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THE INFLUENCE OF MERGER CONTROL ON THE EARLY STAGES OF M&A DEALS

Anticipation of the potential impact merger control constraints may have on M&A:
A key factor for the launching of a successful transaction

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Competition law can be a decisive key factor that may influence the decision to sell or acquire companies or assets. At the end of the day, sellers, interested bidders and the final acquirer all come together on a common concern: defining an optimal timetable for the transaction. To meet this goal, it is highly recommended to anticipate a competitive assessment of the planned transaction, at a very early stage of the strategic discussions around the project, either within the context of a private sale, or a bidding process. Anticipation allows the parties to move into the notification process with greater comfort.

IN THE SELLER'S LENS: SELECTION OF AN APPROPRIATE ACQUIRER

Considering a transactional project from a merger control perspective, the seller's main arbitration concerns the selection of a candidate for the acquisition who has the most appropriate profile in order to circumscribe the impact of potential competition concerns on the actual feasibility of the contemplated transaction.

From a competition law viewpoint, giving priority to a logical desire for industrial consolidation can be, under some circumstances, a more complex deal to complete compared to a financial investment by a private equity investor or a family office. An aggregation of high market shares, together with significant overlap in the parties' respective businesses or bringing together various complementary businesses of the same value chain in a post-merger entity, as well as the reduction of the number of competing players in a concentrated market can all raise competition concerns, make the clearance decision more complex to issue, and therefore slow down the selling process or even alter the substance of the transaction.

Conversely, by choosing a private equity fund or a family office as a new comer investing in a sector, the seller takes a conservative option, which allows to contain or remove competition concerns in the approval process of the transaction. The transaction is also likely to meet the criteria for applying for a simplified procedure at the EU level, thus accelerating the issuance of the clearance decision within a 15 working day time-period. In 2017, among the 353 European Commission First Phase decisions, 280 were issued under a simplified procedure.

These are two opposite logics, but the industrial vision can still be preferred if potential competition concerns are early and duly foreseen, and if the level of commitment that the proposed acquirer or interested bidders are willing to give to help the transaction to succeed is in line with the nature of the concerns.

It is far too often found that competition counsels are consulted at a late stage of the selling process to assess whether the transaction falls within the scope of a review by competition authorities. Actually, this question should be analyzed much earlier and with an extended scope: does the transaction require notification to one or more competition authorities, and will the notification be a mere technical matter? If not, when difficulties are anticipated, the seller should be offered some flexibility to contemplate other, more appropriate candidates (if any). The interest for the seller to adhere to this approach is usually well understood within the context of bidding processes launched for the acquisition of certain strategic companies or assets. An in-depth competitive assessment is often part of the documentation required from the bidders, together with a draft SPA and their offer. The appraisal of competitive effects of the transaction that could result in long and complex discussions with the competition authorities is often, together with the price, one of the key criteria for selecting the final bidder. Adherence to this approach is, however, still not the case in too many deals, and it is very detrimental to the achievement of the transaction.

Another risk for the seller actually derives from an exit scenario implemented by an acquirer giving up the project in the light of constraints that would not have been properly identified and accordingly addressed, and

that would entail an unreasonable burden on the business plan (*e.g.* as a result of structural remedies that would be imposed to clear the notification). The financial implications of this risk for the seller can be circumvented by agreeing on an exclusivity or including a breakup fees mechanism in the SPA. The acquirer should consider these options with caution as the amount of the breakup fees can be relatively high, aimed at compensating the seller for all of the consequences such an exit would cause, including the hypothesis of an acquirer deciding not to conclude the transaction, even sometimes at a very late stage of the discussions, while the formal examination of the case already takes place. This was recently the case in a proposed acquisition by Fraikin (no. 2 in the market for the rental of refrigerated vehicles) of their direct competitor, Petit Forestier, the market leader. Fraikin decided to withdraw the filing after the French Competition Authority initiated Phase 2 proceedings justified by the insufficiency of the proposed remedies in Phase 1. The transaction would have reduced the number of market players from 4 to 3, and resulted in combined market shares of up to 90% for the new post-merger-entity, including numerous overlapping businesses. Looking back, considering the irreversible consequences these competition concerns had on the transaction itself, it could reasonably be asked whether this difficulty had been properly assessed before the notification of the merger. Out of 233 clearance decisions issued by the FCA in 2017, only 8 were subject to remedies.

IN THE BIDDER'S LENS: AN ACQUISITION, BUT AT WHAT PRICE?

For the acquirer, one of the key aspects of its strategy is the acquisition price and integration costs of the target. Competition law is one of the adjustment variables that help to determine the deal value.

While anticipating the competition concerns that could interfere with the clearance by the regulator, the acquirer should also identify the impact on the effective value deal, acquisition price and business plan if structural remedies were imposed. The more accurate the preliminary assessment is - with the support of economists if relevant - the more the impact on the global rationale of the transaction is assessed. Experience shows that it is often more useful to slow down the discussions with the seller to reallocate the appropriate time and resources to an in-depth competitive analysis.

Most of the time, when the formal notification takes place before the EC, the parties have only very limited time to counter-balance the position of the regulator, which is traditionally disclosed during a state-of-play meeting with the case-team, and accordingly not allowing much more time to discuss potential remedies. One of the legal instruments offered to the seller to eventually escape an overly expensive clearance process is the condition precedent included in the SPA regarding the clearance of the case by competition authorities. This clause can be more or less sophisticated, covering different situations in consideration of the sorts of risks that are anticipated, namely regarding the nature and details of remedies, and/or the occurrence of an in-depth examination in Phase 2. At what point would the deal lose its strategic interest? Which remedies are not acceptable? Is the acquirer solely responsible for the assessment? All of these factors should help properly design the condition precedent, which will most of the time be counter-balanced by a breakup fees clause.

A COMMON CHALLENGE: A CONCLUSIVE TRANSACTION IN A REASONABLE TIMEFRAME

As a conclusion, if having an optimal and fast transaction calendar is an agreed goal shared by all the parties involved in a deal - sellers, acquirers, bankers, external counsel, management and project teams - the suspensive effect of merger control in most of the jurisdictions often impedes this wish, as the transaction cannot be closed until the clearance decision is issued. It is highly preferable to define a reasonable retro-planning, with a longstop date consistent with the actual complexity of the case and the probable difficulties to get a swift clearance decision, and allow time for constructive discussions with the regulator. Mechanisms, such as a carve-out of a local part of the business concerned by the extended examination time-period, that are aimed at isolating the suspensive effect of a notification should only be considered with great care, in consideration of the risks of gun jumping, *i.e.* anticipating the realization of the deal before being granted the related clearance decision, and the related heavy fine.

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