WILSON
SONSINI

Risk Allocation in Merger Agreements in an Era of Increased Enforcement

By Scott Sher, Brendan Coffman, and Alexandra Keck[1]

CONTENTS

INTRODUCTION

It has never been more important for companies of all sizes, and across all industries, to focus on risk allocation in merger agreements. Antitrust agencies in the United States and worldwide continue to galvanize enforcement efforts, leading to longer, increasingly complex, and substantially more expensive reviews. The scrutiny can be impactful: protracted antitrust reviews with uncertain outcomes could lead parties to live with deals that look far different than originally contemplated, either as a result of antitrust-mandated divestitures, constraints on the post-merger business, or because of substantial deterioration in businesses caused by the uncertainty of the timing and likelihood of close. JPMorgan agrees: "The regulatory environment remained challenging … M&A regulatory approvals remain an area of concern for boards and managements. As a result, there is an increased level of preparedness and advanced planning regarding potential divestitures or concessions necessary to secure a successful closing."[2]

Risk-shifting provisions in merger agreements have emerged as a critical counterbalance to increased regulatory scrutiny. In fact, second only to deal value, antitrust risk management and allocation oftentimes represents the key negotiating point, especially between sophisticated parties in concentrated or dynamic markets. The emphasis on antitrust is logical—after all, a desirable purchase price is only meaningful if it will get paid—but companies and boards of directors going through the process for the first time are often surprised by the intensity and rigidity of these negotiations. Moreover, unfamiliarity with these negotiations and the importance of critical terms can lead to negotiation asymmetry that could ultimately prove costly for an unprepared company against a counterpart skilled in devising risk mitigation techniques.

In addition to becoming more prevalent, risk-shifting provisions have evolved in terms of creativity, aggressiveness, and consequence. This evolution empowers those who may try to use antitrust to extract unreasonable concessions or unfairly saddle an unprepared counterparty with oppressive terms. While the antitrust risks and mitigation strategies will vary depending on the transaction, there are several critical terms that merger partners must negotiate to allocate risk between them: efforts clauses, divestiture requirements, litigation requirements, break-up and reverse break-up fees, and termination date provisions.

Wilson Sonsini, working with NERA Economic Consulting, scrutinized over 700 merger agreements from 2004-2019 to construct an empirical analysis of the prevalence of these provisions. Our data set includes both high-risk and low-risk deals and examines whether specific industries are more likely to include risk-shifting provisions (and which ones they employ). This analysis serves as a benchmark that can help inform optimal transaction-specific negotiating strategies and protect against aggressive counterparties.

The study included a combination of public and Wilson Sonsini deals, with approximately half of the data derived from mergers that presented high antitrust risk (those that received at least a Second Request from the Federal Trade Commission (FTC) or Department of Justice (DOJ)) and half of the data derived from low-risk mergers (those that did not face FTC or DOJ scrutiny beyond the initial waiting period). A calibrated scoring mechanism of the antitrust risk provisions ensured an apples-to-apples comparison of deals. This article discusses the results of the analysis and opines on key lessons extracted from the data.

Over 100 countries have implemented a merger notification regime. These merger regimes vary widely in terms of filing triggers, requirements, due process rights, transparency, and potential consequences. The following is just a short list of examples of areas where the filing regimes diverge:

1. Size-of-transaction thresholds (global, regional, national)
2. Size-of-party thresholds (buyer, seller, global turnover, regional or national turnover, global assets, regional or national assets)
3. Consideration of related corporate entities, minority interests, and/or associates in calculating thresholds and assessing competitive impact
4. Whether vertical transactions are included
5. Suspensory powers (whether parties must wait for approval before consummating the transaction)
6. Discretion to review transactions below established thresholds
7. Timing certainty
8. Confidentiality vs. public nature of review
9. Other considerations (e.g., consideration of impact on national domestic industry or non-competition aspects of a transaction)

With so many jurisdictions and so many variables, one can imagine the confusion that ensues. Recent experience confirms that large, multinational transactions face a host of speedbumps and hurdles on the path to clearance.

United States, Europe, and China Remain Characteristically Aggressive

It is no secret that regulators in the United States, Europe, and China have renewed their focus on market consolidations and strategic acquisitions, and are willing to exercise their regulatory authority if they identify a problematic transaction. The United States and the European Commission (EC) remain the most active,[3] and have long taken an aggressive stance during the review of mergers that result in industry consolidation through elimination of a direct competitor. However, these agencies are also increasingly focused on "potential competition," or strategic acquisitions that may harm nascent competition or future, yet-unrealized markets.[4] The FTC opined that mergers involving nascent or potential competitors may be anticompetitive, particularly "when an industry leader seeks to acquire an up-and-coming competitor that is changing customer expectations and gaining sales."[5]

The EC similarly remains aggressive in merger review, with approximately 45 merger investigations proceeding to phase II (enhanced review) between 2015 and 2019, six transactions blocked, and many other deals approved only with commitments.[6] The EC has been active in the review of mergers involving digital platforms, with particular concerns about competitors' access to the market and the scale of the parties' combined data.[7] Like U.S. agencies, the EC has also considered nascent competition in its merger review, as "[k]iller acquisitions and acquisitions of nascent competitors are particularly prone to having an impact on potential competition and innovation," and innovation is among the criteria the EC uses to assess the impact of a proposed merger.[8] While there is much debate regarding the wisdom of pursuing antitrust enforcement on a potential competition theory, it is undeniable that antitrust agencies now scrutinize mergers involving nascent competition closely. The result from a dealmaker's perspective is more uncertainty, and more risk.

Statistically, China's merger control authorities (State Administration for Market Regulation (SAMR), and previously the Anti-Monopoly Bureau of the Ministry of Commerce) are less foreboding than their reputations—they have imposed conditions in 44 transactions (and prohibited two more) out of more than 2,900 filings since 2008.[9] However, this data belies the challenge that the review process can present. SAMR's mandate includes consideration of a transaction's impact on industrial policy and national economic development,[10] and Chinese regulators frequently involve other national stakeholders in the review and analysis (up to, and including, domestic competitors). Glencore/Xstrata epitomizes the prudentialism that can dominate merger review in China—the parties ultimately agreed to divest a copper mine in Peru to a consortium led by Chinese mining company Citic Metal.[11]

Intense Scrutiny of Global Deals Beyond the Big Three

Although the challenges are evolving, brokers and attorneys specializing in global transactions have a certain level of familiarity with merger notification and enforcement in the United States, Europe, and China. While theories may be dynamic, processes remain relatively predictable (even if onerous). The same cannot be said for merger control regimes throughout the world, where parties to a transaction frequently find themselves navigating uncertain terrain and facing challenges that could jeopardize the entire transaction. This potential outsized impact creates enormous leverage for regulators and demands that parties appropriately protect their interests when negotiating merger and acquisition agreements.

Brazil's Administrative Council for Economic Defense (CADE) and the United Kingdom's Competition and Markets Authority (CMA) are two examples of relatively young merger enforcement authorities that have demonstrated a willingness to complicate global transactions. In 2015, CADE was the first regulator to oppose the Halliburton/Baker Hughes merger, concluding it "could result in price increasing in several markets and reduction of innovation incentives, which would directly impact [the] Brazilian oil and gas sector."[12] CADE also aggressively enforces gun-jumping, with high-profile fines of Cisco/Technicolor for $7M and IBM/Red Hat for $14M.[13] The UK's CMA illustrates the outsized impact a relatively small regulator can have on global transactions. Indeed, as evidenced by the Illumina/PacBio merger, the CMA is willing to intervene when only a trivial amount of UK commerce is at issue. CMA asserted jurisdiction solely based on the 0-5 percent share in UK DNA sequencing systems that Illumina would gain from acquiring PacBio.[14] Similarly, in Roche/Spark, the parties did not notify the CMA of the deal because Spark had no UK sales, but the CMA found jurisdiction based on the number of UK employees and UK patents.[15] Other recent transactions disrupted by the CMA include Taboola/

Outbrain, where even after the DOJ cleared the deal, a lengthy CMA review ultimately led to the deal's collapse, and Sabre/Farelogix, where the CMA found it had jurisdiction when the parties had sales to a lone UK customer (British Airways) and the market exhibited certain two-sided features. With the exception of Roche/Spark, in each case the parties ultimately abandoned the transaction, offering a cautionary tale about the impact small but aggressive regulators can have.

Competition authorities in emerging markets are often eager to become involved and leverage regulatory approval for concessions aimed at improving national economies. Uber's 2019 acquisition of MENA ridesharing company Careem is illustrative. The Egyptian Competition Authority, the General Authority for Competition for the Kingdom of Saudi Arabia, and the Competition Commission of Pakistan all conducted long, probing inquiries that resulted in significant concessions from the merging entities. The notification and review period took nearly a year across the several jurisdictions and required immense coordination between the parties and the several regulators. To further complicate efforts, the jurisdictions all expressed a preference for behavioral remedies, thus requiring the parties to calibrate country-specific solutions. The Egyptian Competition Authority's press release speaks to the intensity of that particular review: "ECA then initiated its investigation, which was supported by a consumer survey carried out by Information and Decisions Support Center (IDSC); data on 270 million trips (obtained from the Parties under Article 22(bis.) ECL); a study of Egyptian and international precedent; and ongoing cooperation with relevant competition authorities from around the world, such as the Competition Commission of Pakistan, the General Authority for Competition (Saudi Arabia), and the COMESA Competition Commission (under confidentiality waivers obtained from the Parties), as well as with competition authorities that were not affected by the transaction in question but have previously studied the ride-sharing market."[16]

Risk allocation measures played an integral role in all of the above instances, and their importance will only increase. The remainder of this article discusses particular risk allocation provisions, their province in modern M&A negotiations, and considerations for deal-makers and attorneys moving forward.

Absent risk-shifting provisions, the seller generally bears the risk of the transaction not closing. The seller may experience significant losses during any antitrust investigation or litigation period due to timing and prolonged uncertainty, including the loss of customers and employees, which can drive down the value of the business, especially if the deal never closes. If the seller has concerns about obtaining antitrust approval, it should seek to place some of the risks of obtaining approval on the buyer. Provisions aimed to shift antitrust risk, described in greater detail below, include efforts clauses, divestiture requirements, litigation requirements, reverse break-up fees, and deal date extensions. Specific examples and options for these provisions from a range of past deals are included in **Appendix A**.

Efforts Clauses

Although parties have mutual incentive to work to close their deal at the time that they sign it, merger agreements often specify the level of "effort" that they must apply on an ongoing basis. "Efforts" provisions concern the degree to which the buyer will be required to make accommodations to satisfy concerns from the antitrust regulators. The "efforts" clause will define a general standard to apply a certain degree of effort (such as "reasonable" or "best" effort, for example), but will often carve out and specifically omit a requirement to litigate and/or divest assets.

The most comprehensive efforts provision is commonly known as a "hell or high water"—or HOHW—clause. As the Delaware Court of Chancery explained in 2008, a hell or high water clause is when a "merger agreement requires [the buyer] to 'take any and all action necessary' to obtain antitrust approval for the transaction, and prohibits [the buyer] from taking 'any action with the intent to or that could reasonably be expected to hinder or delay the obtaining of' such approval."[17] This type of clause is not tempered by any reasonableness requirement. Instead, it requires the buyer to do *anything* in its power to secure approval of the transaction and may require the buyer to pay the full purchase price even if the antitrust agencies successfully block the transaction.

HOHW clauses are rare.[18] Just three of the 26 (11.5 percent) high-risk deals we studied from 2019 contained a HOHW clause, likely because they shift such a significant amount of risk onto the buyer. By contrast, such provisions were far more common in low-risk deals (nine of the 36 low-risk deals—or 25 percent—that we studied from 2019), perhaps because it was so unlikely that they would be necessary in the first place.

Some efforts provisions are ambiguous or silent with regard to whether the parties must litigate and/or divest assets, which can cause problems for the parties if the deal meets resistance from antitrust authorities. In that type of situation, if the parties end up litigating against each other to apportion fault in the wake of a failed deal, a court is likely to examine the efforts provision in determining whether an agreement mandated divestitures or litigation. For example, a merger agreement that calls for "commercially reasonable" efforts is unlikely to be interpreted as requiring more drastic actions such as large divestitures or litigation. On the other hand, the result may be different if the merger agreement calls for the parties to use their "best efforts."

But, as illustrated in a recent decision by the Delaware Court of Chancery, though lawyers differentiate between different efforts clauses, such as "best efforts," "reasonable best efforts," and "commercially reasonable efforts," courts may not always view these provisions as differently as lawyers. The meaning of "best efforts" is vague and is treated inconsistently by courts. In *Akorn, Inc. v. Fresenius Kabi AG*, the court stated that both reasonable efforts and reasonable best efforts require the party to "take all reasonable steps" to solve problems and complete the transaction.[19] Moreover, the court stated that even a "best efforts" obligation "is implicitly qualified by a reasonableness test."[20] Indeed, two recent cases for high-profile failed mergers—between Anthem Inc. and Cigna

Corp., and Tribune Media Company and Sinclair Broadcast Group, Inc.—involve one side accusing the other of failing to use “reasonable best efforts.”[21] Accordingly, companies should be aware that even seemingly boilerplate language in a merger agreement may be litigated, to the tune of billions of dollars. Due to the potential ambiguity of efforts provisions, merger agreements that do not specify other requirements, such as the divestiture and litigation requirements outlined below, may leave parties vulnerable to uneven court interpretation.

Divestiture

A divestiture requirement is a provision within a merger agreement that specifies the assets the buyer must divest if necessary to obtain antitrust approval and ultimately close the deal. A divestiture can help cure antitrust concerns when the merging parties have overlapping business lines that, when combined, may result in high concentration in the market and, in the view of the antitrust agency, lessen competition. Due to the ambiguity of reasonable best efforts clauses as described above, a seller seeking more assurances from the buyer should consider including specific divestiture provisions.

Because buyers may not want to divest any of the to-be required assets, particularly at the direction of the antitrust agency, a divestiture provision shifts the risk of a transaction to the buyer by specifying the actions it must take to obtain antitrust approval. At the same time, buyers will want to limit the extent of a divestiture requirement to ensure they are able to retain the value of the transaction.

Various types of divestitures may be used to allocate risk. The parties may agree to require only specific divestitures of assets, such as a particular manufacturing facility, assets within a particular geographic area, certain products under development, or licensing intellectual property. If the buyer is willing to divest up to a limit but does not want to offer specific assets, a cap can be placed on the value of assets so the divestiture will not exceed a certain amount of total revenue or EBITDA. If the buyer has not yet determined which assets it is willing to divest, or counsel has not completed a substantive antitrust analysis by signing, the parties may instead agree to divest only those assets that would not have a material adverse effect on the party selling the assets. Other lesser requirements, such as provisions imposing no obligation to divest, or no obligation to divest if the divestiture is burdensome or material, may also be used by parties who seek flexibility regarding potential divestitures. In other instances, the parties may commit to any divestiture required by a specific antitrust enforcer or by any antitrust enforcement agency.

Ultimately, the specifics around any divestiture are key. Outlining specific product lines or manufacturing facilities that a buyer is willing to divest may provide the merging parties a degree of certainty regarding obligations to obtain antitrust clearance. Limiting divestiture obligations upfront may also decrease delays of a potentially protracted FTC or DOJ investigation. However, divestiture provisions in a merger agreement can signal to the enforcers the parties’ willingness to divest certain assets, typically those with antitrust significance, and thus may impact the government’s view of the deal. Agreeing to any divestiture required for FTC or DOJ clearance may also embolden the reviewing agency to seek a divestiture.

Litigation

Another key provision in any merger agreement is the litigation provision. Together with the end date (i.e., the date after which one or either of the parties may terminate the deal to prevent a prolonged state of limbo), a litigation requirement dictates whether the parties will fight a legal challenge by the government to block their transaction. Litigation presents uncertainty and costs that may be untenable, and either the buyer or seller may not be willing to sign the deal if litigation is required. Both the buyer and seller may be concerned about the costs and delay associated with a merger litigation, especially given the highly uncertain outcome, which often turns on the opinion of a single trial-court judge. There may be some cases, however, where parties are fully prepared to litigate, either because the seller views the transaction as its only opportunity to remain viable or because the buyer believes that the efficiencies afforded by the transaction are sufficiently important.

A litigation requirement may be important to a seller by mitigating the likelihood that it will have endured the tribulations of a lengthy investigation—with the accompanying business uncertainty that could discourage customers, partners, and employees—and then be left in the lurch by a would-be buyer who does not want the added risk and expense of litigation. Other sellers may not want to remain in a period of litigation uncertainty. A litigation requirement is particularly important where the parties have not negotiated divestitures, or where the size of the reverse break-up fee, as discussed below, is insufficient to account for the substantial antitrust risk.

Reverse Break-Up Fee

A reverse break-up fee (RBUF) is a termination fee paid by the buyer to the seller if the deal fails to close, including for failing to obtain the necessary antitrust approvals. RBUFs shift risk from sellers to buyers by providing the seller compensation if the deal fails to close and by incentivizing the buyer to obtain antitrust approval. When the target agrees to sell itself (or a portion of itself), it sometimes becomes more difficult to hold on to key stakeholders (especially employees and customers) and so the company will need protection against the possibility that the deal does not close and it must continue on in a perhaps weakened state. RBUFs can appeal to buyers as well, as they provide for cost certainty and for protection against other costly remedial measures such as divestiture of key assets or lengthy, risky litigation. There are a variety of reasons besides antitrust considerations that a deal may fail to close, and parties carefully craft RBUF provisions in their merger agreements. Many RBUF provisions are antitrust-specific (i.e., the RBUF is payable if the deal fails to close specifically because of antitrust problems), many are sufficiently broad to include antitrust among other causes of failure, and other provisions specifically *exclude* antitrust from the RBUF considerations.

In addition to whether the fee exists in the first place, the size of the RBUF is crucial. It is one thing for a buyer to pledge a $100 million RBUF for a $50 billion deal, and it is quite another thing for a buyer to pledge a $100 million RBUF for a $2 billion deal. The average antitrust-specific RBUF in a high-risk deal over the past 16 years is 4.5 percent of total deal value and 4.2 percent of total deal value in a low-risk deal. These averages are "simple" averages, meaning that they are not weighted. By contrast, the *median* antitrust-specific fees are lower than the averages: 3.9 percent for high-risk deals and 3.6 percent for low-risk deals.

Antitrust Reverse Break-Up Fees: Summary Statistics

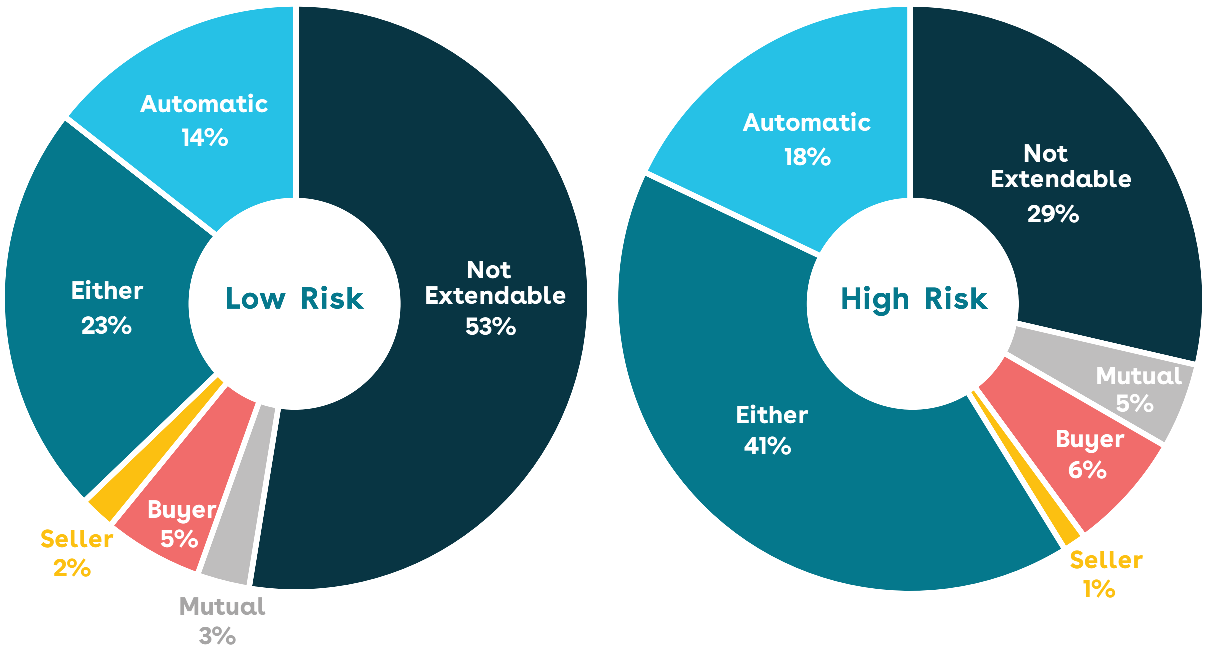
	Share of Deals with Fee			Average Fee			Median Fee		
Period	High Risk	Low Risk	All	High Risk	Low Risk	All	High Risk	Low Risk	All
	--------------(Percent)-------------			-------(Percent of Deal Size)------			-------(Percent of Deal Size)------		
(a)	(b)	(c)	(d)	(e)	(f)	(g)	(h)	(i)	(k)
2004	-- %	13.3 %	**9.1 %**	-- %	2.6 %	**2.6 %**	-- %	1.8 %	**1.8 %**
2005	33.3	13.6	**20.6**	4.0	2.4	**2.9**	2.0	2.8	**2.4**
2006	12.5	25.0	**19.4**	3.0	2.8	**2.8**	3.0	2.9	**3.0**
2007	13.8	25.0	**18.4**	6.5	3.0	**4.4**	4.5	3.1	**3.8**
2008	19.0	26.3	**22.5**	4.7	5.2	**4.9**	4.0	3.8	**3.8**
2009	--	6.7	**3.3**	--	2.0	**2.0**	--	2.0	**2.0**
2010	6.1	35.0	**17.0**	5.4	3.6	**4.8**	3.8	3.5	**3.5**
2011	13.0	48.3	**32.7**	5.2	3.7	**3.9**	4.5	4.7	**4.7**
2012	31.3	58.3	**47.5**	3.8	4.5	**4.4**	3.3	4.7	**4.0**
2013	41.4	19.0	**32.0**	4.0	3.5	**3.9**	4.6	4.4	**4.6**
2014	52.6	39.3	**44.7**	4.0	2.4	**2.8**	2.9	4.3	**3.5**
2015	12.5	51.7	**31.1**	3.7	2.6	**2.8**	3.1	3.0	**3.0**
2016	17.1	21.9	**19.4**	3.5	2.8	**3.1**	3.9	4.5	**4.5**
2017	8.0	25.0	**16.3**	2.4	2.7	**2.7**	2.4	2.8	**2.8**
Overall	**18.6 %**	**31.1 %**	**24.9 %**	**3.9 %**	**2.9 %**	**3.1 %**	**3.4 %**	**3.7 %**	**3.6 %**

Drop-Dead Date

Major antitrust investigations of proposed mergers in the United States take longer than they ever have before—an average of about one year.[22] For complex, cross-border transactions that are reviewed by multiple antitrust authorities around the world, that timeline is often extended even further. As a result, an antitrust risk provision known as the "outside" or "drop-dead" date—the date by which the proposed transaction must close or else one or both parties may terminate the deal—has likely grown in importance in recent years. Depending on the specific terms, the seller may be able to collect an RBUF if it terminates the proposed deal when the drop-dead date arrives. Merger agreements often contain provisions for extending this date and parties who are litigating to defend their deal against a government challenge often mutually agree to extend it.[23] A drop-dead date can prevent the parties from remaining in limbo for an unexpectedly long time. Unless it is extended, this date predetermines the deadline for divestiture negotiations or for a court to rule on whether to block the deal. However, one of the many uncertainties with litigation is that there is no way to know how long a judge will take to rule on the case and no way to bind a judge to rule within a certain timeframe.

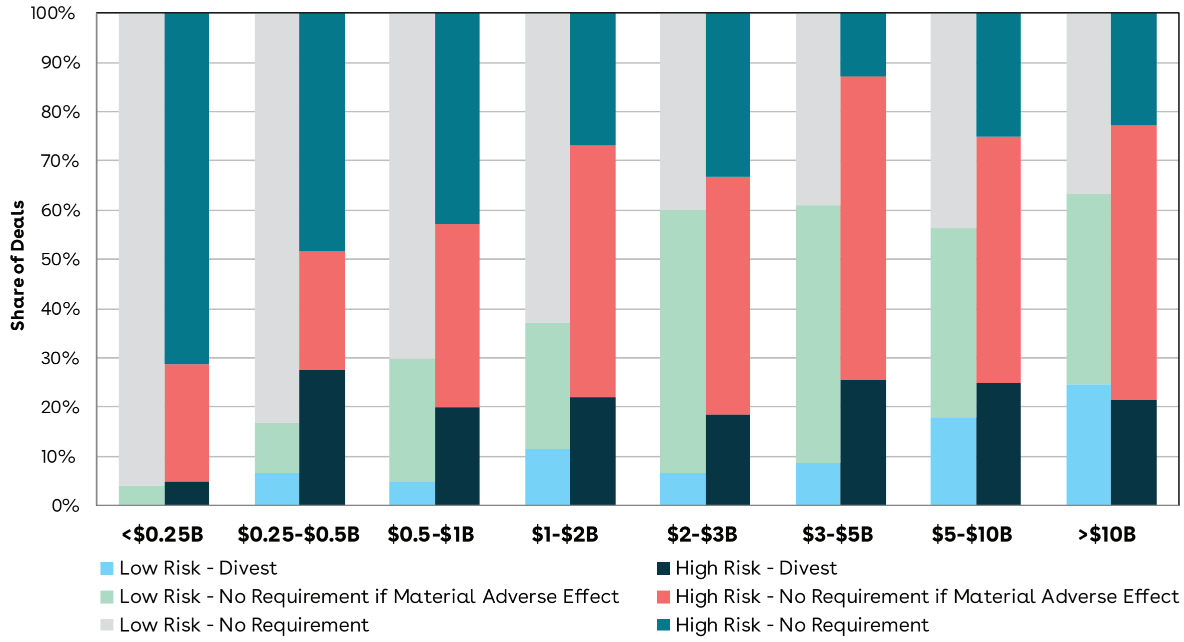
Drop-Dead Date Extensions, Divestiture Requirements, and RBFs Are More Common in High-Risk Deals

Unsurprisingly, high-risk deals are more likely to contain drop-dead extensions, divestiture requirements, and RBUFs. Our analysis shows that divestiture as a remedy is more likely in deals with high demonstrated antitrust risk; over the 16-year period, 45.8 percent of high-risk deals have a divestiture requirement, compared to 37.1 percent of low-risk deals. However, the share of low-risk deals with divestiture requirements has risen, especially in recent years: in 2019, two-thirds of low-risk deals included divestiture requirements, the highest share on record during the 16-year period that we studied. From 2004 to 2012, the share of low-risk deals with a divestiture requirement never exceeded 31 percent in any given year, but it has exceeded 34 percent every year since then. Meanwhile, the share of high-risk deals requiring a divestiture has been unpredictable: 79.2 percent of high-risk deals in 2017 required a divestiture, whereas just 34.8 percent did the following year. Most high-risk deals also include a drop-dead date extension, usually automatically or at the election of either party.



Our study also shows that just over half—51 percent—of high-risk deals have contained an RBUF clause that either explicitly covers antitrust or is sufficiently broad to encompass antitrust. Among low-risk deals across the 16-year period, 29 percent contain this type of RBUF. As for antitrust-specific RBUFs, 33.5 percent of high-risk deals and 17.4 percent of low-risk deals from 2004-2019 contain one. The share of low-risk deals with an antitrust-specific RBUF is skewed upwards by the three-year period from 2012-2014, when over 40 percent of the studied low-risk deals had one. In 2019, just 2.8 percent of low-risk deals had an antitrust-specific RBUF.

Buyer Divestiture Requirements for Risk and No-Risk Deals by Deal Size



Litigation Requirements Common for All Deals

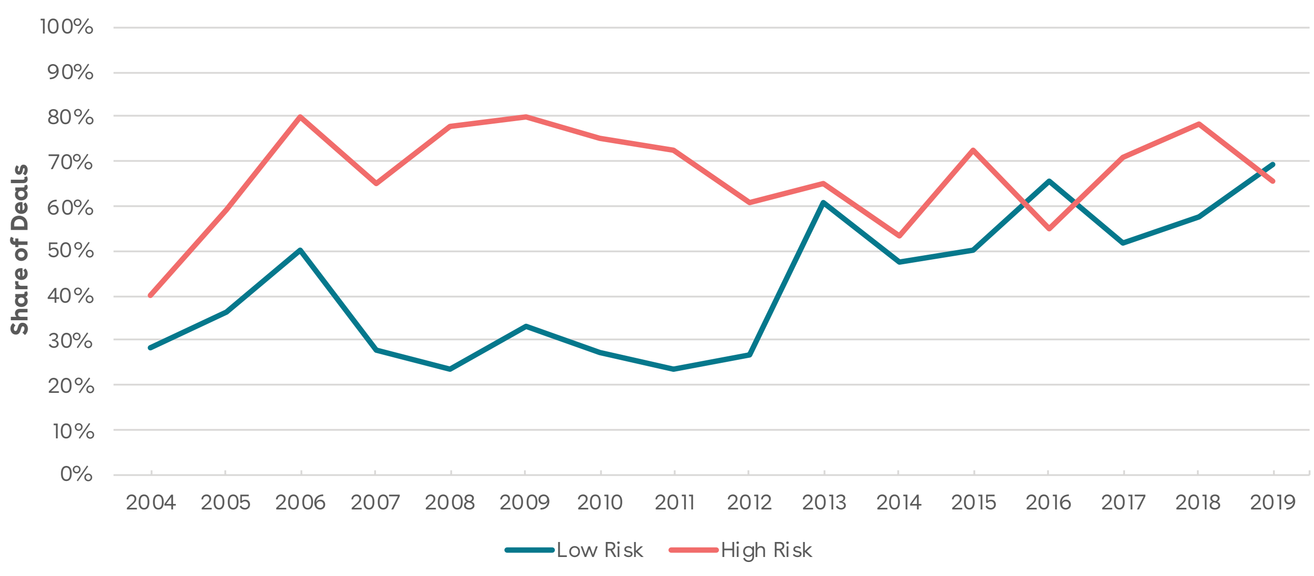
Our analysis reveals that litigation requirements are a more common feature of both low- and high-risk deals than are other types of risk-shifting provisions such as divestiture requirements and RBUFs. Across the 16-year study period, 65.9 percent of all high-risk transactions have a litigation requirement and 44.7 percent of low-risk deals do. Similar to the rising prominence of divestiture requirements in low-risk deals, the share of low-risk deals with a litigation requirement has risen in recent years: in 2019, 69.4 percent of low-risk deals featured litigation requirements, the greatest share recorded over the period studied. Since 2013, that share has never dipped below 47 percent, whereas prior to 2013, the share of low-risk deals containing a litigation requirement exceeded 47 percent just once (in 2006).

The lessons from this are likely threefold. **First**, parties recognize the shared difficulty of litigating antitrust challenges and seek to mutually bind each other for the long haul. Litigation requirements serve to reinforce all other risk-shifting and risk mitigation tactics. One could imagine a paradoxical situation in which a party would have an incentive to shirk on litigation if other protections are robust. Litigation requirements also benefit from shared acknowledgment of futility: if both parties recognize success is unlikely, they can mutually agree to terminate the deal. Exceptions do exist, perhaps none more notable (and costly) than Anthem's failed acquisition of Cigna. There, not only did litigation requirements fail to salvage the transaction, but they turned a bad situation worse, ultimately forcing both companies to ensure years of costly litigation for naught.

In Anthem's failed acquisition of Cigna, the litigation requirement obligated Cigna to oppose any antitrust litigation "fully and vigorously" and to follow Anthem's chosen litigation strategy.[24] But due in part to disagreements over executive control of the merged company, Cigna instead actively undermined Anthem's defense. Cigna's opposition to the deal was even apparent to the district court, who called it the "elephant in the courtroom" during trial.[25] Cigna elicited testimony from its own CEO and Anthem witnesses that aided the DOJ's case, proposed trial exhibits that undermined Anthem's efficiencies, cross-examined Anthem's CEO and its key expert to bolster DOJ arguments, failed to make an opening or closing argument in support of the merger, and engaged in a stealth public relations campaign to derail the deal.[26] Instead of vigorously pursuing all avenues for appeal following the district court's injunction, Cigna declined to support Anthem's appeal, issued a termination notice, and filed a lawsuit of its own.[27]

The Delaware Court of Chancery found that Cigna breached its merger efforts covenants by intentionally thwarting the deal. However, Anthem could not collect on its claim for billions in damages because it failed to prove that Cigna's breaches led to causally related damages. Cigna proved that even if it fulfilled its efforts obligations, the DOJ still would have blocked the merger, the district court would have enjoined the merger, and on appeal the ruling would still be upheld.[28] **Second**, litigation requirements similarly serve to filter out the most problematic deals. By making litigation requirements essentially commonplace, merging parties are aware that they will be required during negotiations. This likely serves as a deterrent for the most problematic deals. **Finally**, given the high number of transactions that include litigation requirements, it is possible that they are over-deployed. When negotiating deal terms and risk allocation, parties should step back and consider whether such stringent requirements are truly necessary. While litigation requirements may provide some level of comfort, insisting upon them is not—or should not be—free.

Share of Deals with Litigation Requirements by Year

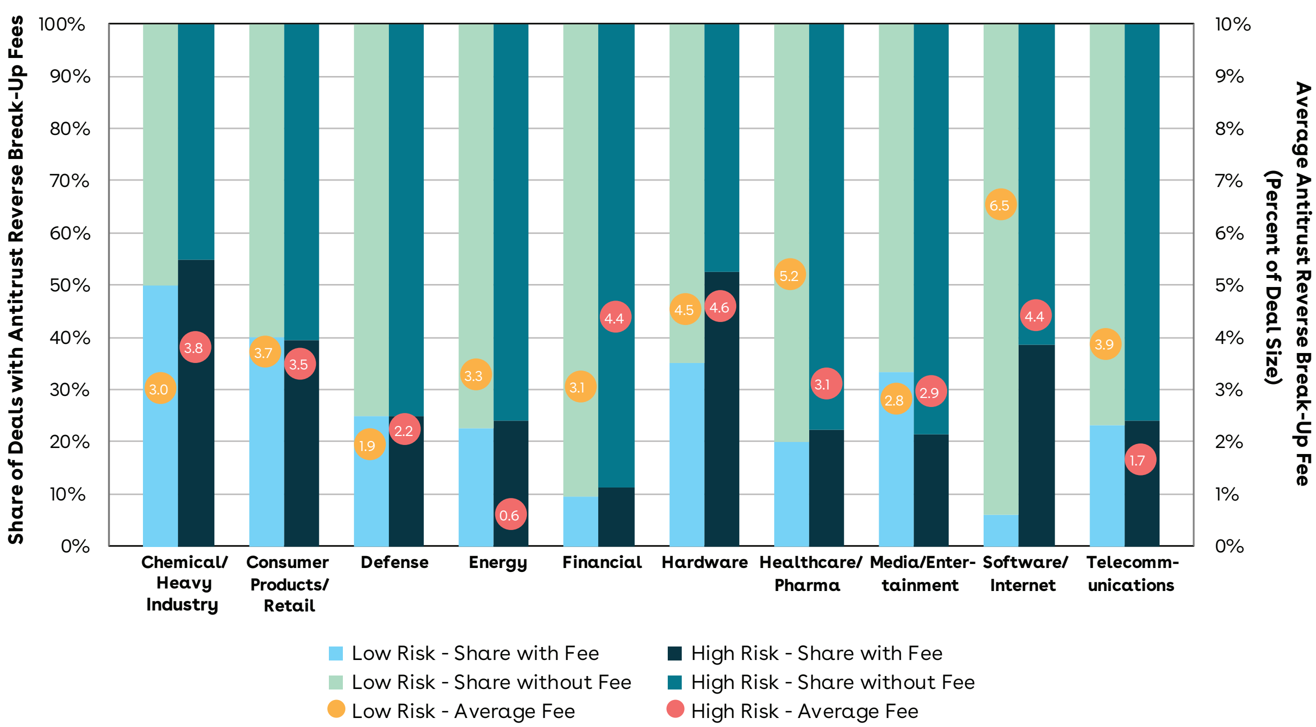


Software/Internet and Hardware Among Industries Most Often Using Risk Allocation Provisions

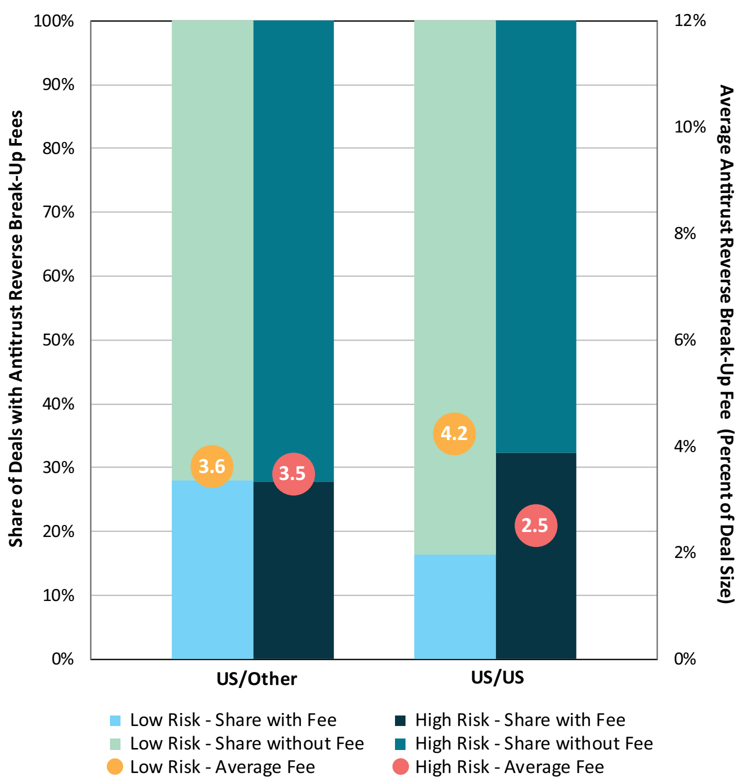
Our study examined differences across industries. High-risk deals in the hardware and chemicals/heavy industry sectors were especially likely to have antitrust-specific RBUFs (over half of high-risk deals in both industries), whereas high-risk deals between financial services companies were far less likely to have an antitrust-specific RBUF (about 10 percent). The size of the antitrust-specific RBUFs was much larger in tech-related industries—hardware, software/internet, and telecommunications (north of 5 percent on average)—than in industries that are usually less reliant on innovation, such as energy (under 3 percent on average).[29] This matched our expectations. Hardware industries generally have higher RBUFs because those industries are capital goods' businesses, which tend to get decimated between the time of signing and closing because consumers do not want to make capital purchases. As a result, a higher RBUF is needed in order to persuade the seller to weather the risks of a prolonged review and the potential that the deal never consummates.

RBUFs are often used as an incentive to close a deal rather than force payment in the face of remedy demands. RBUFs can be calibrated such that it becomes a cost-benefit analysis for the buyer: the buyer must decide whether to shed certain assets or make a behavioral concession rather than pay the RBUF. A seller will thus sometimes opt to push for a higher break-up fee rather than win every point on the scope of divestiture or litigation requirements, because the seller knows that the buyer would rather divest than pay a fee that is sufficiently high.

Share of Deals with Fee and Average Fee by Industry Antitrust Reverse Break-Up Fee



Share of Deals with Fee and Average Fee by Region Antitrust Reverse Break-Up Fee



Deals with RBUFs Are Likely to Include Litigation and/or Strict Divestiture Requirements

Our data reveals that many deals with reverse break-up fees also include litigation and divestiture requirements. This is perhaps unsurprising: RBUFs essentially guarantee that a buyer will take all necessary actions to obtain antitrust clearance, and in exchange, buyers want certainty that sellers are similarly committed to overcoming all antitrust hurdles. Including strict obligations to litigate and divest ensures that buyers will not be forced to pay an RBUF simply because the seller is unwilling to make concessions that would eliminate antitrust concerns.

The failed Anthem-Cigna merger again illustrates the benefit of placing obligations on the seller in conjunction with an RBUF. The Anthem-Cigna deal included a reverse termination fee as well as a requirement to litigate. Anthem was the first to validly terminate the merger agreement once Cigna breached its efforts obligations in litigation.[30] Cigna's unwillingness to support the deal during litigation thus allowed Anthem to escape paying the hefty reverse termination fee. Had the agreement not included a litigation requirement, the result may have been different.

CONCLUSION

Our study of more than 700 merger agreements over a 16-year period peeled back the curtain to reveal insights regarding what the transacting parties agreed to and offers clues as to why they agreed to those terms. An antitrust authority's investigation of a proposed transaction is one of the key variables that can delay or prevent the deal's closing. As a result, it is in the parties' respective best interests to retain antitrust counsel to conduct a quick but careful study of the potential antitrust ramifications while the deal is still being negotiated. This way, each party can come to the negotiating table prepared to assign antitrust risk in appropriate and mutually agreeable ways. The results of our study, some of which are described in this article, can serve as a benchmark for what is typical of a particular type of deal under particular circumstances.

Merger Agreement Provisions Protecting for Antitrust Risk

Type of Provision	Simple Explanation	Example Language
General Efforts		
Best Efforts	Seller-friendly provision that holds the buyer to the highest standard to consummate the transaction; typically has been interpreted similarly to a good-faith standard	"…Parent and the Company shall… each use its **best efforts** to avoid the entry of, or to have vacated or terminated, any decree, order, or judgment that would restrain, prevent or delay the Closing…and each use its **best efforts** to avoid or eliminate each and every impediment under any antitrust, competition or trade regulation law that may be asserted by any governmental authority with respect to the Merger so as to enable the Closing to occur as soon as reasonably possible… • Chevron/Texaco § 7.1(b) (October 15, 2000)
Reasonable Best Efforts	Intermediate provision blending best efforts requirement with "reasonable" standard; buyer must act in good faith, but will be allowed to consider subjectively important external factors in making a decision	"…the Company and Parent shall **cooperate with each other and use** (and shall cause their respective controlled Affiliates to use) **their respective reasonable best efforts** to take or cause to be taken all actions, and do or cause to be done all things, necessary or advisable on its part under this Agreement and applicable Laws to consummate and make effective the transactions contemplated by this Agreement as promptly as practicable after the date of this Agreement…" • Tiffany/LVMH § 7.3(b) (November 24, 2019)
Commercially Reasonable	Buyer-friendly provision that implicitly adopts objective industry standard and allows the buyer to make decisions based on subjective factors	"…each of the parties agrees to use its **commercially reasonable efforts** to take, or cause to be taken, all actions, and to do, or cause to be done, and to assist and cooperate with the other parties in doing, all things necessary, proper or advisable under applicable laws and regulations to consummate and make effective, in the most expeditious manner practicable, the Merger and the other transactions contemplated by this Agreement…" • Ecvision/Fortis § 5.02 (March 2, 2015)

Type of Provision	Simple Explanation	Example Language
Divestiture or Other Remedies		
Cooperation Requirement: Hell or High Water (HOHW)	Strict requirement that the buyer must take any and all legal steps to complete the transaction	"…the Buyer agrees…to avoid or eliminate each and every impediment under any Antitrust Law…[including] **offering, negotiating, committing to and effecting, by consent decree, hold separate order or otherwise, the sale, divestiture, license or other disposition** of any and all of the capital stock, assets, rights, products or businesses of the Buyer and its Subsidiaries and the Company and its Subsidiaries and any other restrictions on the activities of the Buyer and its Subsidiaries and the Company and its Subsidiaries and (iii) **contesting, defending and appealing any threatened or pending preliminary or permanent injunction** or other order, decree or ruling or statute, rule, regulation or executive order that would adversely affect the ability of any party hereto to consummate the transactions…" • Google/DoubleClick § 6.4 (April 13, 2007) "Buyer shall take, and cause its Subsidiaries and Affiliates to take, any and all actions necessary to… **avoid or eliminate each and every impediment under any Antitrust Law** that may be asserted by **any Governmental Entity**, and (C) avoid the entry of, effect the dissolution of, and have vacated, lifted, reversed or overturned, any decree, Order or judgment that would prevent, prohibit, restrict or delay the consummation of the transactions contemplated hereby, in each case, to allow the Parties to consummate the transactions contemplated hereby prior to the Outside Date, including, without limiting the foregoing, (1) proposing, offering, negotiating, committing to and effecting, by consent decree, a hold separate Order or otherwise, the sale, divestiture, license or other disposition of any and all of the capital stock, assets, properties, rights, products, leases, businesses, services or other operations or interests therein of the Company or Buyer or either's respective Subsidiaries…and (3) contesting, defending and appealing any threatened or pending preliminary or permanent injunction or other Order, decree or ruling or statute, rule, regulation or executive Order that would adversely affect the ability of any Party to consummate the transactions…" • 3M Company/Acelity § 5.2(d) (May 1, 2019)

Type of Provision	Simple Explanation	Example Language
Divestiture or Other Remedies		
Material Divestiture	Buyer agrees to divest assets to obtain approval, up to and including assets that are material to the transaction and/or the buyer's business; may include requirements to end contractual relationships and/or joint ventures	"…The Merger Agreement provides that Bayer is required to take all actions necessary to obtain antitrust approvals, including (i) **agreeing to the sale, divestiture or other conveyance** or holding separate of assets of Bayer or the Company, (ii) **permitting the Company to sell, divest or otherwise convey** or hold separate its assets, (iii) **terminating or creating any relationship, contractual right or obligation** of Bayer or the Company or (iv) **terminating any joint venture or other arrangement** of Bayer or the Company…" • Bayer/Monsanto § 1.01 (September 14, 2016) "Parent, the Company and their respective Subsidiaries shall use their reasonable best efforts to take or cause to be taken all lawful actions necessary to obtain the Antitrust Approvals of the Merger or the Transactions or the expiration or termination of any applicable waiting periods (and any extension thereof) in connection therewith in order for the Parties to consummate the Transactions as promptly as reasonably practicable and in any event prior to the Outside Date (as the same may be extended), including (i) proposing, negotiating, committing to, and/or effecting, by consent decree, hold separate order, or otherwise, the sale, divestiture, transfer, license, disposition, or hold separate (through the establishment of a trust or otherwise) of the assets, properties, or businesses to be acquired pursuant to this Agreement as are required to be divested in order to avoid the entry of any lawful decree, judgment, injunction (permanent or preliminary), or any other lawful Order that would make the Transactions unlawful or would otherwise materially delay or prevent the consummation of the Transactions…" • Nvidia/Mellanox § 6.2(g) (March 10, 2019)
Divestiture Based on Size of Asset	Buyer agrees to divest specific assets or assets valued up to a certain revenue threshold, typically aligned with the value of the overlapping product	"…neither Parent nor any of its subsidiaries shall be required to sell, transfer, dispose of, divest or hold separate…**more than an aggregate of 1,000 retail stores…**" • Walgreens/Rite Aid § 6.4(d) (October 27, 2015) "Notwithstanding anything in this Agreement to the contrary, (i) Parent's obligation to (and to cause its Subsidiaries (including for this purpose, the Company and its Subsidiaries) to) offer, negotiate, commit to or effect any Remedy or Remedies shall be limited to (a) total ankle replacement products and services and (b) other products and services that represented, individually or in the aggregate, less than $25,000,000 of annual revenue generated during the 2018 fiscal year…" • Stryker/Wright Medical § 5.6(b) (November 4, 2019)

Type of Provision	Simple Explanation	Example Language
Divestiture or Other Remedies		
Divestiture Only of Immaterial Assets	Buyer agrees to divestitures unless such divestitures demanded by regulations would result in a material adverse effect	"…Notwithstanding anything in this Agreement to the contrary, no party is required to commit to or effect any sale, divestiture, lease, holding separate pending a sale or other transfer or disposal, or any other restriction or action contemplated by this Section 6.3(d) if such actions, in the aggregate would or would reasonably be expected to have a materially adverse impact on Raytheon, UTC or their respective subsidiaries or affiliates…" • United Technologies/Raytheon § 6.3(d) (June 9, 2019)
No Divestiture	Merger agreement expressly states that the buyer will not be required to divest assets to obtain clearance	"…Parent, its Affiliates or Subsidiaries shall not be required under any provision of this Agreement to (i) propose, negotiate, commit to or effect, by consent decree, hold separate orders or otherwise, the sale, divesture, disposition, or license of any assets, properties, products, rights, services or businesses of Parent, Parent's Subsidiaries, Parent's Affiliates, or the Company or any of its Subsidiaries, or any interest therein, or agree to any other structural or conduct remedy…" • Charles Schwab Corp./TD Ameritrade § 8.01(c) (November 24, 2019)
Behavioral Remedies	Buyer agrees to a certain affirmative conduct, such as making information or know-how available to competitors, or agreeing to maintain pricing for a certain amount of time	"…Parent and the Company (if requested by Parent), along with their respective Subsidiaries, shall use their reasonable best efforts to obtain clearance under any applicable Antitrust Laws… which reasonable best efforts shall include … (B) taking or committing to take such other actions that may limit or impact Parent's or any of its Subsidiaries' (including the Company's or any of its Subsidiaries') freedom of action with respect to, or its ability to retain, any of Parent's or any of its Subsidiaries' (including the Company's or any of its Subsidiaries') operations, divisions, businesses, product lines, contracts, customers or assets … and (D) creating, terminating or divesting relationships, contractual rights or obligations of the Company, Parent or their respective Subsidiaries, in each case in connection with obtaining all, or eliminating any requirement to obtain any, waiting period expirations or terminations, consents, clearances, waivers, exemptions, licenses, orders, registrations, approvals, permits and authorizations for the transactions contemplated by this Agreement…" • IBM/Red Hat § 5.03(a)(iii) (October 28, 2018)

Type of Provision	Simple Explanation	Example Language
Divestiture or Other Remedies		
Litigation Requirements	Strict requirement that the buyer litigate regulatory opposition; may vary to what extent a buyer must continue litigation (i.e., through appeal versus through preliminary injunction)	"In the event that any litigation or other administrative or judicial action or Legal Proceeding is commenced challenging the Offer or the Merger or any of the other Transactions and such litigation, action or Legal Proceeding seeks, or would reasonably be expected to seek, to prevent the consummation of the Offer or the Merger or the other Transactions, Parent and Merger Sub shall use best efforts to take any and all action to resolve any such litigation, action or Legal Proceeding and each of the Company, Parent and Merger Sub shall cooperate with each other and use its respective best efforts to contest any such litigation, action or Legal Proceeding and to have vacated, lifted, reversed or overturned any decree, judgment, injunction or other order, whether temporary, preliminary or permanent, that is in effect and that prohibits, prevents or restricts consummation of the Offer or the Merger or the other Transactions…" • Roche Holdings/Spark Therapeutics § 6.9(b) (February 22, 2019)
Break-Up Fee (aka Termination Fee)	Fee payable by the seller to the buyer if the seller backs out of the agreement (e.g., accepts a superior offer or decides not to complete the transaction)	"If the Company terminates this Agreement pursuant to Section 8.1(h), then the Company shall pay or cause to be paid to Parent prior to or substantially concurrently with, and as a condition to such termination, an amount in cash equal to $225,000,000…" • Nvidia/Mellanox § 8.2(b) (March 10, 2019)
Reverse Break-Up Fee (RBUF)	Fee payable by the buyer to the seller if, and only if, the deal cannot close because the necessary antitrust approvals or clearances have not been obtained	If, but only if, (i) this Agreement is terminated by Parent or the Company pursuant to Section 8.01(b)(i) (due to a failure to satisfy any condition set forth in Section 7.01(b) or Section 7.01(c) (if the Restraint arises under Antitrust Laws)). . . then **Parent shall pay to the Company a termination fee equal to $250,000,000** (the "Parent Termination Fee")." • Alphabet/Fitbit § 8.03(b) (November 1, 2019)
HSR Timing Requirements	Timeline for the filing of the agreement with the antitrust agencies	"each party hereto agrees to make an appropriate filing of a Notification and Report Form pursuant to the HSR Act with respect to the transactions contemplated hereby as promptly as practicable, and in any event **within fifteen (15) Business Days after the execution of this Agreement**, unless otherwise agreed to by the parties, and to substantially comply as promptly as practicable with any "second request" for additional information and documentary material under the HSR Act and to take all other actions necessary to cause the expiration or termination of the applicable waiting periods under the HSR Act as soon as practicable." • New Media/Gannett § 7.03(a) (August 5, 2019)

Type of Provision	Simple Explanation	Example Language
	Divestiture or Other Remedies	
Termination Date (aka Drop-Dead Date)	Specific date at which either party can terminate if the transaction is not closed	"Each of Parent and the Company shall have the right to terminate this Agreement at any time prior to the First Effective Time, whether before or after obtainment of the Parent Stockholder Approval or the Company Stockholder Approval, if: (i) the Closing has not occurred prior to 5:00 p.m., New York City time, on March 26, 2020 (the "Outside Date")…" • Centene/Wellcare § 7.1(b) (March 26, 2019)
Termination Date Extension	Provides the parties the ability to extend the termination date; many variations are available; could allow either or both parties unilateral ability to extend; could require parties to agree to extend; could require certain events to have occurred or not occurred	"…by either the [Buyer or Seller], if the Effective Time shall not have occurred on or before [date], provided, however, that if on the Outside Date at least one of the conditions set forth in Section 6.01(b) (as a result of an Order or Law under the Antitrust Laws) shall not have been satisfied, then, at the written election of [Buyer or Seller], the Outside Date may be extended until [date]…" • Alarm.com/iControl § 8.1(d) (June 23, 2016)
Close in Select Jurisdictions	Condition the closing on the satisfaction of the merger control requirements of some or all of relevant jurisdictions. The parties usually reach an agreement to include in the conditions at least the major, if not all, jurisdictions with authority over the transaction. In some cases, however, less significant jurisdictions will not be included in the conditions.	"The waiting period applicable to the consummation of the Merger under the HSR Act shall have expired or been earlier terminated, and any approval or authorization required to be obtained under the EU Merger Regulation in connection with the consummation of the Merger shall have been obtained, (ii) any approval or authorization required to be obtained from the FAA and DOT in connection with the consummation of the Merger shall have been obtained, (iii) any approval or authorization required to be obtained from any other Governmental Entity for the consummation of the Merger shall have been obtained, and (iv) any approval or authorization required under any other foreign antitrust, competition or similar Laws, in each case in connection with the consummation of the Merger and the transactions contemplated by this Agreement, shall have been obtained, except for those, in the case of clauses (iii) and (iv), the failure of which to obtain would not, individually or in the aggregate, (x) reasonably be expected to result in a Material Adverse Effect or (y) provide a reasonable basis to conclude that [the parties] or any of their respective directors or officers would be subject to the risk of criminal liability. In addition to the antitrust related filings and clearances discussed above, [Parties] must obtain approvals from certain foreign regulatory authorities, except where the failure to obtain any such approval will not reasonably be expected to have a material adverse effect on [Parties]…" • American Airlines/US Airways § 5.1(b) (April 15, 2013)

[1] Scott, Brendan, and Alex are attorneys in Wilson Sonsini's antitrust department in Washington, D.C. Their practices include assessing the competitive risks of transactions and negotiating appropriately calibrated antitrust provisions in deal agreements. After that, they get the deal through so the provisions do not come into play.

[2] *See* J.P. Morgan, *2020 Global M&A Outlook: Navigating a Period of Uncertainty*, https://www.jpmorgan.com/jpmpdf/1320748081210.pdf.

[3] *See* OECD, *OECD Competition Trends 2020*, http://www.oecd.org/daf/competition/OECD-Competition-Trends-2020.pdf, at 13, 59 (noting that five jurisdictions, primarily in the Americas and Europe, are responsible for nearly 50 percent of total phase II (in-depth investigation) remedies, and three jurisdictions represent over 50 percent of phase I (initial investigation) remedies).

[4] *See Competition in Digital Technology Markets: Examining Acquisitions of Nascent or Potential Competitors by Digital Platforms: Hearing before the S Judiciary Subcomm. on Antitrust, Competition Policy and Consumer Rights*, (Sept. 24, 2019) (statement of Bruce Hoffman, Dir. of the Bureau of Competition at the Fed. Trade Comm'n) https://www.judiciary.senate.gov/imo/media/doc/Hoffman%20Testimony2.pdf, at 5; Speech, Makan Delrahim, Asst. Att'y Gen., U.S. Dep't of Justice, *"And Justice for All:" Antitrust Enforcement and Digital Gatekeepers*, Antitrust New Frontiers Conference: The Digital Economy & Economic Concentration (June 11, 2019), https://www.justice.gov/opa/speech/file/1171341/download, at 11; *Start-ups, Killer Acquisitions and Merger Control*, OECD, Note by the United States (June 4, 2020), https://www.ftc.gov/system/files/attachments/us-submissions-oecd-2010-present-other-international-competition-fora/oecd-killer_acquisiitions_us_submission.pdf; Jonathan Jacobson and Christopher Mufarrige, "Acquisitions of "Nascent" Competitors," *The Antitrust Source* 1 (Aug. 2020), https://www.americanbar.org/content/dam/aba/publishing/antitrust_source/2020/august-2020/aug20_jacobson_8_18f.pdf (recognizing increased agency scrutiny of nascent competitor acquisitions).

[5] *See Competition in Digital Technology Markets: Examining Acquisitions of Nascent or Potential Competitors by Digital Platforms: Hearing before the S Judiciary Subcomm. on Antitrust, Competition Policy and Consumer Rights*, (Sept. 24, 2019) (statement of Bruce Hoffman, Dir. of the Bureau of Competition at the Fed. Trade Comm'n) https://www.judiciary.senate.gov/imo/media/doc/Hoffman%20Testimony2.pdf, at 7.

[6] *See* European Commission, Merger Statistics, https://ec.europa.eu/competition/mergers/statistics.pdf.

[7] *Start-ups, Killer Acquisitions and Merger Control*, OECD, Note by the European Commission (May 25, 2020), https://one.oecd.org/document/DAF/COMP/WD(2020)24/en/pdf, at 10. These concerns are driving the EC's review of the Google-Fitbit merger and were also assessed in the EC's 2018 review of Apple-Shazam. *See* Press Release, European Commission, "Mergers: Commission opens in-depth investigation into the proposed acquisition of Fitbit by Google" (Aug. 4, 2020), https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1446.

[8] *Start-ups, Killer Acquisitions and Merger Control*, OECD, Note by the European Commission (May 25, 2020), https://one.oecd.org/document/DAF/COMP/WD(2020)24/en/pdf, at 8; *see* Carles Esteva Mosso, European Commission, *Innovation in EU Merger Control* (Apr. 2018), https://ec.europa.eu/competition/speeches/text/sp2018_05_en.pdf.

[9] *GCR Insight: Asia-Pacific Antitrust Review 2020*, at 20.

[10] *See* Anti-Monopoly Law of the People's Republic of China, article 27(5).

[11] "China Group Buys $6bn Glencore Peru Copper Mine," BBC (April 14, 2014), https://www.bbc.com/news/business-27017623.

[12] Chelsea Naso, "Brazil Challenges $34.6B Halliburton-Baker Hughes Tie-Up," *Law360* (Dec. 7, 2015), https://www.law360.com/articles/735030/brazil-challenges-34-6b-halliburton-baker-hughes-tie-up.

[13] Bryan Koenig, "Brazil Fines IBM $14M For Closing Red Hat Deal Preapproval," *Law360* (Dec. 12, 2019), https://www.law360.com/articles/1227781/brazil-fines-ibm-14m-for-closing-red-hat-deal-preapproval; Bryan Koenig, "Brazil Dings Cisco, Technicolor $7M For Merger Gun-Jumping," *Law360* (Jan. 22, 2016), https://www.law360.com/articles/749895/brazil-dings-cisco-technicolor-7m-for-merger-gun-jumping.

[14] CMA, Anticipated acquisition by Illumina, Inc. of Pacific Biosciences of California, Inc., Decision on relevant merger situation and substantial lessening of competition, ME/6795/18 (June 18, 2019), https://assets.publishing.service.gov.uk/media/5d307b9ded915d2fe8096fb8/Illumina_PacBio_Full_textP1_Redacted.pdf, at 7.

[15] CMA, Anticipated acquisition by Roche Holdings, Inc. of Spark Therapeutics, Inc., Decision on relevant merger situation and substantial lessening of competition, ME/6831/19 (Dec. 16, 2019), https://assets.publishing.service.gov.uk/media/5e3d7c0240f0b6090c63abc8/2020207_-_Roche_Spark_-_non-confidential_Redacted-.pdf, at 23-35.

[16] Egyptian Competition Authority, Press Release, December 29, 2019, http://www.eca.org.eg/ECA/upload/News/Attachment_E/11288/ECA%20Uber%20Careem%20Decision%20Press%20Release%20Decision%20Press%20Release-1.pdf. Commitments to resolve competition concerns included service fee and surge caps, commitments regarding utilization rates, innovation and service quality requirements, and data portability. *See* https://www.docdroid.net/22ASEc3/eca-uber-careem-fifth-commitments-proposal-non-confidential3-pdf.

[17] *Hexion Spec. Chems., Inc. v. Huntsman Corp.*, 965 A. 2d 715, 756 (Del. Ch. 2008); *see also Akorn, Inc. v. Fresenius Kabi AG*, C.A. No. 2018-0300-JTL, 2018 WL 4719347, at *46 (Del. Ch. Oct. 1, 2018) ("Akorn also relies on Fresenius's specific commitment to 'take all actions necessary' to secure antitrust clearance, which the Merger Agreement states shall require efforts that 'shall be unconditional and shall not be qualified in any manner.' This level of commitment is generally called a 'Hell-or-High-Water Covenant.'").

[18] Although hell or high water provisions are not frequently litigated, the Delaware Court of Chancery recently interpreted a hell or high water provision in *Akorn, Inc. v. Fresenius Kabi AG*, 2018 WL 4719347, at *99-100 (Del. Ch. Oct. 1, 2018), and found that the buyer did not materially breach the hell or high water covenant when it briefly pursued a divestiture package with the FTC that it knew would delay approval and closing.

[19] *Akorn, Inc. v. Fresenius Kabi AG*, C.A. No. 2018-0300-JTL, 2018 WL 4719347, at *88 (Del. Ch. Oct. 1, 2018), citing *Williams Companies, Inc. v. Energy Transfer Equity, L.P.* No. 330, 2016, Del., 159 A.3d 264 (Del. 2017). *But see Stamicarbon, N.V. v. Am. Cynamid Co.*, 506 F.2d 532, 538 (2d Cir. 1974) (evaluating the meaning of a "reasonably best efforts" provision and stating that the word "reasonably" must add some meaning to "best efforts."); *In re Chateaugay (LTV Aerospace and Defense v. Thomson)*, 198 B.R. 848, 854 (S.D.N.Y. 1996) (finding obligations under a "reasonable efforts" clause were "indisputably less stringent than that imposed by the 'best efforts' clauses contained elsewhere in the Agreement").

[20] *Akorn*, at *87 (citing *Alliance Data Sys.*, 963 A.2d 746, 763 n. 60 (Del. Ch. 2009)); *see Coady v. Toyota Motor Distributors*, 361 F.3d 50, 59 (1st Cir. 2004) ("Best efforts" is implicitly qualified by a reasonableness test.).

[21] *Tribune v. Sinclair*, No. 2018-0593 (Del. Ch. 2018); *In re Anthem Cigna Merger Litigation*, C.A. No. 2017-0114-JTL (Del. Ch. Aug. 31, 2020). Anthem-Cigna was decided on August 31, 2020, while Tribune-Sinclair remains pending.

[22] Bryan Koenig, "US Merger Review Times Ticked Up In 2019," *Law360* (Jan. 30, 2020), https://www.law360.com/articles/1238868/us-merger-review-times-ticked-up-in-2019.

[23] *See, e.g.*, *U.S. v. AT&T Inc.*, 310 F. Supp. 3d 161, 184 (D.D.C. 2018) ("to allow for the possibility of the March 19, 2018 trial and the ruling to follow, AT&T and Time Warner extended yet again the drop-dead date of the merger from April 22, 2018 to June 21, 2018").

[24] *In re Anthem Cigna Merger Litigation*, C.A. No. 2017-0114-JTL (Del. Ch. Aug. 31, 2020), at 252.

[25] *Id.* at 6.

[26] *Id.* at 252-53.

[27] *Id.* at 257-58.

[28] *Id.* at 273.

[29] Figures cited in this paragraph are as of 2017.

[30] *In Re Anthem Cigna Merger Litigation*, C.A. No. 2017-0114-JTL (Del. Ch. Aug. 31, 2020), at 302-05.

WILSON
SONSINI

650 Page Mill Road, Palo Alto, California 94304-1050 | Phone 650-493-9300 | Fax 650-493-6811 | www.wsgr.com

Austin Beijing Boston Brussels Hong Kong London Los Angeles New York Palo Alto San Diego San Francisco Seattle Shanghai Washington, DC Wilmington, DE