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