Current issues in M&A transactions

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Agenda

1. Negotiating purchase agreements

2. Gun-jumping
Negotiating purchase agreements
Planning your deal: assessing commercial dynamics

- **Is this an auction sale or are there competing bidders?**
  - Assessing antitrust risk amongst bidders and how this might impact deal negotiations

- **Are significant competition problems raised by the deal?**
  - If issues can be isolated (by business or geography) could part of the deal be carved-out?

- **The price of clearance**
  - If remedies are required, when would either party walk away?

- **Timing**
  - Is there a long-stop date by which completion must have taken place?

- **Public bid or private sale**
  - Specific rules on conditions and timing
Seller vs. Buyer interests

Seller will seek to
- Maximize certainty of closing and/or compensation for failure to close
- Expedite completion of the merger review

Buyer will see to
- Minimize required remedies
- Avoid or minimize any break fee
- Ensure sufficient time to negotiate with agency
- Maximize leverage with the agency
- Control the process
Negotiating agreements

Relevant antitrust contractual provisions

- Merger control filings
- Litigation covenants
- Restructuring obligations
- Termination rights
- Payments
- Cooperation covenants

Other contractual provisions: our experience

- Joint Defense Agreements
- Counsel-to-counsel or between the parties
- Disclosure risk
- Enforceability
- Query: can the joint defense privilege or work product doctrine shield a risk-shifting provision from a reporting requirement?
Relevant conditions precedent

Negotiating conditions precedent to reflect the commercial positions of the parties

**Purchaser friendly conditions**
- Unconditional clearance
- Conditions acceptable Purchaser
- Option to walk away if Phase 2 investigation and/or remedies required
- Purchaser keeps control of contacts with regulators

**Vendor friendly conditions**
- Prevent Purchaser from walking away if remedies required
- Require Purchaser to take all steps necessary to secure clearance
- “Hell or high water” provisions
- Deal protection for Vendor if significant risk
## Types of risk shifting provisions

<table>
<thead>
<tr>
<th>Take or Pay</th>
<th>Hell or High Water (HOHW)</th>
<th>HOHW with Materiality Cap</th>
<th>Reverse Break Fee</th>
<th>Reasonable Best Efforts</th>
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<tbody>
<tr>
<td>Requires payment of the full purchase price by an identified termination date even if the transaction cannot close. Rare</td>
<td>Unconditional obligation to propose and accept any divestitures necessary to secure clearance of the transaction or defend through litigation on the merits any claim asserted in court by any party seeking to block the transaction.</td>
<td>A HOHW provision, but required divestitures are capped by revenues, fair market value of assets to be divested, a specific list of assets, diminished profits, some defined “material adverse impact” on the transaction, or some combination of these</td>
<td>The buyer agrees to pay a fee if it does not secure antitrust clearance. A reverse-termination fee can be combined with a HOHW or reasonable best efforts provision</td>
<td>The buyer must use reasonable best efforts to secure antitrust approvals, but typically the contract gives the buyer an affirmative right to abandon the transaction in lieu of agreeing to make divestitures or litigate.</td>
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**Freshfields Bruckhaus Deringer US LLP**
**Efforts covenants**

Sets standards for obligations to obtain antitrust clearances

- **Unqualified “best efforts” provision**
  - Usually taken to imply an obligation to offer or accept restructuring relief if necessary to obtain antitrust clearance
  - Often coupled with express risk-shifting provision

- **“Reasonable best efforts” / “Commercially reasonable efforts”**
  - Something less than best efforts/more than reasonable efforts
  - Typically the contract gives the buyer an affirmative right to abandon the transaction in lieu of agreeing to make divestitures or litigate
  - In most merger agreements, parties agree to use reasonable best efforts to obtain regulatory approval

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<th>Best efforts</th>
<th>Reasonable best efforts</th>
<th>Commercially reasonable efforts</th>
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Risk shifted towards

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**Buyer**  \[\rightarrow\]  **Risk shifted towards**  \[\rightarrow\]  **Seller**
Remedies covenants: divestiture obligations

• Hell or High Water (HOHW)
  - Unconditional obligation to propose and accept any remedy necessary to obtain antitrust clearance or defend through litigation on the merits any claim asserted in court by any party seeking to block the transaction
  - Includes divestitures, licenses, behavioral undertakings, and hold separates
  - Theoretically could require divestiture of entire target business

• Qualified HOHW with materiality cap
  - HOHW provision, but required divestitures are (i) limited to certain business, product line or specific list of assets, (ii) capped by revenue or FMV of assets to be divested, (iii) some defined “material adverse impact” on the transaction, or (iv) some combination of these

• “Road map” problem – informs agency of issues and remedies available for the asking

| HOHW | HOHW with materiality cap | Silent / expressly excluded |
|      |                          |                           |

Buyer  |  Risk shifted towards   | Seller
Placement of Remedy Commitment

Practitioners debate where the remedy commitment ought to be memorialized and what its effect is.

**Remedy commitment in definitive agreement**
- **Pro:** certainty of enforceability
- **Con:** more leverage to the agency by signalling remedy it can obtain without a big fight

**Definition of remedy commitment outside definitive agreement (e.g. in a side letter or JDA)**
- **Pro:** reduced leverage to antitrust agency because it is not likely to learn about the level of remedy commitment
- **Con:** reduced certainty of enforceability
Litigation covenants

Are the parties committed to litigate in the event of an antitrust challenge?

- May be imposed on buyer alone or on both parties
- Obligation may be to litigate through to a final, non-appealable judgment (or something less)

Interactions with:

- Any obligation to accept remedies in order to obtain clearance
- Drop-dead date
  - Provide purchaser with sufficient time to litigate before HOHW/fee due?
  - Affects credibility of litigation threat in settlement negotiations
Payment obligations

**Reverse breakup fee with an antitrust trigger**
- Buyer agrees to pay seller a fee if the transaction does not close before the purchase agreement is terminated, and only conditions not satisfied are the antitrust clearance conditions
- Reverse-termination fee can be combined with a HOHW or reasonable best efforts provision
- Relatively rare – sellers usually negotiate some form of remedy obligation and/or higher purchase price to avoid reverse breakup fee

**Ticking fees**
- Requires buyer to pay interest on purchase price if transaction not closed by particular date
- Aim to motivate buyer to obtain regulatory clearances quickly

**“Take or pay” clauses**
- Requires buyer to pay full purchase price by identified termination date even if transaction cannot close
- Rare
Cooperation covenants

Specifies level of cooperation by parties in obtaining antitrust clearances

Typical requirements

- Sharing information (confidentiality agreements)
- Preparing filings (e.g., right to review documents at various stages of clearance)
- Attending meetings/conferences with regulator (subject to agreement by agency)

Party interests

- Buyer – wants to control process and not have seller operating independently with governmental authorities
- Sellers – wants to know what is going on to ensure buyer is fulfilling efforts obligations
- Both – want to maximize knowledge of evidence submitted to regulators
Remedies: EU and US experience

Negotiating structural and behavioural remedies

- When and how to offer remedies
- Scope of the “negotiation”
- Divestments of entire businesses as going concerns
- Market-testing
- Deliverability

Dealing with multiple authorities

- Negotiation of remedies with more than one authority
Gun jumping
Gun jumping: an introduction

Most jurisdictions have ‘suspenory’ merger control regime

- Strict prohibition of early integration steps
- **Aim:** ensure that pre-merger market conditions are fully maintained until clearance or prohibition of transaction
- **Effect:** parties must act as independent competitors until clearance
  - No integration
  - No exercising of management control
  - No joint marketing
  - No coordination of commercial behaviour
  - No uncontrolled sharing of competitively sensitive information
Gun jumping: general contexts

Two Contexts in Which Risks of Gun Jumping Arise

• Due Diligence
  - Occurs prior to and until signing
  - Purpose to value and assess the target and deal

• Integration Planning
  - Spans from signing until closing
  - To plan for consolidated operations and to allow for synergies to be realized

Non-Disclosure Agreements (NDAs)

• Should be employed early in the deal process to cover information exchange during due diligence and integration planning

• To be effective, NDAs should specify the relevant parameters of the information exchange, including:
  - Purposes and scope of the exchange;
  - Who will have access to the information; and
  - Restrictions on the use of such information
Gun jumping: Altice decision (France)

- Decision issued by French competition authority against Altice in November 2016 - €80m fine for gun jumping
- Highest fine ever – previous EU record was €20m
- Highly unusual – first French case on pre-closing conduct (i.e. not full implementation or failure to notify)
- Altice knew their conduct was risky:

» MERCI DE NE PAS OUBLIER DE DETRUIRE LES MAILS APRES. !!! «.

- Findings largely consistent with EU and US precedents/principles which are widely accepted and generally followed in M&A transactions

However, decision potentially departs from practice consensus in relation to purchaser approval rights over target actions pre-clearance
<table>
<thead>
<tr>
<th>Violation</th>
<th>Category</th>
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<tr>
<td>Two weeks after an intervention by Altice's Chairman, SFR terminated a</td>
<td>Involvement in management</td>
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<tr>
<td>promotional offer on high-speed fibre broadband which was initially</td>
<td>decisions</td>
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<tr>
<td>meant to run much longer</td>
<td></td>
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<tr>
<td>Altice set up a weekly information feedback mechanism allowing Altice</td>
<td>Information sharing</td>
</tr>
<tr>
<td>to closely monitor the economic performance of Virgin Mobile</td>
<td></td>
</tr>
<tr>
<td>Negotiation and preparation of joint product offering ('Box TV Fibre')</td>
<td>Strengthening of economic links</td>
</tr>
<tr>
<td>by Altice and SFR – launch a few days after clearance</td>
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Gun jumping: global enforcement activities

Several other authorities have recently taken action against parties for integration in pre-closing period:

- **EY/KPMG Denmark**: Announcing the termination of a material contract taking effect on closing
- **United States v. Duke Energy Corp**: Gaining control of target’s output and profits & losses through plant tolling agreement pending acquisition of target
- **Edeka/Kaiser’s Tengelmann (Germany)**: Entering into joint purchasing agreements
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