
15. Contractual Merger Antitrust Risk Allocation

Antitrust Law

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Possible outcomes in DOJ/FTC reviews

Close investigation

- Waiting period terminates at the end of the statutory period with the agency taking enforcement action
- Agency grants early termination prior to normal expiration

Litigate

- DOJ: Seeks preliminary and permanent injunctive relief in federal district court
- FTC: Seeks preliminary injunctive relief in federal district court
Seeks permanent injunctive relief in administrative trial

Settle w/consent decree

- Typical resolution for problematic mergers
- DOJ: Consent decree entered by federal district court
- FTC: Consent order entered by FTC in administrative proceeding

Parties terminate transaction

- Parties will not settle at agency's ask and will not litigate
- Agency concludes that no settlement will resolve agency concerns (AT&T/T-Mobile, NASDAQ/NYSE Euronext)

Antitrust considerations in merger agreements

■ Key antitrust issues

- Relevant merger control filings
 - Which merger clearances should be disclosed in reps and warranties?
 - Which merger clearances should be closing conditions?
- Cooperation on regulatory matters
 - Where and when to make merger filings?
 - How much information sharing?
 - Agreement on specific tactics and timing?
 - Agreement to litigate any challenges to the acquisition?
- Antitrust risk-shifting provisions
 - Settlement and divestiture commitments
 - Reverse breakup fees
 - Other payments
- Drop-dead date and termination provisions
 - Why can either party terminate the merger agreement without cause?
 - Does the merger agreement provide for enough time to defend the merger in the HSR review and, if necessary and desirable, in litigation?

Merger control filings

- “Consents and approvals” reps and warranties
 - Merging parties typically represent that the execution of the agreement and consummation of the transaction will not require any consents and approvals except for compliance with the HSR Act or ECMR (if applicable)
 - For other jurisdictions:
 - Parties can identify in advance all other specific jurisdictions, but this requires significant due diligence and agreement up-front
 - Parties typically refer to all “applicable”, “all required foreign approvals” or all “necessary foreign approvals” (generally understood as those with mandatory suspensory effect)
 - May have a carve out for those foreign filings that would not have a material adverse effect if not obtained

Merger control filings

- Where do merger control filings need to be made?
 - Over 80 jurisdictions have merger control filing requirements
 - Most are mandatory and suspensory—cannot close without filing and obtaining clearance
 - A few are voluntary (e.g., U.K., Australia, New Zealand, Singapore)
 - A few are not suspensory (e.g., Argentina)
- When do the merger filings have to be made?
 - Two considerations
 - Starting the clock as quickly as possible
 - Allowing sufficient time for preparation of defense and customer contacts
- Which clearances will be incorporated in the closing conditions?
 - Major jurisdictions almost always specifically identified
 - Query: What if the closing conditions do not include clearance in a suspensory jurisdiction in which a filing is required?

Litigation closing condition

- Common formulation: No threatened or pending litigation
 - Typically provides that no government action is pending or threatened that seeks to delay or prevent consummation of the transaction
 - Question: What constitutes a “threat” of litigation?
 - Question: What about private party actions?
- Alternative: No order
 - “If you can close, you must close”
 - Typically provides that no restraint, preliminary or permanent injunction or other order or prohibition preventing the consummation of the transaction shall be in effect
- Carve-out
 - From a seller’s perspective, may wish to have a carve-out that prior to asserting condition, the asserting party must be in compliance with its best efforts obligations (e.g., to settle or litigate)

Litigation covenant

- 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
 - The drop-dead date
 - Should the drop-dead date automatically be extended?
 - Should the unilateral right to terminate be symmetrical?

Restructuring obligations

- Can arise in two provisions
 - “Efforts” covenant
 - Specific covenant to offer and accept remedies

Efforts covenant

- Sets standard for obligations to obtain antitrust clearances
- These covenants usually only provide vague parameters, but they do provide a general guide of what is expected from both parties
 - Best efforts;
 - Reasonable best efforts;
 - Reasonable efforts; or
 - Commercially reasonable efforts

Decreasing level
of required efforts



Efforts covenant

- 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 best efforts”
 - Something less than best efforts/something more than reasonable efforts
 - Most common formulation in antitrust covenants
 - Obligation not well defined by courts
 - Usually chosen precisely for this reason
 - *Conventional wisdom*: Does not imply an obligation to offer or accept material restructuring relief to obtain antitrust clearance
 - Can add express proviso to make explicit or limit obligation
- “Reasonable efforts”
 - Generally regarded as imposing no obligations that would change the transaction or reduce the benefit of the deal to the buyer in any meaningful way

Specific covenant re remedies

■ Range of alternatives

Decreasingly
onerous on Buyer
↓

- “Hell or high water” provision
- Capped divestiture obligation
- Remain silent and rely on general efforts covenant
- Specifically exclude divestitures

■ Unqualified “hell or high water” provision

- Requires seller to offer whatever remedy is necessary to obtain antitrust clearance
 - Includes divestitures, licenses, behavioral undertakings, and hold separates
 - Theoretically could require divestiture of entire target business
- HOHW provisions are not self-executing—Agency still must agree to accept remedy
 - In some deals, agency will not accept any consent decree (e.g., Staples/Office Depot, AT&T/T-Mobile, NASDAQ/NYSE Euronext)

Specific covenant re remedies

- Qualified remedies obligations
 - Limited to certain business, product lines, or assets
 - Limited by revenue, EBITDA or materiality cap
- Remain silent and rely on general efforts covenant
- Explicit no divestiture obligation
- “Road map” problem
 - Informs agency of issues and remedies available for the asking
 - *Queries:*
 - Can the joint defense privilege or work product doctrine shield a risk-shifting provision from disclosure in an HSR filing or second request?
 - Even if there are, are there disclosure obligations under applicable securities laws?

Litigation

- 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

- Interaction of litigation provision with—
 - Any obligation to accept remedies to obtain clearance
 - The more onerous the obligation, the more the buyer will want a credible threat to litigate
 - The drop-dead date
 - A litigation obligation (or right) is meaningless in the absence of time to litigate
 - Should the drop-dead date automatically be extended?
 - Should the unilateral right to terminate be symmetrical?

Antitrust-related payments

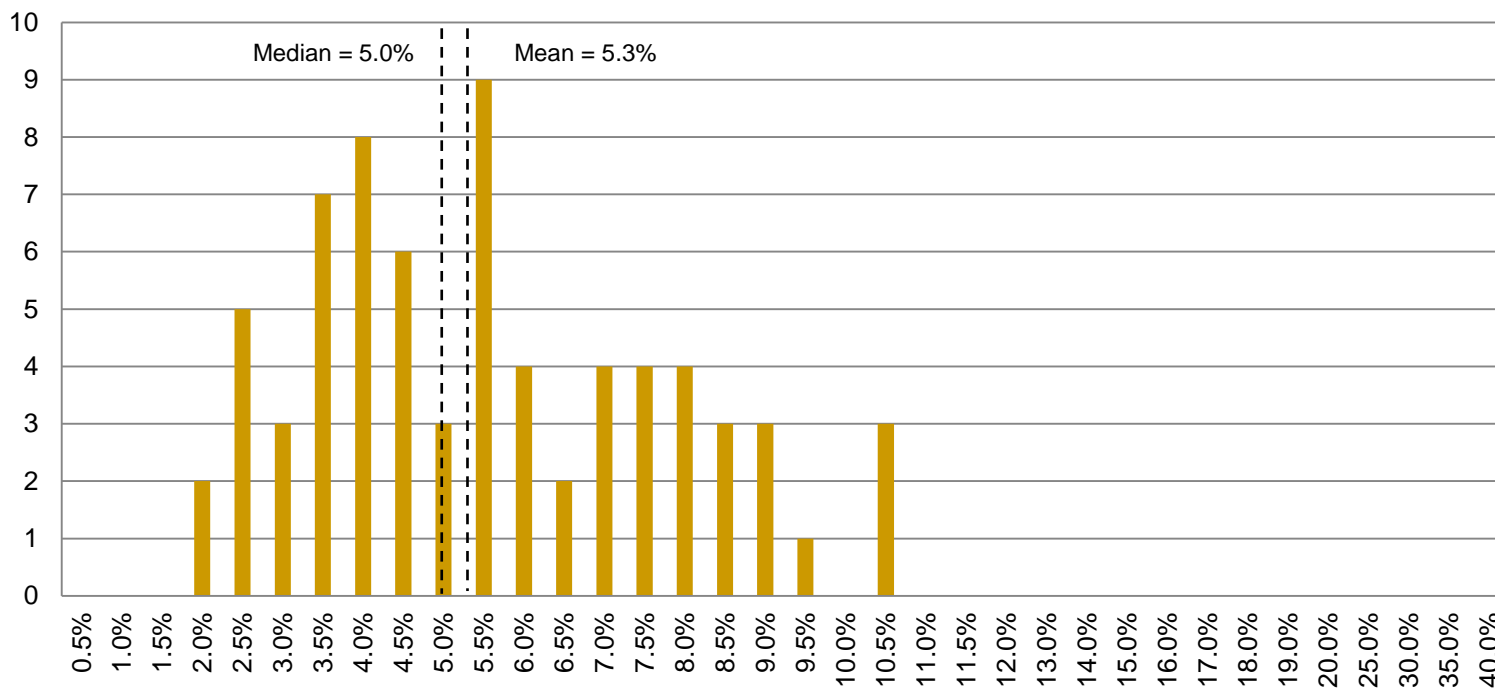
- Antitrust reverse termination fees
- Nonrefundable partial payments or “deposits”
- Ticking fees
- “Take or pay” obligation

Antitrust reverse termination fees

- Reverse breakup fee with an antitrust trigger
 - Payable by the buyer to the seller where:
 - the transaction does not close before the purchase agreement is terminated, and
 - the only conditions not satisfied are the antitrust clearance conditions
 - Historically relatively rare, but seeing more often in modern agreements
 - Sellers usually negotiate some form of remedy obligation and/or higher purchase price to avoid reverse breakup fee
 - Size of fee—Varies widely
 - Sample: January 1, 2012 – March 31, 2017
 - 395 transactions
 - 130 with antitrust reverse termination fees (18%)
 - Percentage of transaction value
 - Large: 10.4%
 - Have been larger before 2012: 39.81% (Monsanto acquisition of Delta and Pine Land)
 - Small: 1.5%
 - Have been smaller before 2012: 0.11% (CapitalSource's proposed acquisition of TierOne)
 - Mean: 5.3%
 - Median: 5.0%
 - Highest absolute dollar value
 - \$4.2 billion (AT&T's proposed acquisition of T-Mobile) (15.4%)

Antitrust reverse termination fees

Frequency of Antitrust Reverse Breakup Fees January 1, 2012 through March 31, 2017 (71 transactions)



NB: The difference between the intervals is not uniform.

Antitrust reverse termination fees

■ Recent examples

Announcement Date	Acquiror	Target	Status	Equity Value (\$M)	Antitrust Reverse Breakup Fee	
					Amount (\$M)	% of Equity Value
2/27/2017	Tricon Capital Group	Silver Bay Realty Trust	Pending	\$759.44	\$62.50	8.2%
1/26/2017	Alipay (UK) Ltd.	MoneyGram	Pending	\$699.17	\$17.50	2.5%
12/9/2016	Sibanye Gold Ltd.	Stillwater Mining	Pending	\$2,179.44	\$33.00	1.5%
11/3/2016	AAM	MPG	Pending	\$1,453.98	\$101.79	7.0%
10/31/2016	General Electric	Baker Hughes	Pending	\$35,900.00	\$1,300.00	3.6%
4/28/2016	Comcast Corp.	Dreamworks Animation	Completed	\$3,800.00	\$200.00	5.3%
3/4/2016	AMC Entertainment	Carmike Cinemas	Completed	\$736.46	\$50.00	6.8%
10/27/2015	Walgreens Boots Alliance	Rite Aid	Pending	\$9,416.39	\$325.00	3.5%
10/21/2015	Western Digital Corp.	SanDisk	Completed	\$17,139.75	\$1,060.42	6.2%
7/3/2015	Aetna	Humana	Blocked	\$34,088.24	\$1,000.00	2.9%
6/20/2015	Anthem	Cigna	Blocked	\$47,215.57	\$1,850.00	3.9%
2/12/2015	Expedia	Orbitz Worldwide	Completed	\$1,329.58	\$115.00	8.6%
2/4/2015	Staples	Office Depot	Blocked	\$6,205.61	\$250.00	4.0%
11/17/2014	Halliburton	Baker Hughes	Abandoned	\$34,600.00	\$3,500.00	10.1%
11/17/2014	Actavis	Allergan	Completed	\$67,365.83	\$2,100.00	3.1%
9/21/2014	Siemens	Dresser-Rand Group	Completed	\$6,359.15	\$400.00	6.3%
8/1/2014	Scientific Games	Bally Technologies	Completed	\$3,194.97	\$105.00	3.3%
7/28/2014	Zillow	Trulia	Completed	\$2,631.48	\$150.00	5.7%
4/30/2014	Exelon	Pepco Holdings	Completed	\$6,826.59	\$180.00	2.6%
2/20/2014	Brookdale Senior Living	Emeritus	Completed	\$1,380.13	\$143.00	10.4%
1/28/2014	Martin Marietta Materials	Texas Industries	Completed	\$2,059.29	\$140.00	6.8%
12/8/2013	Sysco	US Foods (p)	Blocked	\$3,500.00	\$300.00	8.6%
3/20/2011	AT&T	T-Mobile USA	Abandoned	\$39,000.00	\$4,200.00	10.8%

Payments

- Ticking fees
 - Require buyer to pay interest on purchase price if transaction not closed by particular date
 - Aim to motivate buyer to obtain regulatory clearances quickly
 - Relatively rare in public transactions
 - Dow Chemical/Rohm and Hass: 5% of equity value
 - Boston Scientific/Guidant: 3% of equity value
- Nonrefundable partial payments
 - Like a ticking fee but requires more than the payment of interest
 - Payable on a specified schedule
- “Take or pay” clauses

Cooperation covenants

- Specifies level of cooperation by parties in obtaining antitrust clearances
- Typical requirements
 - Advance notice and review of communications and submissions with agency
 - Right to attend meetings/conferences with agency
 - Subject to agreement by agency
 - Right to review 4(c) and second request documents
- Party interests
 - Buyer usually want to control process and not have seller operating independently with governmental authorities
 - Seller wants to know what is going on to ensure buyer is fulfilling efforts obligations
 - Both want to maximize knowledge of the evidence submitted to the agency

Timing provisions

- Timing for filings
 - Often “as promptly as possible”
 - But some delay (5-10 business days) may be desirable to permit:
 - Indepth substantive analysis
 - Customer rollout
 - Coordination in submitting required merger filings

- Other timing-related provisions
 - Provisions agreeing not to withdraw filings, extend waiting periods or enter into timing agreement without consent of other party
 - Seller may want to impose a specific deadline on second request compliance

Timing and termination

- Drop-dead date
 - Typical: One year from signing
 - Does it provide long enough for expected approvals and litigation?
 - One year should be enough in most cases
 - Can include an extension (often +120 days) in the event of a second request or Phase II investigation
 - Can add further extension (often 3 months + 3 months) to permit litigation of a preliminary injunction (but does not permit an appeal)
 - MAC clause: If business likely to deteriorate significantly during a prolonged antitrust review, may need provisions to ensure MAC is not used to avoid any divestiture commitments or avoid payment of reverse breakup fees

Risk-shifting summary

	Buyer-friendly	←————→	Seller-friendly
Level of efforts	Commercially reasonable efforts	Reasonable best efforts	Best efforts
Obligation to make divestitures	Silent/expressly excluded	Divestitures up to cap – measured in asset or revenue terms or MAC applying to part or all of acquired or merged business	Obligation to make any and all divestitures necessary to gain clearance no matter how much or what impact is (HOHW)
Timing for other aspects of regulatory review	Silent/may be deadline for submission of HSR filing	Silent/may be deadline for submission of HSR filing	Express timing for submission of filing, Second Request compliance and other milestones
Timing for offering divestitures	Silent	Silent	Express timing for offering remedies to obtain clearance
Control of regulatory process	Buyer controls; require cooperation from Seller and may give access and information	Buyer leads; Seller entitled to be present at meetings, calls; obligation on Buyer to communicate certain matters to Seller	Full involvement of Buyer in negotiations with regulators; Seller prohibited from communicating without Buyer (except as required by law)
Obligation to litigate	Silent/expressly exclude/litigate at buyer's option	Silent/expressly exclude	Obligation to litigate if regulators block exercisable at seller's option; does not relieve buyer of obligations to make divestitures
Termination provisions	Open-ended, extendable at buyer's option	Tolling at either party's option	Tolling at seller's option
Reverse break-up fee	None	Possible	Substantial fee; provision for interim payments and interest
Time to termination date	As long as buyer anticipates needing to fully defend transaction on merits, plus ability to extend at buyer's option	Tolling at either party's option	Tolling at seller's option at specified inflection points (e.g., second request compliance, commencement of litigation)
"Take or pay" provision	None	None	Requires payment of full purchase price by termination date even if transaction cannot close

SUMMARY

Summary: Will the deal close?

■ The framework for assessing a horizontal transaction

What “markets” should be analyzed?

“Market” here means any identifiable subset of customers that purchase from one or both of the merging parties (not a Merger Guidelines relevant market)

What “markets” will be challenged?

Ultimate question: Will customers likely be harmed in prices, quality, or innovation?
Are the parties head-to-head competitors?
How many other realistic alternative sources of supply?
Are the parties uniquely close competitors?
Is one of the merging parties a “maverick”?
Is one of the merging parties a potential entrant?
Will there be significant customer complaints?
Are there “bad” documents?

Can the problematic “markets” be fixed?

Ultimate question: Can the threat to customers be eliminated through a divestiture?
What businesses or assets need to be divested to solve the antitrust problem?
Are additional assets necessary to make the divestiture assets separable from the business?
Are additional assets necessary to make the divestiture assets saleable?
Are there buyers acceptable to the reviewing agency?
Will the agency require a single buyer for all divestiture assets?

Is the deal still worthwhile?

What is the loss of value (including lost synergies) due to the divestiture(s)?
What contractual protection can be obtained to ensure against a bad deal?
Important but not critical: How long will all of this take?