
MERGERS AND ACQUISITIONS

Allocating Antitrust Risk in Merger Agreements

As antitrust authorities around the globe have stepped up merger enforcement, parties negotiating potential transactions have become more sophisticated about allocating antitrust risk. To effectively negotiate risk allocation provisions, lawyers must consider the parties' antitrust risk assessments, their respective bargaining leverage, and the interplay between the various antitrust-related provisions in the agreement.

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Antitrust risk has always been high on the list of transaction planners' concerns when they contemplate a proposed merger or acquisition. This focus has intensified in recent years, as antitrust regulators around the world have become increasingly aggressive.

In the United States, after permitting four significant mergers in the airline industry between 2005 and 2011, the U.S. Department of Justice (DOJ) filed a lawsuit in August 2013 to block the proposed merger of US Airways and AMR, American Airlines' parent company. Although relatively few mergers are ultimately blocked,¹ agency enforcement actions often result in divestiture or other settlements. For example, in April 2013, after challenging the transaction in court, the DOJ settled with Anheuser-Busch and Grupo Modelo, allowing Anheuser-Busch to purchase the remaining

interest in Mexico-based Grupo Modelo on the condition that Grupo Modelo divest a brewery in Mexico and other assets.² In September 2013, the U.S. Federal Trade Commission (FTC) settled with Honeywell and Intermed, allowing the proposed acquisition if Honeywell licensed patents relating to 2-D scanners.

In the European Union, the rate at which merger and acquisition transactions trigger antitrust investigations has nearly tripled since 2010.³ The European Commission Directorate-General for Competition took action to block the proposed merger of Deutsche Börse and NYSE Euronext in 2012 and the proposed merger of UPS and TNT Express in 2013. In addition, the European Commission is considering revisions to its antitrust statute, the European Union Merger Regulation (EUMR), to streamline the process by which merger cases are referred to the European Union⁴ and to extend the jurisdiction of the EUMR to cover certain noncontrolling minority acquisitions.⁵

Outside the U.S. and the European Union, China, Brazil, and India have emerged as significant merger control regimes, and established antitrust regulators in Canada, Japan, and South Korea continue to be active. Indeed, over one hundred countries around the world have antitrust and competition laws that may apply to a wide range of business transactions.

In this robust global regulatory environment, parties are thinking very hard about whether their proposed transaction will become the target of an information request or an investigation by the antitrust regulators, and whether the antitrust regulators are likely to demand remedial steps. Parties also are exercising greater care when drafting and negotiating agreement provisions designed to allocate and shift antitrust risks.

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Parties address antitrust risks through a number of provisions in the agreement, including “hell or high water” provisions, covenants regarding antitrust litigation, and termination rights, to name a few. The details of these antitrust-related provisions vary from deal to deal, depending on the parties’ assessments of antitrust risk and relative bargaining power. Because the provisions are related closely and interact with each other, they are often negotiated as a package rather than separately.

Assessing Antitrust Risk

The parties and their lawyers should begin by assessing the antitrust risk of the proposed transaction. Although this assessment is often difficult, it is critical. Measuring antitrust risk allows a party to conclude whether to proceed with the transaction, and if so, how to negotiate with its counterpart.

Assessing antitrust risk is primarily a task for the antitrust lawyers and business teams rather than the transactional lawyers. If possible, the antitrust lawyers and business teams should start their work early, when they first begin considering the proposed deal. The lawyers for each party are unlikely to be able to develop fully informed views about antitrust risk in the early stages of the transaction; their assessment will evolve over time as they gather more information and engage with their counterparts. However, developing a preliminary assessment early in the process will help the parties establish diligence and negotiation strategies.

The lawyers must review the fundamental questions of whether the deal raises substantive antitrust concerns, and whether antitrust regulators are likely to conduct an extended investigation, impose remedies, require divestitures, institute litigation, or block the transaction. Among other things, this assessment involves a review of: the parties’ motivations for the transaction; whether and to what extent the parties are competitors; the parties’ respective market shares and the presence of other competitors in the market; how customers and competitors will react to the merger; the parties’

internal business plans; whether there is a history of antitrust enforcement in the industry; and whether the parties are vertically related in any respect. For companies operating globally, these factors must be considered for each of the jurisdictions in which the companies operate. For more complex risk assessments, the antitrust lawyers often hire economists to conduct a quantitative analysis of these factors.

The parties and their lawyers should begin by assessing the antitrust risk of the proposed transaction.

As part of the risk assessment, the lawyers also must review the applicable filing and compliance requirements. Filings may be required not only in the U.S. under the Hart-Scott-Rodino Antitrust Improvements Act (HSR Act), but also in the European Union and other countries around the world.⁶ Even if a deal does not pose a substantive antitrust risk, it may present a regulatory compliance risk. If the parties do not comply with all applicable filing requirements, they may incur substantial monetary fines or other penalties.⁷

In determining how the parties’ risk assessments will affect the negotiation of antitrust-related provisions, the lawyers should recognize that the buyer’s and seller’s views on antitrust risks may be aligned in some respects but not in others. For example, the typical buyer and seller both will want to close the transaction as quickly as possible. They both will be worried about the possibility of regulatory delays and the risk that regulators will block the transaction. However, because the seller will not operate the business after the acquisition, it is less concerned than the buyer about the risk that the regulators will require divestitures, except to the extent that this risk will impact the price that the buyer is willing to pay or result in significant closing delays. In contrast, the buyer will be very worried about the possibility that regulatory remedies will have an adverse impact on the business

it is acquiring. As another example, once the seller selects a buyer and enters into an agreement, it will want to minimize the risk that the deal is terminated for any reason and eliminate opportunities that permit the buyer to walk away from the transaction.⁸ The buyer, on the other hand, will want the ability to walk away from the deal if it becomes clear that satisfying regulatory demands will be too costly.

Further, the buyer and seller may disagree about risk levels. One party may conclude that the substantive antitrust risk is higher than the other, or the parties may dispute the proper interpretation of filing requirements. Even if the parties do not really disagree, for strategic purposes they may overstate or understate their worries. More than one seller has expressed serious concern about the possibility of an antitrust challenge—even though it believes the likelihood of a challenge is low—in an effort to extract concessions from the buyer. And even if the parties agree that the risk of a challenge is small, a seller may be unwilling to bear even a small risk.

Evaluating Bargaining Leverage

When the parties and their lawyers develop their plan for negotiating antitrust-related provisions, they should consider the parties' bargaining leverage. A party with significant bargaining leverage will be less willing to accept antitrust risk than a party that is negotiating from a weak position.

A seller will have leverage when it is selling a desirable asset for which there are a number of potential buyers. In a hot auction, when the seller is choosing among several buyers, it can make demands that it might not be able to make when buyer interest is less intense. A buyer will have leverage when the seller's asset is not particularly desirable, the seller is in financial distress (*e.g.*, is facing bankruptcy), or when it does not face competition for the asset from others.

The parties' bargaining leverage also will be impacted by other deal terms. For example, a

buyer that is willing to pay a rich price or offer other favorable terms may have significant leverage when it comes time to negotiate the antitrust-related provisions. Similarly, a seller that is willing to make significant concessions on price or other key deal terms may be better able to obtain a favorable package of antitrust-related provisions.

Although leverage is important, it will not be a feature of every negotiation. If the transaction is a merger of equals or stock-for-stock combination, the parties may be much more likely to work cooperatively to assess and manage antitrust risks. They may take the view that because they will both have a stake in the business going forward, they should both work hard to overcome regulatory hurdles in a way that will preserve the value of the combined company.

Specific Antitrust Risk-Shifting Provisions

There is no "market standard" set of antitrust risk-shifting provisions that all merger agreements feature.⁹ Instead, the parties will negotiate a bundle of provisions that reflects their antitrust risk assessments, their bargaining leverage, and the other terms of the deal. Because antitrust provisions are interrelated closely, a strong covenant in one area may compensate for a weak covenant in another area. Understanding these relationships is an important element of an effective negotiation strategy.

Filing Covenants

A proposed transaction may trigger filing requirements with multiple antitrust regulators around the world.¹⁰ Thus, the parties will ordinarily negotiate a covenant specifying where and when filings will be made. The key negotiating issues include the following:

- Will the covenant simply require that filings be made in all jurisdictions where they are required? Or, will it identify specific jurisdictions where filings should be made?

- If the covenant lists jurisdictions, which jurisdictions will be identified?
- Will the covenant require that filings be made promptly? Or, will it specify a time period for filing?
- If time periods are specified, will filings for different jurisdictions have different submission deadlines?

As a general matter, both the buyer and seller will want to file quickly in all jurisdictions where filings are required. As a result, both the buyer and seller are likely to prefer a filing covenant that lists these jurisdictions. Both parties typically will want to finalize the list of jurisdictions before the agreement is signed to reduce the risk of post-signing disputes and delays. In addition, the parties will want to assess which jurisdictions are likely to have the longest review periods so that they can ascertain the probable time to closing.

However, the question of where filings should be made is not always easy to answer. Sometimes it may require strategic decision-making—for example, when the parties have the option to file with the European Commission or with individual European Union Member States. In other cases, it may be unclear whether filings are required in a particular jurisdiction.

When filing requirements are ambiguous, the buyer may be more inclined than the seller to file in these jurisdictions, since penalties for failures to file often fall more heavily on the buyer.¹¹ The seller may be more willing to skip filings that clearly are not required, given its desire to close as quickly as possible. In such circumstances, the parties often identify the key jurisdictions where filings clearly are required and defer the ambiguous filing decisions until post-signing. A buyer with bargaining leverage may argue for an open-ended approach that does not identify specific jurisdictions so that it has flexibility to demand that additional filings be made after signing.

The parties' positions on time limits for filing will depend in part on their assessment of their own ability to assemble filing materials quickly, and in part on their confidence in their counterpart's ability and willingness to move quickly. The seller generally is more concerned about timing than the buyer and may insist on filing deadlines to press the buyer to move quickly. Having said that, both the buyer and seller often resist deadlines because of their concern that a minor delay could give the other side a basis for claiming that the agreement has been breached and asserting termination rights. Further, in some jurisdictions like the European Union and China, the parties cannot feasibly set deadlines because the antitrust regulators have a degree of control over the timing of filings.¹²

Covenants Regarding Information Requests and General Interactions with Regulators

After filings are made and an initial waiting period (30 days, in most jurisdictions), antitrust regulators may initiate a formal investigation¹³ or request additional information (known as a Second Request under the HSR Act¹⁴). The parties often will negotiate a covenant clarifying how such investigations or information requests will be addressed. They usually also will negotiate provisions addressing the parties' interactions and negotiations with the antitrust regulators. The key negotiating issues include the following:

- Are the parties required to respond to these requests? Or, can they choose to terminate the transaction if regulators demand additional information?
- In responding to these requests, are the parties required to use best efforts, commercially reasonable efforts, reasonable best efforts, or good faith efforts?
- Will one of the parties have the right to lead the response to an information request? More generally, will one of the parties have the right

to manage all interactions and negotiations with regulators?

- Will the agreement include a general covenant not to take actions that could delay antitrust approval?

If the transaction poses significant antitrust risk, both the buyer and the seller will be very interested in the scope of the covenant relating to investigations and information requests, since providing the information sought by regulators can be very time-consuming, expensive, and burdensome. A buyer with leverage may seek the right to walk away from the deal if an investigation commences or a Second Request is made, in order to cut its losses when it becomes clear that the transaction may become subject to significant regulatory scrutiny. Even a seller without much leverage will push back very hard if a buyer makes this demand.

A seller with leverage may ask that the parties use “best efforts” to respond to information requests. More often than not, however, the parties will compromise on a less demanding standard. A seller with leverage also may seek to impose time limits for responding to information requests—suggesting, for example, that all responses be completed within 45 to 80 days. In addition, a buyer that is worried about a seller’s ability to move quickly may press for a time limit in the hopes that the pressure of a contractual deadline will prompt more vigorous action. As an example, the US Airways/AMR merger agreement stipulates that the parties will use “reasonable best efforts” to complete a response to a Second Request within 60 days.

However, both the buyer and seller may be concerned about their ability to comply with a tight deadline in this context, especially since regulators often control the time it takes to respond to information requests in a formal investigation. The parties also may desire flexibility to negotiate timing agreements with regulators, which may extend the time for the regulator’s review in exchange for other concessions. Accordingly, the buyer and seller may

opt to forgo strict time limits for a requirement that responses must be made “promptly.”

In a deal that is likely to be subject to significant antitrust scrutiny, a buyer with leverage may demand the right to manage interactions with the regulators. The buyer will especially want to manage these interactions if the buyer has agreed to make divestitures. The seller may acquiesce to this request, but may insist on the rights to attend all meetings and other communications with regulators and to provide input into important strategic decisions. For example, the 2011 Google/Motorola Mobility merger agreement provides that Google will “control and lead all communications and strategy relating to the Antitrust Laws... subject to good faith consultations with [Motorola Mobility] and the inclusion of [Motorola Mobility] at meetings with Governmental Entities.”

A seller also may be concerned that a buyer that encounters stiff regulatory opposition will drag its feet in dealing with the regulators and ask for a covenant that provides that the parties may not intentionally take any action that delays the regulatory review process. The buyer may respond by arguing that this covenant will generate disputes, since distinguishing between intentional delay and appropriate conduct will be difficult.

Covenants regarding information requests and interactions with regulators are related closely to payment provisions. If the buyer must pay the seller a substantial fee if the transaction is terminated for antitrust reasons, the seller may be less concerned about the scope of the information request and regulatory process covenants because it knows that the desire to avoid a large payment will motivate the buyer to cooperate with regulators and obtain regulatory approval as quickly as possible.

The parties also should be aware of the relationship between the regulatory process covenant and the outside termination date. If the agreement can be terminated after a certain date, both the buyer and seller will want the regulatory

process covenant to be sufficiently demanding to ensure that neither party can cause the process to extend beyond the termination date.

The regulatory process covenant is related closely to other termination rights. Neither party will want to give the other party the opportunity to terminate the agreement because it commits a “foot fault” and fails to comply with a burdensome regulatory process covenant in some minor way.

Remedy Covenants

In most transactions that raise antitrust issues, regulators address their concerns by allowing the transaction to proceed on the condition that the parties agree to a remedy. Antitrust regulators have agreed to divestitures, asset sales, licensing arrangements, behavioral or conduct remedies, long-term supply agreements, and other remedial measures in settlements with merging parties. To address this wide range of potential outcomes, the parties often negotiate a covenant discussing the extent to which the buyer will agree to remedies. The key negotiating issues include the following:

- Will the covenant provide that the buyer has no obligation to agree to any remedies? In particular, will the buyer have the right to walk away from the transaction if a regulator requires remedial measures?
- Will the covenant be a “hell or high water” covenant, and provide that the buyer must take any and all steps necessary to obtain regulatory approval? Will the covenant chart a middle course, and require the buyer to accept some remedies but place limits on this obligation?
- If the covenant includes limitations, what will they provide? Will the obligation be limited to specified licensing arrangements or the divestiture of specified businesses? Will the divestiture obligation be structured so that it is limited to the sale of businesses or assets

that generate revenues, income, or EBITDA below a specified level?

- If remedies may be required in multiple jurisdictions, what will the limits be for different jurisdictions?

If the transaction poses significant antitrust risk, a seller with bargaining leverage may demand that the buyer agree to a hell or high water covenant. If the buyer has leverage, it may not commit to any remedies. If both parties have leverage, they may compromise on a modified covenant that places negotiated limits on the buyer’s obligation to agree to remedies. These limits can take various forms. For example, in the 2011 Express Scripts/Medco merger agreement, Express Scripts agreed to divest one facility anywhere except St. Louis, facilities outside of Indianapolis with a net book value of less than \$30 million, and contracts with EBITDA less than \$115 million during the last year.

The buyer and seller are sometimes reluctant to negotiate remedy covenants that specify a set of actions the buyer must take, not only to limit their exposure, but also because negotiated limits may alert the regulators to the fact that the parties believe the transaction is subject to challenge on antitrust grounds. The parties may be concerned about the “signaling” or “roadmap” problem—*i.e.*, that negotiated limits will help the regulators identify the businesses that give rise to the antitrust risk, and may incentivize the regulators to seek remedies up to the agreed-upon limits.

To avoid this signaling problem, parties may agree to a flexible but imprecise standard for divestitures and other remedies. For example, the buyer may commit to agree to divestitures and other remedies, so long as the remedies will not have a “material adverse impact” on the buyer’s business or the expected benefits of the transaction. For example, the US Airways/AMR merger provides that neither party is required to agree to any remedy that “individually or in the aggregate, [would] reasonably be expected to result in

a...Material Adverse Effect” on the combined company. But even such a formulation sends a signal to regulators that the parties are willing to negotiate. Moreover, it increases the possibility of disputes between the buyer and seller about what constitutes a “material adverse effect.”

Experience suggests that signaling is not as big a problem as parties sometimes fear. For example, in the Express Scripts/Medco merger, the DOJ did not require any of the divestitures the parties committed to offer in the merger agreement.

If the transaction poses no significant antitrust risk, a buyer with leverage can argue that a hell or high water covenant is simply inappropriate, and even a seller with leverage is unlikely to push for such a covenant. Although there are few examples, a buyer that faces competition from other prospective bidders could agree to an unlimited hell or high water covenant to demonstrate its strong commitment to close the deal and its confidence that antitrust review will not be a problem.

In practice, unlimited hell or high water covenants are extremely rare. The buyer generally is unwilling to risk its entire business in order to acquire a smaller company. Hell or high water covenants also give antitrust regulators an enormous amount of bargaining power, which the regulators can exert to their advantage.

Remedy covenants typically are paired with strong litigation covenants, as discussed in the following section. In addition, the scope of the remedy covenant may be adjusted depending on whether the agreement also includes payment provisions. If the buyer must pay a substantial fee if the transaction is terminated for antitrust reasons, the seller may not insist that the buyer undertake far-reaching remedies to secure regulatory approval, as the seller knows that the buyer will go to significant lengths to avoid paying the fee. However, if the transaction poses significant antitrust risk and the

seller has leverage, the seller may insist on both a strong remedy covenant and a substantial termination fee.

The scope of the remedy covenant also may influence negotiation of the termination date and termination rights. The seller, and even a very committed buyer, will want to make sure that the deal cannot be terminated before the buyer has enough time to complete the remedy negotiations required to secure regulatory approval.

Litigation Covenants

After reviewing the transaction, antitrust regulators may initiate an enforcement proceeding or litigation to challenge or block the transaction. The parties often will negotiate a covenant outlining how they will respond to a proceeding or litigation. The key negotiating issues include the following:

- Are the parties required to defend against any enforcement proceeding or litigation brought by the government?
- Are the parties required to defend against all stages of litigation, including appeals?
- Are the parties required to initiate litigation to challenge the government’s decision?
- Which party will lead the legal defense or challenge?
- Which party will pay for the legal defense or challenge?

If a transaction poses significant antitrust risk, a seller with bargaining leverage may insist that the buyer defend the transaction in court and even bear the legal costs, but that the seller jointly control the course of litigation with the buyer. If the buyer has leverage, it may propose a covenant under which it has the right, but not the obligation, to defend the transaction.¹⁵ Alternatively, the

buyer may propose that it has the obligation to litigate only through a relatively early stage of the proceedings. For example, the buyer may agree to defend against litigation at the agency level (*e.g.*, FTC Part III administrative proceedings) but not in the federal courts. A buyer with leverage also may insist that the seller share the legal costs. If the transaction poses no significant antitrust risk, neither party may insist on such covenants.

Litigation covenants are closely related to remedy covenants. As was the case in the Anheuser-Busch/Grupo Modelo merger, the government will initiate litigation when it wants to impose more significant divestitures or asset sales than the parties have committed to undertake, or when it wants to block the transaction completely, as was the case in AT&T's attempted acquisition of T-Mobile. If the buyer has not agreed to remedies, the seller may be more likely to insist that the buyer defend against government litigation and bear all related legal costs. The buyer may be more willing to commit to litigate if it has already agreed to a strong hell or high water covenant; since it must agree to any remedies necessary to obtain regulatory approval, the extra burden of agreeing to litigate is relatively minor. Or, the buyer may take the position that a strong litigation covenant is unnecessary, given its commitment to accept any and all remedies necessary to obtain regulatory approval.

Litigation covenants also are closely related to payment provisions. If the buyer must pay a substantial fee if the transaction is terminated for antitrust reasons, the seller may be less likely to insist that the buyer agree to defend the transaction and bear the legal costs.

In addition, litigation covenants can affect the discussion about the termination date. Both the buyer and seller may want to extend the termination date while litigation is ongoing, but they also may like the idea of retaining the right to walk away from the deal if litigation is not resolved by a certain date.

Closing Conditions

The key negotiating issues for closing conditions include the following:

- Will the parties agree to a condition that the deal may not be closed unless all necessary regulatory approvals have been obtained? If so, will this condition specify the jurisdictions where approval is required?
- Will compliance with the antitrust-related covenants be a condition to closing?
- Will closing be conditioned on the absence of a final, nonappealable court order blocking the transaction?
- Will closing be conditioned on the absence of any government investigation or litigation?

Most deals include a condition requiring that regulatory approvals from a list of specified jurisdictions be obtained. This list usually parallels the list set forth in the filing covenant. A buyer with bargaining leverage may argue for a general closing condition that does not list jurisdictions but instead provides simply that all required approvals must be obtained. For example, the US Airways/AMR merger agreement conditions closing on obtaining approval under the HSR Act and the EUMR as well as "any approval or authorization required under any other foreign antitrust, competition or similar Laws." The seller may object to such an approach on the ground that it gives the buyer too many opportunities to walk away from the deal.

Almost all deals include a condition that the parties must have complied with their covenants, including the antitrust-related covenants. Both parties typically will want to ensure that "foot faults," or relatively minor breaches of antitrust-related covenants, do not allow the other party to claim a condition failure. They generally solve this problem by providing that breaches must be material.

Both parties likely will agree to a condition requiring the absence of any court order

prohibiting the transaction. A buyer with leverage may insist on a stronger closing condition, under which it can refuse to close if the government has launched an investigation or litigation, or perhaps even if the government has threatened to do so.

Closing conditions help give force to the other antitrust-related covenants. They also are closely related to termination rights and payment provisions; the parties will focus on the extent to which the failure to meet a closing condition triggers termination rights or other payments.

Drop-Dead Dates

The “drop-dead” date, or termination date, is the date on which either party can terminate the transaction if it is still pending. The key negotiating issues for the termination date include the following:

- When is the termination date?
- Will there be an extension period if the only obstacle to closing the deal is securing antitrust regulatory approval? Will this extension period be available when a regulator has made a Second Request, demanded remedies, or initiated litigation?
- If there is an extension period, how long is it? Can both parties invoke the extension period?
- Can a party extend the termination date if it breaches an antitrust-related covenant?

If the transaction poses significant antitrust risk, the most important factors determining the termination date are the likely length of the regulatory review process and the risk of litigation. A seller will want the termination date to be set far enough out to ensure that the parties have sufficient time to obtain the necessary regulatory approvals. It will not want the buyer to have an opportunity to walk away from the deal because the termination date arrives before regulatory clearance has been granted.

However, the seller also may want a relatively short termination date to put pressure on a buyer to work quickly to obtain clearance, or to allow the seller to pursue alternatives to the transaction in the event of an unexpectedly extensive regulatory review. The buyer may prefer a short termination date, since it allows the buyer to exit the transaction upon stiff regulatory opposition. However, if the buyer is committed to the transaction, it may want the comfort provided by a longer termination date.

Extension periods are often used to resolve debates about termination dates. The buyer and seller may agree that they will extend the termination date if all that remains is antitrust clearance. In a deal that does not involve significant antitrust risk, the debate about the termination date is likely to be easier to resolve. The parties will agree on how much time it will take to complete filings and obtain clearances, and make sure that the termination date takes those periods into account. Other pre-closing hurdles (*e.g.*, stockholder approvals, SEC filing and review processes) may ultimately play a more important role in determining the termination date.

The negotiation about termination dates likely is to be affected by payment provisions. If the buyer must pay a substantial fee if the transaction is terminated because required antitrust approvals were not obtained, the buyer will want a longer termination date and extension rights to minimize the risk that it will be required to pay the seller.

The negotiation regarding the termination date also will be affected by the discussion about other covenants. For example, if the seller has persuaded the buyer to accept strong information request covenants, hell or high water provisions, or litigation covenants, it will want a longer termination date so that the buyer cannot avoid complying with these covenants.

Termination Rights

In addition to the termination date, the parties are likely to negotiate provisions that permit

termination before that date. The key negotiating issues include the following:

- Will each party have a right to terminate if the other party breaches an antitrust-related covenant?
- Will the parties have a right to terminate if a regulator makes a Second Request, requires remedies, or initiates litigation?
- Will the parties have a right to terminate if a court enters a final, nonappealable order blocking the transaction?

If the transaction poses significant antitrust risk, a seller with leverage may not want the buyer to have the right to terminate under any of these circumstances, whereas a buyer with leverage will want such termination rights. Neither party, regardless of its leverage, is likely to want to force closing when a court order enjoining the transaction is in effect. If the transaction does not pose significant antitrust risk, discussions about these provisions are less likely to generate heat.

Termination rights are closely related to payment provisions. If the buyer must pay a substantial fee if the transaction is terminated for antitrust reasons, the buyer will want to minimize the circumstances in which the seller can terminate the deal and collect the fee.

Payment Provisions

Payment provisions require the buyer to pay the seller a fee, sometimes referred to as a “reverse termination fee,” if the transaction does not close for antitrust reasons. This fee is intended to compensate the seller for any costs and time expended on a failed deal. The key negotiating issues include:

- What is the amount of the fee?
- Will payment be due upon breach of an antitrust-related covenant, denial of regulatory

approval, or termination of the transaction for any reason?

- Will the fee be the sole and exclusive remedy for the seller? Or, can the seller seek additional damages or a court order enforcing the antitrust-related covenants?¹⁶
- Will there be a so-called ticking fee? If so, what is the ticking rate?

A seller with bargaining leverage that is worried about antitrust risk is likely to push for strong payment provisions. The payment provision will give a seller comfort that the buyer will work hard to obtain regulatory approvals and close the deal. If the transaction ultimately fails for antitrust reasons, the fee will compensate the seller, at least partially, for the losses it incurs (*e.g.*, legal fees, lost employees or customers, or the opportunity cost of other transactions). A buyer with leverage is likely to resist payment provisions in deals involving antitrust risk. The buyer will be concerned about the real possibility that it will not be able to obtain the necessary clearances (even with an acceptable level of divestitures or other remedies) and will be forced to write a large check to the seller.

However, the buyer will not always resist payment provisions. If the transaction poses some antitrust risk but the buyer believes that it can obtain regulatory approval, it may agree to payment provisions to signal its commitment to the deal. In an auction situation, when a buyer is competing with other bidders that do not present antitrust problems, the buyer may conclude that a payment provision is a low-risk way to distinguish its offer, provided that the buyer believes the transaction does not pose significant antitrust problems. Interestingly, a survey of mergers and acquisitions between 2005 and 2012 indicates that reverse termination fees often are used in transactions that pose little to no antitrust risk.¹⁷ And buyers can take comfort in the data showing that fees have been paid in only a handful of transactions.¹⁸

The amount of the reverse termination fee will depend on the parties' respective risk assessments and bargaining leverage. Reverse termination fees often are higher than fees payable by sellers to buyers when they exercise their "fiduciary out" and terminate the transaction in favor of another deal. Delaware courts generally limit fiduciary out fees to 3-4 percent of the transaction value because of their concern that higher fees may discourage the seller from accepting "superior bids" and thus violate the seller's *Revlon* duties to obtain the best possible value for stockholders. The same reasoning does not apply to reverse termination fees, and the courts have not imposed limits on what buyers can pay. The average reverse termination fee is 5.8 percent of the transaction value.¹⁹ But, especially in large deals involving high-profile parties that have previously been the target of antitrust regulators, reverse termination fees can greatly exceed this average. The Google/Motorola Mobility merger agreement included a staggering 20 percent fee, and the 2012 Intercontinental Exchange/NYSE Euronext merger agreement included a 9 percent fee.

As suggested throughout this article, payment provisions are often viewed as substitutes for, or complementary to, other antitrust-related covenants. If the other antitrust-related covenants are very strong, the seller may feel less compelled to push for a substantial reverse termination fee. Similarly, if the fee is substantial enough, the seller may not insist that the buyer commit to other obligations to ensure completion of the transaction. However, the seller often will argue that no fee is sufficient compensation and will insist on strong remedy covenants or early termination rights.

Parties also may include so-called "ticking fee" provisions in their agreements. Ticking fees are not payable to the seller only upon termination of the transaction. Instead, ticking fees require the buyer to pay the seller interest on the purchase price if the transaction has not closed by a specified date. For example, the 2013 Service Corporation/Stewart Enterprises merger agreement provides that the \$13.25 per share in cash

consideration increases by 0.016 percent for each day until and including the closing date, if the closing does not occur within seven months. However, ticking fees are uncommon, used in only about 1 percent of merger agreements.²⁰ Ticking fees are most likely to appear in transactions that do not involve substantial antitrust risk, where the seller has leverage and the buyer is attempting to distinguish its bid. Ticking fees may encourage the seller to agree to a longer outside date or extensions to an earlier outside date.

Conclusion

Negotiating antitrust risk-shifting provisions in a proposed merger or acquisition is a complex process, highly individualized to the specific deal and particular parties. In order to negotiate effectively, lawyers must understand the parties' antitrust risk assessments and bargaining leverage, and the relationship between the various antitrust risk-shifting provisions.

Notes

1. In 2011, the DOJ successfully blocked the proposed AT&T/T-Mobile merger. The parties agreed to abandon the transaction after the DOJ filed a complaint in federal court.
2. Other examples of antitrust enforcement that resulted in divestiture settlements include the Nielsen Holdings/Arbitron acquisition in 2013, the Tesoro/Chevron merger in 2013, the Hertz/Dollar Thrifty merger in 2012, and the Watson Pharmaceuticals/Actavis merger in 2012.
3. Peter Alexiadis, Adam J. Di Vincenzo, Pablo Figueroa, Caeli Higney, Joseph Pinto III, Joshua Soven, & Daniel Swanson, *2013 Merger Enforcement Update and Outlook*, Gibson Dunn, Mar. 21, 2013, http://www.gibsondunn.com/publications/pages/2013-Antitrust-Merger-Enforcement-Update-Outlook.aspx#_toc351047847.
4. If the European Commission does not have jurisdiction to review a merger under the EUMR, the European Union Member States are responsible for the review. In certain cases where the parties are otherwise required to file in three or more European Union Member States, the EUMR allows parties to request a referral of the transaction to the European Commission using a Form RS, but the present framework can be burdensome and time-consuming.
5. Currently, the EUMR only applies to acquisitions of "control." The European Commission cites the example of Ryanair and Aer Lingus in

support of its proposal to extend the EUMR to apply to certain acquisitions of noncontrolling minority shareholdings. Although the European Commission has twice prohibited the acquisition of full control of Aer Lingus by Ryanair, it has not been able to prevent Ryanair's ownership of a significant 30 percent minority stake in Aer Lingus.

6. In the U.S., the HSR Act requires parties to a proposed merger to file a Notification and Report Form with the FTC and the Antitrust Division of the DOJ, if certain filing thresholds are met and the transaction is not otherwise exempt. For 2013, the filing thresholds may be satisfied if (a) one party has at least \$141.8 million in sales or assets and the other party has at least \$14.2 million in sales or assets, and (b) the proposed transaction's value is at least \$70.9 million. In the European Union, the EUMR requires parties to file a Form CO with the European Commission if the parties meet certain revenue thresholds relating to the parties' global and European Union-based revenues. If the EUMR does not apply, the parties should assess the notification requirements of the individual European Union Member States. In China, the Anti-Monopoly Law (the AML) requires parties to notify the Minister of Commerce (the MOFCOM) if the transaction would result in a change of control and if the parties meet the relevant turnover thresholds. There are numerous other jurisdictions that impose pre-merger filing requirements depending on the parties' assets, revenues, or market share in those jurisdictions.

7. Failure to comply with the filing requirements of the HSR Act can lead to civil penalties of up to \$16,000 per day. In 2013, pursuant to a settlement agreement with the DOJ, MacAndrews & Forbes paid \$720,000 for failing to make the required filing under the HSR Act. Similarly, in China, antitrust regulators may levy fines of up to \$80,000 or require the parties to revert to their pre-merger status, if the parties fail to comply with the filing requirements of the AML.

8. Note that in some cases a seller may want the right to walk away. A seller may conclude after signing that it could sell the business to another buyer at a higher price. Or, it may have a change of heart regarding strategy and conclude that it should retain the business. As a result, a buyer cannot completely ignore the risk that the seller may choose to terminate the deal.

9. The closest to a "market standard" set of provisions would appear in a deal with relatively little antitrust risk and equal bargaining power between the parties. This neutral set of provisions likely would include covenants to file in the requisite jurisdictions and to cooperate with regulators, without an obligation to sell assets, without payment provisions, and without special termination rights.

10. See note 6.

11. There are two reasons why the buyer bears the consequences of failures to file. First, antitrust regulators typically do not complete investigations of failures to file until after the merger has closed, at which point, the

buyer is the remaining entity. Second, in most jurisdictions other than the U.S., the buyer is responsible for the filing, either in practice or by law, and is therefore seen as the more culpable party. For example, in China under the AML, the party that is acquiring control through the proposed transaction (the buyer) has the obligation to make the filing with the MOFCOM.

12. For transactions that trigger pre-merger filings in the EU and China, the parties must submit a draft filing to the relevant authority, which then assesses whether the filing is sufficiently complete or requires additional detail from the parties. This is an iterative process that typically requires weeks (and in some cases, months) before the filing is deemed "final" by the authority.

13. Under the HSR Act, either the DOJ or the FTC will conduct the investigation. In the initial 30-day waiting period, agencies often request basic information from the parties (*e.g.*, customer lists, marketing plans, profit/loss reports, manufacturing capacity, and transaction-related documents not submitted as part of the initial filing) and ask to interview company executives.

14. The DOJ and the FTC issue Second Requests 30 days after each party has filed its Notification and Report Form (15 days in the case of an all-cash tender offer). A Second Request has the effect of "tolling" the HSR Act waiting period until 30 days after each party has "substantially complied" with its requirements. A Second Request does not mean the agencies will ultimately oppose the transaction or seek remedies, but complying with the Second Request itself can be very burdensome.

15. The buyer typically prefers the right to litigate, rather than the obligation to litigate, because it is an option rather than a requirement. In addition, the right to litigate mitigates the signaling problem discussed above with respect to hell or high water covenants. If the buyer has an obligation to litigate, antitrust regulators know that the buyer has a greater incentive to settle to avoid the expense and time spent litigating in court.

16. For example, in the Google/Motorola Mobility merger agreement, Google agreed to pay a \$2.5 billion termination fee to Motorola Mobility, but Motorola Mobility could seek an additional \$1 billion if Google's breach of an antitrust-related covenant caused the failure to secure regulatory approval.

17. Dale Collins, *Antitrust Reverse Termination Fees*, Shearman & Sterling LLP, July 20, 2012, http://www.shearmanantitrust.com/siteFiles/BlogPosts/010_reverse_breakup_fees.pdf.

18. There have been only 58 transactions since January 1, 2005, where the buyer actually paid a reverse termination fee. Collins, *supra* note 17. One of these 58 was the failed merger of AT&T and T-Mobile, where AT&T paid T-Mobile's parent company \$4 billion in cash and wireless spectrum.

19. Collins, *supra* note 17.

20. Peter D. Lyons, Beau W. Buffier, & Jessica K. Delbaum, *Strategic Deals Require Strategic Thinking*, The M&A Lawyer, Feb. 2010, http://www.shearman.com/files/upload/M&A%20Lawyer0210_Lyons.pdf.