



Antimonopoly Law Considerations and Risk Management in connection with M&A Transactions

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General Indemnity

(1) Background and structure



- An acquisition agreement typically includes representations and warranties and covenants by the acquisition target and/or its seller.
- Information underlying breaches or potential breaches of the representations and warranties or covenants may or may not have been disclosed by target/seller or otherwise discovered by buyer during, e.g., due diligence.

General Indemnity

(1) Background and structure (cont'd)



- Indemnity structure typically includes **(i) survival periods applicable to the representations and warranties and covenants;** **(ii) any minimum threshold indemnifiable amounts (a “basket”);** **(iii) any *de minimis* claim amounts;** **(iv) any maximum indemnifiable amounts (indemnification “caps”);** **(v) scope of indemnifiable losses;** **(vi) whether buyer’s knowledge precludes indemnification;** and **(vii) procedures for handling third party claims.**
- An acquisition agreement may provide indemnity structures with different, customized details applicable to different representations and warranties or covenants.

General Indemnity

(2) Main provisions



(i) Seller to retain all (subject to applicable baskets and caps) liabilities resulting from any violation or breach of the representations and warranties or covenants (subject to applicable survival periods) and to indemnify buyer for losses resulting therefrom, including claims from third parties and legal fees in connection with indemnification claims.

➤ **Survival period:**

Provides for how long the representations and warranties and covenants survive after closing, e.g., 12 months, their respective applicable statutes of limitations or indefinitely.

General Indemnity

(2) Main provisions (cont'd)



- (ii) **Basket**: Provides for a certain minimum amount of damages, individually or in aggregate, before buyer may seek indemnification therefor; may be a “tipping basket” (once the threshold amount is reached, the entire damages amount is indemnifiable) or a “deductible” (only the amount in excess of the threshold amount is indemnifiable).
- (iii) **De minimis claims**: Provides for a certain minimum amount of damages that an individual claim must meet in order to be recognized for indemnification under the indemnification mechanism in the agreement (i.e., any claim below such amount will not be indemnifiable, or even count towards any basket).
- (iv) **Cap**: Provides for a maximum amount of damages buyer may receive indemnification for, e.g., 10% of the purchase price, 100% of the purchase price or unlimited.

General Indemnity

(2) Main provisions (cont'd)



In addition, the indemnity structure may provide:

- (v) The scope of indemnifiable losses, e.g., whether consequential damages or lost profits are indemnifiable.
- (vi) Whether buyer's actual or constructive knowledge of a violation or breach before the signing or the closing (e.g., through due diligence performed by buyer and information and disclosure schedules provided by target/seller) precludes buyer from making indemnification claims after the closing based on such known violation or breach.

General Indemnity

(3) Conduct of claims



- (vii) An acquisition agreement may provide for a variety of structures and procedures for handling third party claims, e.g.,
- which party controls the defense of such claims.
 - whether other parties to the agreement may participate in the proceedings.
 - whether consent of other parties to the agreement is required prior to reaching settlement agreements with claimants.
 - which party bears the various legal costs associated with the defense and each party's participation.

Antitrust Indemnity

(1) Background



- Target of acquisition under investigation by antitrust authority
- Early stage of investigation - details not yet public
- No information disclosed during due diligence - duty of co-operation/confidentiality for subject of investigation
- Specific indemnity required:
 - (i) No disclosure
 - (ii) Length of investigations
 - (iii) Conduct of investigation/claims - certain liability will remain with current parent

Antitrust Indemnity

(2) Main provisions



- Seller to retain all liabilities resulting from any competition law infringements and to indemnify the buyer for any losses resulting from:
 - (i) Proceedings by antitrust authorities
 - (ii) Third party claims
 - (iii) Legal costs incurred in connection with proceedings or claims
- Buyer also entitled to claim for losses:
 - (i) Resulting from cancellation of overcharge requested by customers
 - (ii) Resulting from the termination or reduction by customers of business related to products affected by infringement

Antitrust Indemnity

(2) Main provisions (cont'd)



- Loss of opportunity specifically excluded
- Seller to provide buyer with details of all investigations/claims on the closing date
- Indemnity obligation remains in place until the expiry of any applicable statute of limitation - applies to both investigations by antitrust authorities and third party claims

Note: A number of antitrust authorities are not subject to any limitation period within which to commence an investigation. E.g. Brazil and the UK.

Antitrust Indemnity

(3) Conduct of investigation/claims



- Seller retains conduct of antitrust investigations and any third party claims, even those not directed at the seller
- Seller retains exclusive decision-making power in determining buyer's position with respect to antitrust claims, including negotiation of settlement agreements with claimants
- Seller to decide defence strategy and prepare all written and oral submissions to be made or filed in any proceedings and terms of any settlement offer
- Buyer prohibited from entering into negotiations with third parties in respect of antitrust claims

Thank you

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