

Brexit

Implications for M&A transactions

Short term considerations

Debt financing

Given the nature of the representations, undertakings and defaults found in most customary “certain funds” provisions, it seems unlikely that a financing institution would be able to walk away from its funding obligations. Terms of live or proposed financing for transactions should be checked to ensure that the Brexit decision and its market impact does not affect the ability to draw down funds, although standard debt terms should not cause any concerns.

Equity financing

If equity commitments are given in a currency which is different to that in which funds are drawn, buyers should take care that there is no shortfall in funding. This is likely to only affect limited partners who fund in sterling and give equity commitments which are denominated in another currency.

Market disruption

Current market conditions suggest that market volatility and a shortage of liquidity may not reach levels seen in the global financial crisis. Given the limited exercise of “market disruption” provisions in 2008, it seems unlikely that parties will seek to exercise such provisions now.

Closing adjustments and financial limitations

Exchange rate fluctuations may significantly impact closing adjustments for cross-border businesses. Consideration should be given to the currency of any adjustments; for example, where a net debt adjustment is proposed for a business which has debt in sterling and US dollars, it may be appropriate to have separate adjustments, in the relevant currency, for each debt. Similar considerations apply to financial limitations on liability.

Material adverse change (“MAC”) clauses

The applicability of MAC clauses will be a matter of contractual interpretation and will need to be considered on a case by case basis. The Brexit decision itself and the uncertainty regarding the ultimate market impact of the decision mean that invoking a MAC clause would be a very aggressive approach.

Covenants and warranties

Repetition of covenants which concern the conduct of a target group’s business between signing and closing should be reviewed to ensure that a seller’s permission does not need to be sought. Similarly, any warranties repeated on closing should be reviewed so that they are not inadvertently breached.

Medium and longer term considerations

Competition law

A number of transactions that are big enough to be notifiable under the EU Merger Regulation (which automatically pre-empts filings with EU Member States) will also be susceptible to pre-merger review in the UK. That potentially means two merger reviews in Europe (rather than the current “one-stop” review in Brussels), increasing the costs/burdens of the pre-merger process, with inconsistent timetables (UK reviews are lengthier than EU reviews) and possibly inconsistent outcomes. As a substantive matter, however, in most cases the UK is likely to reach decisions that are similar to the European Commission (“**EC**”) decisions, since the UK Competition & Markets Authority and the EC apply similar, economically-oriented, rules of assessment that emphasise the importance of free markets and unfettered competition (rather than the kind of “public interest” and protectionist values that typify some other countries’ reviews). What happens after Brexit in the EU (not the UK) is less predictable. Without the UK playing its traditionally leading role (with Germany) in development/application of the EC’s competition rules and processes, those may, over time, become more interventionist/protectionist than has been the case so far.

Warranty and indemnity insurance

The broker community does not anticipate changes to underwriting supply, pricing and terms. If anything, a short term reduction in deal flow is likely to lead to overcapacity and a better negotiating position for those seeking insurance. When choosing an underwriter, consideration should be given to their credit profile (where listed) given the fluctuations in the listed markets.

Tax

The UK remains an extremely competitive jurisdiction taking into account its low corporation tax rate of 17% (from 2020) and its large double tax treaty network to relieve the effect of withholding taxes on cross-border payments.

Financial regulatory clearances

It is very unlikely that the UK financial regulators will change their approach to making change of control decisions or suitability of purchasers, at least in the short term. They are likely, however, to insist that financial information provided to them as part of the process is refreshed more frequently than normal and will be more interested in a buyer's plans around governance and stress/scenario testing.

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