Mergers and Acquisitions:
Predicting Outcomes and Allocating Risk

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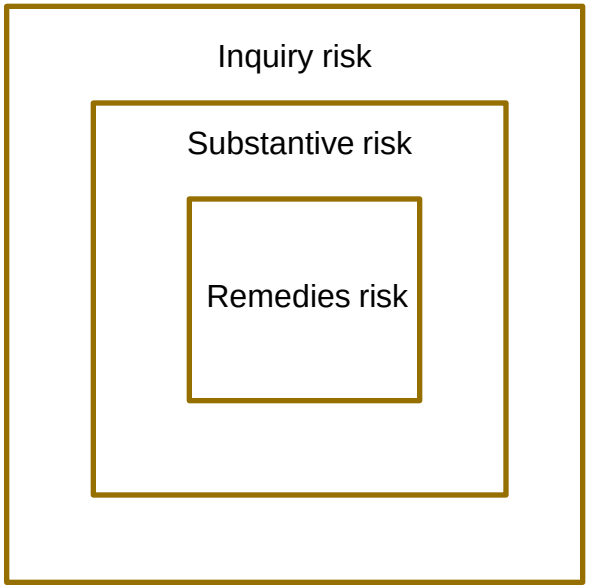
Dealing with merger antitrust risk

- Thinking systematically about antitrust risk
- Inquiry risk
  - Who has standing to investigate or challenge the transaction?
  - What is the probability that one of these entities will act?
- Substantive risk
  - When is a merger anticompetitive?
  - How can we practically assess antitrust risk?
- Remedies risk
  - What are the outcomes of an antitrust challenge?
  - Will the transaction be blocked in its entirety?
  - Can the transaction be “fixed” and if so how?
- Allocating the antitrust risk in the purchase agreement

THINKING SYSTEMATICALLY ABOUT ANTITRUST RISK

Types of antitrust risks

- Three types of risk
  - *Inquiry risk*: The risk that legality of the transaction will be put in issue
  - *Substantive risk*: The risk that the transaction will be found to be anticompetitive and hence unlawful
  - *Remedies risk*: The risk that the transaction will be blocked or restructured
- The three risks are nested
  - The substantive risk does not arise unless there is an inquiry
  - The remedies risk does not arise unless the transaction is found to be anticompetitive

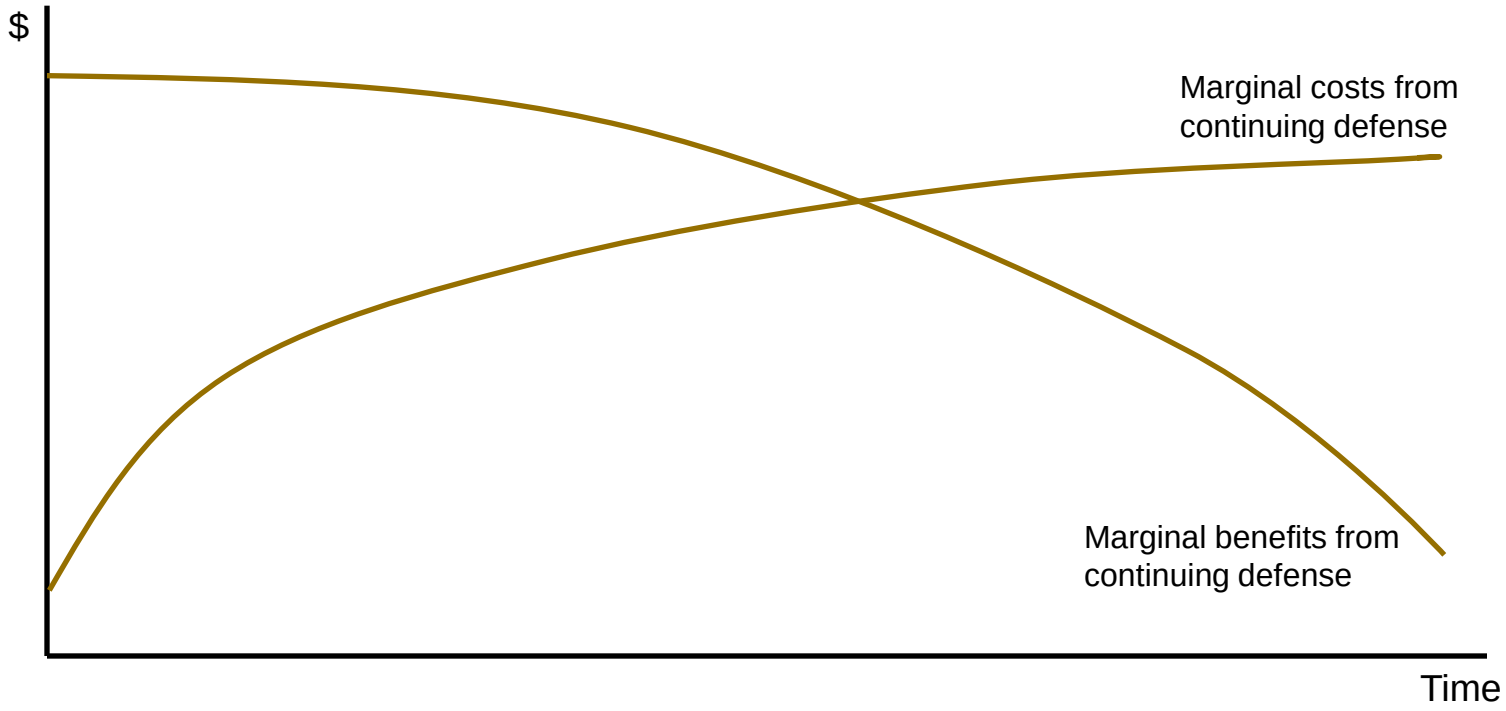


Costs associated with antitrust risk

- Delay/opportunity costs
  - Possible delay in the closing of the transaction and the realization of the benefits of the closing to the acquiring and acquired parties
- Management distraction costs
  - Possible diversion of management time and resources into the defense of the transaction and away from running the business
- Expense costs
  - Possible increased financial outlays for the defense of the transaction
- Outcome costs—Four possible outcomes:
  - The inquiry terminates without resolution
  - The transaction is cleared on the merits
  - The transaction is blocked and the purchase agreement is terminated
  - The parties restructure ("fix") the deal to eliminate the substantive antitrust concern
    - "Fix-it-first"—Restructuring the deal preclosing to avoid a consent decree
    - Post-closing "fix" under a judicial consent decree (DOJ) or a FTC consent order

Costs and benefits of continuing the defense

- For a “fixable” deal



Query: Why are the curves shaped (roughly) as they are?

ASSESSING INQUIRY RISK

Inquiry risk—Two questions

- Who has standing to investigate or challenge the transaction?
- What is the probability that one or more of these entities will act?

Inquiry risk

- Preclosing

Potential plaintiff	Considerations	Risk assessment
Injured private parties	No damages to recover Courts historically very reluctant to grant preliminary or permanent injunctions	Very low—usually no payoff *unless* 1. a competitor or customer will fund the suit, or 2. a hostile target will challenge the transaction to buy time to find a more suitable acquirer
State attorneys general (NAAG)	Constrained enforcement resources No damages to recover But can obtain injunctions	Very low, *unless transaction* 1. threatens employment, or 2. threatens widespread price increases to voters
DOJ/FTC	HSR Act suspensory period and second request powers Substantial congressional funding for merger enforcement Large experienced staff dedicated to merger antitrust enforcement Courts will enter preliminary and permanent injunctions upon proper showing	High *if* 1. there is any indication that the transaction may be anticompetitive, or 2. the transaction has a high public profile and has attracted political interest

Inquiry risk

- Postclosing

Potential plaintiff	Considerations	Risk assessment
Injured private parties	Can recover damages and in principle can obtain a permanent injunction of divestiture Courts historically very reluctant to find mergers anticompetitive after DOJ/FTC clearance	Extremely low Actions on the merits are likely to be very lengthy and costly to prosecute, with a negligible chance of success
State attorneys general (NAAG)	Can recover damages (*parens patriae*) and obtain injunctions But constrained enforcement resources Even in state actions courts historically very reluctant to find mergers anticompetitive after DOJ/FTC clearance	Extremely low Actions on the merits are likely to be very lengthy and costly to prosecute, with a negligible chance of success
DOJ/FTC	Courts will enter preliminary divestiture permanent injunctions upon proper showing But No HSR Act leverage Substantial disincentive to find that a "cleared" transaction is anticompetitive and should have been challenged "Eggs may be scrambled" with no effective relief	Extremely low, *unless* 1. the transaction was not HSR reportable and hence not reviewed, but customers complain about anticompetitive effects (especially price increases), or 2. the transaction was reviewed but customers complain and the actual anticompetitive effects are apparent and significant

Inquiry risk

- Bottom line on challengers
  - Absent special circumstances, competitors, customers, targets, and state attorney attorneys general can usually be ignored in the risk calculus
  - If the state attorneys general are interested, they usually piggyback on the DOJ/FTC investigation
  - In the vast majority of cases all of the action is with the federal antitrust agencies
    - No significant difference in the inquiry risk between the DOJ and FTC

So when will the DOJ/FTC investigate a transaction?

To answer this question, we first need to examine when a transaction is likely to anticompetitive and so attract the investigating agency's attention

ASSESSING SUBSTANTIVE RISK

Clayton Act § 7

- Provides the U.S. antitrust standard for mergers

> No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

- *Simple summary*: Prohibits transactions that—
  - may substantially lessen competition or tend to create a monopoly
  - in any line of commerce (product market)
  - in any part of the country (geographic market)

"May be to substantially lessen competition"

- No operational content in the statutory language itself
  - What does in mean to "substantially lessen competition"?
  - Judicial interpretation has varied enormously over the years
- *Modern view*:[1] Transaction threatens—with a reasonable probability—to hurt an identifiable set of customers through:
  - Increased prices
  - Reduced product or service quality
  - Reduced rate of technological innovation or product improvement
  - (Maybe) reduced product diversity

1. The modern view dates from the late 1980s or early 1990s, after the agencies and the courts assimilated the 1982 DOJ Merger Guidelines.

Theories of anticompetitive harm

- Major theories
  - Elimination of horizontal competition among current rivals
    - *Unilateral effects*
      - Merger of uniquely close competitors[1]
      - Anticompetitive effect depends only on the elimination of "local" competition between the merging firms
      - Assumes other firms in the market continue to compete as they did premerger
    - *Coordinated effects*
      - Merger of significant competitors where customers have few realistic alternatives
      - Anticompetitive effects depends on an anticompetitive oligopolistic response by other firms in the market
  - Vertical harm—Major in EU/gaining traction in U.S
    - Foreclosure of competitors (upstream or downstream)
    - Raising costs to rivals
    - Anticompetitive information access

NB: In the U.S., to be actionable vertical theories require some likely demonstrable anticompetitive marketwide effect on customers

[1] This requirement, which was part of the 1992 DOJ/FTC Horizontal Merger Guidelines, was dropped in the 2010 revisions.

Theories of anticompetitive harm

- Dormant theories
  - Elimination of potential rival entrants
    - Rarely invoked in the U.S. over the last 30 years
    - Historically has had at best limited success in the United States when it was invoked
    - But DOJ/FTC could bring a case on this theory if the evidence is compelling
  - Conglomerate effects
    - Have not seen in United States since 1960s
    - Used to block GE/Honeywell in the EU in 2001

But this is all too complicated—

- Very true
- Basic distinction
  - *Discovery*: How do the agencies detect an anticompetitive merger?
  - *Explanation*: How do the agencies demonstrate how a merger is anticompetitive?
- The formal theories go more to explanation than discovery
  - Theories in 1992 Merger Guidelines very information-intensive
    - Especially since both unilateral and coordinated effects theories require market definition as a prerequisite
  - Consequently, not overly useful for screening purposes either by agencies or parties
    - Particularly problematic for parties in assessing antitrust risks prior to signing a merger agreement
- Impetus for 2010 Merger Guidelines revisions
  - In fact, the agencies were not using the 1992 Guidelines for merger antitrust assessment
  - 2010 revisions motivated in part by DOJ/FTC desire to describe more what the agencies actually do

So how do you assess substantive antitrust risk?

- Recall that the purpose of merger antitrust law is to prevent the creation or facilitation of market power to the harm of customers in the market as a whole through—
  - Increased prices
  - Decreased product or service quality
  - Decreased rate of technological innovation or product improvement
  - [Maybe] decreased product variety[1]

Absent compelling evidence of significant customer harm from other sources, only price increases count

- Economic theory not well-developed in predicting—
  - Consequences of transaction for nonprice market variables
  - Consequences of changes in nonprice market variables for consumer welfare
- *Implication*: Need strong direct evidence to proceed on a theory other than a price increase

[1] Recognized as a dimension of anticompetitive effect in the 2010 DOJ/FTC Merger Guidelines.

So how do you assess substantive antitrust risk?

- Critical substantive questions
  - Are prices likely to increase postmerger?
  - Are the merging companies strong and uniquely close competitors with one another?
  - How many other effective competitors does each merging party have?
  - Do customers play the merging parties off of one another to get better prices or other deal terms?
  - How high are barriers to entry, expansion, and repositioning?
    - What are the gross margins for the overlapping products of each of the merging parties?[1]
  - Is the rate of innovation or product improvement likely to decrease postmerger?
  - Will the merged firm discontinue a product or product family?
    - If so, how will this affect current and future customers in the space?
    - If so, do the companies have a plan to support legacy products?[2]

[1] If high premerger gross margins did not precipitate entry, expansion, or repositioning, then a slightly higher margin due to a postmerger anticompetitive price increase is not likely to precipitate this type of market correction either.

[2] Concern about legacy product support is often a primary cause of customer complaints about a pending transaction.

So how do you assess substantive antitrust risk?

- Critical substantive questions (con't)
  - What is the business model behind the transaction?
    - What does the business model say about likely competitive effects?
    - How does the buyer expect to recoup any premium paid for the target?
    - Is there a procompetitive rationale for the merger?
      - That is, an explanation that makes customers as well as shareholders better off as a result of the transaction?
  - What are the operational plans for the combined company?
    - Fixed cost savings?
    - Marginal cost savings?
    - Product line integration and migration plans?
    - Changes in investment or direction of R&D activities?

So how do you assess substantive antitrust risk?

- Truth v. evidence on the critical questions
  - Having truth on the side of the deal gets the parties about 60% of the way to a successful outcome before the agencies
  - The remaining 40% comes from evidence
- Important sources of evidence for the DOJ/FTC
  - Company documents
  - Company data (especially win-loss data)
  - Company interviews and depositions
  - Customer interviews
  - Industry analyst and interviews
  - Competitor interviews
- Sequence of agency evidence gathering
  - Timing of filing: HSR forms from both parties (including 4(c)/4(d) documents)
  - Initial waiting period: Company strategic plans; customer and competitor interviews
  - Second request: Company documents and date; depositions; more detailed customer and competitor interviews; agency economic analysis

Developing the defense

- The best way to assess the substantive risk is to develop the defense
- Canonical structure of the initial presentation of a complete defense
  1. The parties and the deal
     - Brief overview of the merging parties
     - Brief overview of the deal (including terms, timing, and conditions precedent)
  2. The deal rationale
     - Ideally, a rationale that both makes the deal in the profit-maximizing interest of the acquiring company's shareholders *and* interest of customers ("win-win")
     - Include any cost, cross-marketing, or product development deal synergies
  3. The market will not allow the deal to be anticompetitive
     - This is equivalent to saying that customers can protect themselves from harm if the merged firm sought to act anticompetitively

The best defense is a good offense

The procompetitive argument

- *Key*: Reconcile the profit-maximizing interest of the acquiring firm's shareholders with the interest of customers
  - "Pushing the demand curve to the right"
- Menu of customer benefits
  - Lower costs of production, distribution, or marketing make merged firm more competitive
    - Elimination of redundant facilities and personnel
    - Economies of scale or scope
  - Complementary product lines
    - Broader product offering desired by customers
    - Better integration between merging products further enhances customer value
  - Accelerated R&D and product improvement
    - Greater combined R&D assets (researchers, patents, know-how)
    - Complementaries in R&D assets
    - Greater sales base over which to spread R&D costs
  - Better service and product support
    - More sales representatives
    - More technical service support

The not-anticompetitive argument

- *Key*: Customers will not get hurt even if the merged company attempts to act anticompetitively
  - *Usual argument*: Customers will have sufficient alternatives to the merged firm—from incumbent, repositioned, or new competitors or from vertical integration—to protect themselves from an anticompetitive effect
- Defense menu in horizontal transactions
  (in decreasing order of strength)
  - Parties do not compete with one another
  - Parties compete only tangentially
  - Parties compete but have significant other close and effective competitors
  - Parties do compete, have few existing competitors, but movement into market
    - is easy (no barriers to entry or repositioning), and
    - would occur quickly if merged company acted anticompetitively
  - Some other reason deal is not likely to harm customers

How many effective competitors are enough?[1]

5 → 4 Almost always clears absent

- significant customer opposition, and
- no bad documents

4 → 3 Close case but can clear with:

- a strong procompetitive justification
- significant customer support and little customer opposition, and
- no bad documents

3 → 2 Usually challenged, but can clear with

- a compelling procompetitive justification,
- strong customer support and no material customer opposition, and
- no bad documents

2 → 1 Always challenged; no efficiency defense

[1] Critically, "effective" competitors are those that the customers regard as substitute suppliers that they to which they would readily switch without harm in the event that the merged firm acted anticompetitively postmerger. "Fringe" firms are usually disregarded.

Assessing the defense—Exacerbating factors

- "Hot" company documents
  - Suggest the merging companies are close competitors of one another in some overlapping product
  - Suggest that there are few realistic alternatives to merging firms
  - Suggest that business model behind transaction is anticompetitive (e.g., higher prices, reduced innovation)
- Customer complaints
  - Generally about price
  - The merging companies are close competitors of one another in some overlapping product
  - Customer "plays" the companies off one another to get better prices
  - Insufficient number of realistic alternatives to preserve price competition post-merger
  - *Customer conclusion*: Customer will pay higher prices as a result of the merger

Assessing the defense

- Other considerations
  - High market shares
    - Not helpful
    - BUT not decisive if sufficient alternatives exist
  - Effect on competitors
    - In U.S., irrelevant unless it hurts customers
    - BUT one of the best predictors of enforcement action in the EU
  - Efficiencies
    - Heavily discounted by enforcement agencies
    - BUT important to provide a procompetitive deal motivation
  - High visibility deals that threaten significant job loss
    - Explains some Obama administration enforcement decisions (e.g., NASDAQ/NYSE)
- DOJ/FTC Merger Guidelines
  - NOT a good predictor of enforcement outcomes
  - *PNB* presumption likely to the key in litigation

ASSESSING REMEDIES RISK

PREDICTING AGENCY MERGER REVIEW OUTCOMES

Agency perspectives

- If a competitive concern exists, the solution must—
  - Fix the agency's competitive concern
  - Be workable in practice
  - Must not involve the agency in continuous oversight

Adjudicated relief/consent decrees

- Usual outcome: Overwhelmingly consent relief
  - Rare for merger cases to go to court
- But—
  - Agency starting point:
    - Consent solutions should match adjudicated permanent injunctive relief, assuming that agency establishes a violation
  - Agency negotiates consent relief—
    - Not only to remediate competitive concern with the immediate deal
    - But also with an eye to implications for consent decree negotiations in future deals
- Upshot
  - Agencies have found that they do not have to give much away in negotiations

Horizontal remedies—Agency requirements

- Almost always require the sale of a complete “business”
  - Agency: Essential to the effectiveness/viability of the solution
  - Exceptions:
    - Divestiture buyer has necessary infrastructure and limited divestiture assets will enable rapid and effective entry into divestiture business
    - Divestiture assets are commonly traded (e.g., grocery stores)
- Will permit “trade up” solutions
  - Buyer may sell its own business in order to purchase a larger business

Horizontal remedies—Agency starting point

- Everything associated with the divested business must go
  - Agency will negotiate exclusions
  - But must be convinced that the exclusions will not undermine the effectiveness or viability of the solution

Horizontal remedies—Elements

- Divest physical assets
  - Production plants, distribution facilities, sales office, R&D operations
  - All associated equipment
  - Leases/property from which business operated
- Divest IP
  - Sale of any IP rights used exclusively in the divestiture business
  - Sale and license back/license of IP rights used in both retained and divested operations
  - Divestiture buyer must have ability to develop and own future IP

Horizontal remedies—Elements

- Make “key” employees available for hire by divestiture buyer
  - All employees necessary for
    - production,
    - R&D,
    - sales & marketing, and
    - any other specific function connected with the divestiture business
  - Must facilitate access to employees
  - Cannot make counteroffer or offer other inducement to prevent defection

Horizontal remedies—Elements

- Assign/release customer contracts and revenues
  - If not assignable, offer customers ability to terminate with no penalties in order to rebid business
- Transfer business information
  - Especially customer-related information
- Provide transition services and support

Horizontal remedies—Agency right of approval

- Agency will demand right of approval over divestiture buyer
  - In agency's sole discretion
  - Remedy must eliminate agency's antitrust concerns
  - Buyer must have no antitrust problem in acquiring divested business
  - Buyer must be capable of replacing competition lost as a result of the acquisition

Horizontal remedies—Divestiture deadlines

- Agency will require a very tight deadline for closing the divestiture
  - May require a buyer "up front"
  - Almost always results in a "fire sale"

Practice note:

Unless protected by attorney-client privilege or the work doctrine, business documents and financial modeling of possible divestitures will be disclosable in response to the second request.

Vertical remedies

- To remedy foreclosure concerns
  - Non-discriminatory access undertakings
  - Undertakings to maintain open systems to enable interoperability (e.g., Intel/McAfee)
- To remedy anticompetitive information access
  - Information firewalls

Panasonic/Sanyo—Horizontal

- FTC concern
  - Merging parties produce the highest quality NiMH batteries and are closest competitors – effectively control the market
- Consent decree—Divestiture of Sanyo's NiMH assets
  - Buyer upfront—Fujitsu
  - Divestiture package
    - Manufacturing facility in Takasaki, Japan
    - Supply agreement for NiMH battery sizes not produced at Takasaki
    - All Sanyo IP, including patents and licenses related to portable NiMH batteries
    - Access to identified "key" employees
      - Financial incentives to employees (up to 20% of salary) to move to divestiture buyer
    - Transition services and support for 12 months

Comcast/NBCU—Vertical

- DOJ concern
  - JV between Comcast, NBCU and GE would give Comcast control over NBCU's video programming
- Consent decree
  - Continue to license NBCU programming content to competing multichannel video programming distributors
  - License the JV's programming to emerging online video distributor competitors
    - Commercial arbitration if cannot reach agreement on license terms
    - Prevents restrictive licensing practices
  - Hulu
    - Comcast to relinquish voting and other governance rights in Hulu
    - Comcast precluded from receiving confidential or competitively sensitive information about Hulu's operations

ALLOCATING ANTITRUST RISK IN PURCHASE AGREEMENTS

Antitrust considerations

- 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

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., Brazil)
- 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
  - Specific covenant to offer and accept remedies
  - “Efforts” covenant

Specific covenant re remedies

- 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
  - If remedy is embodied in a consent decree, agency must agree
    - In some deals, agency will not accept any consent decree
- Qualified remedies obligations
  - Limited to certain business, product lines, or assets
  - Limited by revenue, EBITDA or materiality cap
- “Road map” problem
  - Informs agency of issues and remedies available for the asking
  - *Query*: Can the joint defense privilege or work product doctrine shield a risk-shifting provision from a reporting requirement?

Efforts covenant

- Sets standard 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 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

Payments

- 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—Vary widely
    - Sample: January 1, 2005 – December 31, 2011
      - 614 transactions
      - 207 with reverse termination fees (all types)
      - 58 with antitrust reverse termination fees
    - Percentage of transaction value
      - Large: 39.81% (Monsanto acquisition of Delta and Pine Land)
      - Small: 0.11% (CapitalSource's proposed acquisition of TierOne)
    - Absolute magnitude
      - $4.2 billion (AT&T's proposed acquisition of T-Mobile) (15.4%)

Antitrust Reverse Termination Fees

Announcement Date	Acquiror	Target	Status	Equity Value ($M)	Antitrust Reverse Breakup Fee Amount ($M)	% of Equity Value
11/30/2011	Synopsys, Inc.	Magma Design Automation	Pending	505	30	5.9%
8/15/2011	Google	Motorola Mobility	Pending	11878	2500	21.0%
6/13/2011	Honeywell International	EMS Technologies	Completed	510	20	3.8%
5/4/2011	Applied Materials	Varian Semiconductor	Completed	4751	200	4.2%
4/27/2011	CoStar Group	LoopNet	Pending	607	52	8.5%
4/4/2011	Texas Instruments	National Semiconductor	Completed	6119	350	5.7%
3/20/2011	AT&T	T-Mobile USA	Failed	39000	4200	10.8%
11/18/2010	Cardinal Health	Kinray	Completed	1300	65	5.0%
10/28/2010	Carlyle Group	Syniverse Holdings	Completed	2171	60	2.8%
9/29/2010	VeriFone Systems	Hypercom	Completed	406	28	7.0%
9/27/2010	Unilever NV	Alberto-Culver	Completed	3699	125	3.4%
9/19/2010	Safran	L-1 Identity Solutions	Completed	1118	75	6.7%
6/14/2010	Cablevision Systems	Bresnan Broadband	Completed	1365	50	3.7%
6/7/2010	Grifols	Talecris Biotherapeutics	Completed	3604	375	10.4%
4/26/2010	Hertz	Dollar Thrifty	Failed (3)	1430	45	3.1%
3/2/2010	CF Industries	Terra Industries	Completed	4745	123	2.6%
2/23/2010	R.R. Donnelley & Sons Company	Bowne & Co.	Completed	461	20	4.3%
2/21/2010	Schlumberger	Smith International	Completed	9766	615	6.3%
9/16/2008	Getinge AB	Datascope	Completed	843	30	3.6%
8/22/2008	King Pharmaceuticals	Alpharma	Completed	1550	60	3.9%
7/10/2008	Dow Chemical	Rohm and Haas	Completed	15051	750	5.0%

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
  - Does it provide long enough for expected approvals?
  - Firm termination date or extension (typically +120 days) in the event of a second request or Phase II investigation?
  - *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 rquest compliance, commencement of litigation)
"Take or pay" provision	None	None	Requires payment of full purchase price by termination date even if transaction cannot close