Opportunity and risk:

Standard antitrust clauses in share and asset purchase agreements

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Both share and asset purchase agreements usually include clauses that cover antitrust issues — or at least have some content relevant to antitrust matters. The purchaser, seller and any other party to the purchase agreement all need to ensure these clauses adequately reflect their own interests.

Each share or asset deal is different. However, almost every purchase agreement addresses certain fundamental issues. For share deals and asset deals alike, irrespective of the applicable contract law, the following fundamental issues related to antitrust law are usually included: Is the closing of the transaction subject to approval by one or more antitrust authorities? Who is responsible for initiating and managing proceedings with these antitrust authorities? What rights do the other parties to the purchase agreement have with respect to these proceedings? Do the parties need to offer commitments if such commitments are required for obtaining approval? What are the consequences if the authority does not grant approval on time, does not grant unconditional approval or prohibits the transaction? Can the parties agree on a non-compete obligation? During the period between signing and closing, to what extent may the purchaser intervene in the target company's daily business? This article examines the standard clauses typically used to address these issues and explains both the opportunities and risks associated with these clauses.

Condition precedent

Transactions fall within the scope of merger control review if the revenues of the parties involved in the transaction (purchaser, target and potentially the seller) exceed certain thresholds. The revenue thresholds vary from jurisdiction to jurisdiction but usually include references to the parties' worldwide and national revenues. Small transactions involving companies with a limited geographical scope will often only cross a threshold in one jurisdiction, while transactions involving large multinational companies frequently exceed the thresholds →

Most purchase agreements provide for standard antitrust clauses in various jurisdictions. In most jurisdictions, a standstill obligation applies: the parties must notify the relevant national antitrust authority about transactions that exceed the applicable merger control thresholds, and the parties may implement the transaction only once the authority has approved the transaction.

Purchase agreements, therefore, usually provide for a condition precedent related to merger control. The merger control condition precedent is often part of a catalog of condition precedents addressing various issues. It provides that the transaction can be implemented ("closed") only once all competent antitrust authorities have approved the transaction. This condition precedent's level of detail can vary significantly. Some clauses are limited to the essence (for example, "The transaction is subject to the condition precedent that all competent authorities have approved the transaction.") Other clauses are very complex and try to address every conceivable situation, no matter how theoretical. If a transaction has the potential to raise concerns, this level of detail can be necessary. However, the vast majority of transactions do not give rise to any concerns from a merger control perspective, and the antitrust authorities swiftly approve these transactions. For example, the German *Bundeskartellamt* approved 99% of the more than 1,200 notified transactions in 2017. For this kind of transaction, a short and concise condition precedent will usually be sufficient.

Process

If a transaction meets a threshold in one or more jurisdictions, the parties have to notify the respective antitrust authorities about the transaction. Depending on the jurisdiction, number of parties involved and complexity of the transaction, preparing the notification and managing the subsequent merger control process can be very costly and time-consuming. The purchase agreement should specify who is responsible for preparing the notification and who will take the lead in managing the process. In practice, this will often be the purchaser. At the same time, the parties not directly involved in managing the process should make sure the purchase agreement adequately reflects their interests. If it is foreseeable that the merger control process will essentially run on autopilot and the authority will grant approval without substantial inquiries, simple information rights may be sufficient. Limiting a company's own involvement in the process may help the process to run with maximum flexiblility and efficiency. However, in complex cases, all parties involved should make sure they get all the relevant information as soon as possible, guarantee they can actively participate in discussions and negotiations with the authorities (about commitments, for example) and ensure documents are not sent to the authorities without their prior approval.

Worst-case-scenarios

It's rare, but it does happen: One or several antitrust authorities may have serious doubts as to whether they can approve a notified transaction. An authority that has serious doubts usually initiates an in-depth proceeding. At the end of the generally lengthy in-depth proceeding, the authority can still decide to approve the transaction. However, it can also decide to only approve the transaction subject to conditions, or even to prohibit the transaction. Unless the parties can rule out that a worst-case-scenario of this kind could materialize, these scenarios should be reflected in the purchase agreement.

The initiation of an in-depth proceeding extends the merger control process by weeks or even months. Even if the authority ultimately approves the transaction, the closing will be delayed. The purchase agreement can reflect this by providing for the possibility to withdraw from the transaction if the authority initiates in-depth proceedings or if the authority does not approve the transaction prior to a certain date (known as a "longstop date.")

Often, the parties can address the authorities' serious concerns only by offering certain commitments. One typical commitment is the obligation to divest certain companies, parts of companies or business units of the target company and/or the purchaser. The purchaser usually has an interest in committing as little as possible in advance and will therefore negotiate in favor of a "buyer-friendly" clause. A buyer-friendly clause is, for example, an obligation that requires the purchaser to use "reasonable efforts" or "commercially reasonable efforts" to come to an agreement with the authorities. The seller, who generally wants the purchaser to offer concessions that are as far-reaching as possible, will look at limiting the purchaser's room for maneuver. In the most extreme cases, the purchaser will be required to offer everything necessary to obtain the authorities' approval – including the purchaser's own "crown jewels," that is to say, its particularly successful business areas or subsidiaries (a "hell or high water" provision). →

If an authority ultimately decides to prohibit the transaction, the parties cannot implement the transaction. The parties can agree to simply rescind the purchase agreement and can agree that each party bears the resulting economic and financial consequences. However, the parties may also decide to shift the risk of a prohibition to either of the parties (in practice often the purchaser) and agree on a "break fee" or lump sum compensation.

Non compete

Once the parties have implemented the transaction, the purchaser wants to make sure the seller does not use its know-how and customer relationships to compete with the target business. Purchase agreements, therefore, usually provide for non-compete obligations, preventing the seller from competing with the target. Since antitrust law recognizes that the purchaser has a legitimate interest in protecting the value of the target business, non-compete obligations are generally admissible. However, the duration should not exceed three years, and the obligation must be limited to the market(s) where the target is active. If the target sells cars in Germany, the non compete obligation may prevent the seller from selling cars in Germany for a period of three years. The clause may not prevent the seller from selling bicycles in France.

From an antitrust perspective, a non-compete obligation imposed by the seller on the purchaser (preventing the purchaser from competing with the seller) usually lacks the required legitimate interest. Non-compete obligations restricting the purchaser are thus inadmissible, barring exceptional circumstances.

Ordinary course of business

In practice, the signing and closing of a purchase agreement rarely take place at the same time. Often, the closing is subject to approval by the competent antitrust authorities. Depending on the length of the merger control proceedings, the parties can end up implementing the purchase agreement days, weeks or even months after they signed the agreement. The purchaser has an obvious interest in making sure that the target actually purchased when closing corresponds to the target the purchaser expected to purchase at signing. However, until the parties have obtained all the relevant merger control approvals, the purchaser's options to monitor or influence the target's conduct are very limited. Under the standstill obligation, the purchaser and the target must be considered and treated as separate companies. The purchaser is not entitled to actively intervene in the target's management or daily business. In addition, the purchaser and the target may not exchange sensitive information. This effectively prevents the purchaser from requesting access to up-to-date data regarding, for example, the prices charged by the target or the target's individual customers.

The parties to a purchase agreement therefore often agree on "ordinary course of business" clauses. Under these clauses, the seller is required to continue the target's business operations within the scope of the established course of business. As different parties do not necessarily share the same view of what "established course of business" means in practice, they may seek further clarification. For example, in the agreement, the parties can explicitly specify certain measures that fall outside of the established course of business. It is questionable whether the parties can provide that the seller and/or the target may implement certain measures only with the purchaser's consent. Recent case law indicates that at least some antitrust authorities take a critical view of this.

Summary

Most purchase agreements provide for standard antitrust clauses. In terms of the details, however, clauses differ in both form and substance. Each party entering into a purchase agreement must therefore be aware of the clause-specific consequences and risks. Only with this awareness will it be possible to negotiate standard antitrust clauses in a manner that is in line with the party's interests. <–

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