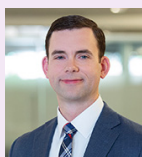


Key Question:

How will antitrust impact my deal?

While not every deal implicates major antitrust concerns, it is important to assess potential issues at the outset, rather than face timing or deal certainty risks down the road. An effective preliminary assessment for the seller will consider the range of potential buyers and corresponding degrees of risk.

The key is to understand the likely timeline and cost of achieving antitrust approval so that these can be taken into account from the early stages of the process. Where antitrust issues are limited, antitrust-related restrictions on diligence and other aspects of the premerger process can be relaxed or eliminated.



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Relevant Regulatory Issues

- Where might the deal need to be notified?
- What are the relevant “markets” that may be impacted by the deal?
- Will customers or suppliers be worse off in any segment of the economy (usually in terms of paying more or getting less than before)?



Areas to Explore

- Is there significant revenue from foreign operations, and, if so, from where?
- How are the parties thinking about the impact of the deal on their ability to compete effectively?
- Are there any parties that might be inclined to complain and, if so, why?



Risk Categories

Timing – Will the regulatory review process impact the time required to get to closing? If so, consider creative solutions (such as obtaining clearance pre-signing) to mitigate risks.

Cost – What are the filing fees, legal expenses and other financial issues that may impact the deal? Where costs may be significant, plan for who will cover them in the negotiation of the deal.

Certainty – If there are multiple bidders, do some present more regulatory issues than others? If so, explore how to weight the risk against other deal terms, such as the purchase price.



Key Question:

How do I avoid early pitfalls that raise antitrust risk?

From the time that a new deal is contemplated, parties should work intentionally to minimize the risk of any antitrust concern. During the pre-signing phase of a transaction life cycle, there are two key areas that should be addressed.

First, parties should manage the flow of information to avoid potential antitrust concerns.

Second, deal teams should understand how documents that they create may impact the antitrust review of the transaction down the road.

Addressing these issues early can avoid problems once the parties have already invested significant time and money in reaching an agreement.



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Diligence

Identify Competitively Sensitive Information "CSI"

- Inappropriate exchanges of CSI can complicate regulatory review or lead to antitrust liability
- CSI includes confidential, company-specific information that gives a competitive advantage
- Most sensitive: pricing, output, capacity, bids, customer information and strategic plans
- Other categories: detailed HR data and R&D

Manage CSI Exchange

- Determine what CSI needs to be shared, and with whom – apply a "need-to-know" principle
- Where CSI must be exchanged to facilitate the deal, use a clean team agreement
- Stage disclosures – highly sensitive CSI later in the process
- Prepare meeting agendas and stick to them



Documents

- Documents will inevitably impact the course of a regulatory review, so deal teams need to draft carefully
- Review with counsel the categories of documents that may be subject to production with a merger filing
- Avoid unnecessarily colorful language (e.g., "we will be able to dominate")
- Document synergies and efficiencies where applicable, but avoid "synergies" that imply price increases or other potential negatives for customers
- Maintain privilege over regulatory assessments from counsel and associated deal implications (i.e., mark "privileged and confidential" where appropriate)



Key Question:

How does antitrust review impact my clearance timeline and cost?

If the transaction involves parties with operations outside the US, foreign merger control may come into play.

With over 100 jurisdictions enforcing some form of merger control notice requirement, it is important to assess early on whether reviews outside the US will be triggered, and how those reviews may impact the cost of the deal and the potential closing date.



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Funneling Multijurisdictional Analysis

Evaluate Structure

Standard acquisitions of control require input from buyer and target
Joint ventures and other transactions involving joint control require input from all controlling parties
Minority investments require careful considerations of control rights and ownership percentages

Analyze Data



Refine Conclusions



Agreed Mandatory Notifications

Key Question:

How is antitrust risk apportioned between the parties?

Negotiation of antitrust risk in a purchase agreement involves a balancing of several different, interrelated provisions. A comprehensive assessment of risk will allow a party to effectively navigate these negotiations.

Where antitrust risk is significant, a party should seek protections against an adverse antitrust outcome.

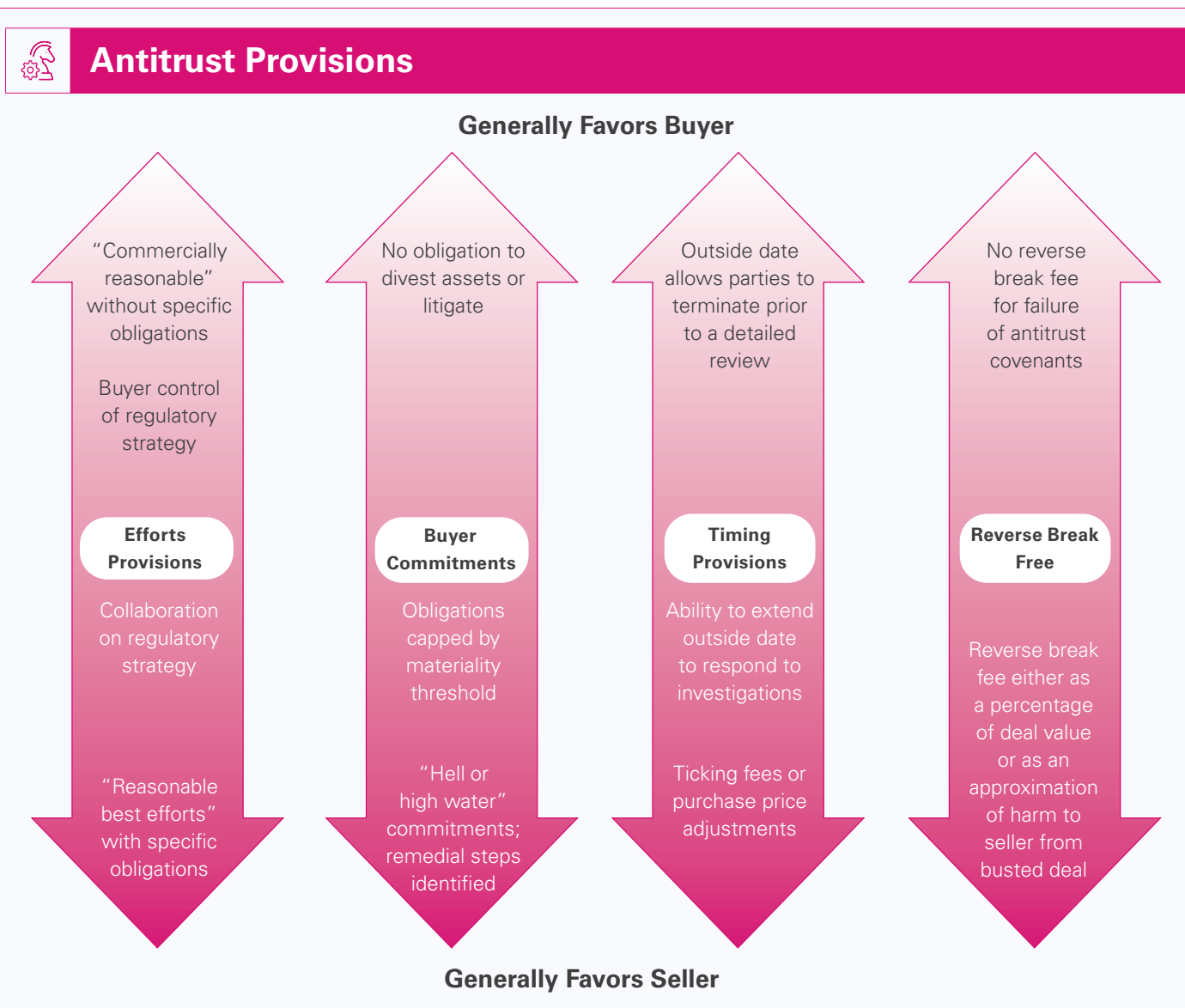
Where antitrust risk is minimal, antitrust protections in the purchase agreement may be traded off against other more important deal terms.

In all cases, the interrelationship between these provisions must be accounted for.



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Key Question:

How do parties minimize antitrust risks while planning for an effective integration?

Antitrust regulators restrict pre-closing conduct between the parties in two ways.

First, the buyer may not exercise control over the seller until the parties have cleared any mandatory merger control review.

Second, the parties may not exchange competitively sensitive information that is then used by the recipient and impacts the competitive dynamic between the parties.

Integration planning is vital to the success of the merger, but parties should plan their efforts carefully to ensure they do not run afoul of the antitrust laws.



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Do

- Establish a defensible procedure
- Plan but do not implement
- Continue to operate in the ordinary course
- When in doubt, consult with antitrust counsel

Do Not

- Transfer ownership of assets
- Consolidate business assets
- Integrate any aspects of the parties' businesses
- Implement synergy plans
- Agree on pricing, products or output
- Exchange competitive information without proper safeguards



Establish a Defensible Procedure

Designate an integration planning team or teams and establish appropriate firewalls.

Distribute gun-jumping guidance and train integration planning teams on antitrust.

Maintain meeting agendas, monitor attendance and involve counsel where needed.



Information Risk Profile



Key Question:

What strategies streamline US antitrust reviews and minimize burdens on the parties?

From the initial conversation with an antitrust authority, parties must carefully navigate the review process, focusing on both an expedient resolution and avoiding unnecessary expenses.

While an in-depth “Second Request” review may be triggered, parties have an opportunity to engage with Federal Trade Commission (FTC) or Department of Justice (DOJ) staff to address questions prior to a Second Request. This could allow for termination of antitrust review without a Second Request being issued or a narrowing of the issues a Second Request will cover.



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Initial Approach

- Often, the parties take a “wait-and-see” approach
- Where concerns are easily addressed or obvious, proactive outreach to the FTC or DOJ may be preferable

Responding to Questions

- Many investigations begin with informal queries from FTC/DOJ staff
- Conclusive responses to initial inquiries can forestall more detailed reviews
- Parties’ greatest asset is often credibility

Voluntary Access Letters

- During the waiting period, a VAL requests documents and data to determine if further review is needed
- Quick response is key – ideally, this process begins before Hart-Scott-Rodino Antitrust Improvements Act (HSR) filing occurs
- Staff will be calling customers – parties can consider their own outreach as well

Second Request Planning

- Where concerns remain after preliminary investigation, parties can proactively plan for 2R compliance
- Where possible, parties should work with staff to narrow the scope of investigation
- Possible steps include identifying key employees, collecting documents and interviews

HSR Investigation Off-Ramps

