

Merger Control: *drafting SPA clauses*

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Matthews Law

COMPETITION · REGULATION · POLICY · STRATEGY

CPs

- **Filings / waiting periods (or approvals)**
 - Mandatory / named / defined only
 - TBA eg within 15 working days. (Specify default.)
 - Purchaser elected
- **Conditions precedent: Named / defined jurisdictions**
 - “Material” jurisdictions
 - Material Adverse Effect
 - No threatened or pending litigation
 - Mop up clause
- **Representation**

Efforts

How hard do I have to try? When do I need to do it?

[P / Parties] will use **commercially reasonable** efforts to take, or cause to be taken, all other actions and do, or cause to be done, **all other things necessary, proper or advisable under applicable Law** to consummate the Transaction, including:

- (i) *making all appropriate filings and submissions considered by [Parties] to be advisable) with [Agencies] under applicable Antitrust Laws by [date];*
- (ii) *obtaining the termination of any waiting period under [relevant named periods] and any applicable foreign Antitrust Laws by [date];*
- (iii) *cooperating and consulting with each other in:*
 - (A) *determining which filings are required to be made prior to the by [date] ...and*
 - (B) *timely making all such filings and seek all such consents...*

Litigation

Best efforts & Conditions

Best efforts: *“best efforts includes defense through litigation of any claim asserted in any court, agency or other proceeding by any person or Agency seeking to delay, restrain or prevent consummation of [Transaction], **however, in no event is** [Purchaser] required to make any **divestiture, hold separate agreement, sale or other disposition** of the assets of [Merged Entity / Target...] {Alternate –below}”*

CP: No Injunctions or Restraints, Threatened or Pending Litigation. *No temporary restraining order, interim or permanent injunction or other judgment, Order or decree (**Restraint**) [and no threatened?] of any court or agency of competent jurisdiction located in [jurisdiction/s] [where one / both conduct business] that prohibits the [Transaction, and no Law shall have been enacted which could result in the [Transaction] being restrained ...*

Co-operation

Detailed co-operation, consultation etc

*parties agree to use **good faith efforts** to:*

- (i) give each other **reasonable advance notice** of all meetings with any Agency;*
- (ii) to the extent not prohibited ...not participate independently in any such meeting without first giving the **other party's counsel an opportunity to participate in such meeting**;*
- (iii) **to the extent practicable**, give the other party reasonable advance notice of all oral communications with any Agency*
- (iv) if any Agency initiates an oral communication regarding the Antitrust Laws, promptly notify the other party of the substance of such communication;*
- (v) provide each other with a **reasonable advance opportunity to review and comment** upon and consider the views of the other in connection with all written communications (including any analyses, presentations, memoranda, briefs, arguments, opinions and proposals made or submitted by or on behalf of a party relating to proceedings with an Agency;*
- (vi) promptly provide each other **copies of all written communications** ...*

Risk shifting

Options & example

- *No obligation*
- *Caveat emptor*
- *Caps:*
 - *Revenue*
 - *Assets*
 - *Materiality / MAE / MAC per disclosure letter*
- *“...failure of [condition] does not relieve P of its obligation to consummate [Transaction] unless consummation of [Transaction] without obtaining the [named] regulatory clearances would reasonably be expected to have a Material Adverse Effect (whether individually or in aggregate)”*

Risk shifting

Caveat emptor

*P will use its **best efforts and take all steps necessary** to eliminate any impediment under any competition law that is asserted by an Agency or other party to enable the Parties to close [Transaction] including:*

- (i) negotiating, committing to and effecting by consent decree, **hold separate orders, or otherwise, the sale, divesture or disposition of such of P's assets...or of [Target's] assets to be acquired under this Agreement, and entering such other arrangements, as are necessary to effect the dissolution of any injunction, temporary restraining order or other order which would otherwise have the effect of preventing the consummation of [Transaction] prior to [Date]; and***
- (ii) **defending through litigation** on the merits any claim asserted in court by any party in order to avoid entry of, or to have vacated or terminated, any decree, order or judgment (whether temporary, preliminary or permanent) that would prevent the Closing from occurring prior to the Termination Date; provided, however, that such litigation in no way limits the obligation of P to use its best efforts, and to take any and all steps necessary, to eliminate each and every impediment under any antitrust, competition or trade regulation law to close the transactions contemplated hereby prior to the Termination Date.*

Risk shifting

NZ example – variant led to record 3 applications

*If NZCC declines ... P will... file an Amended Application in which P undertakes to divest such part [of the Merged Entity] **as is reasonably necessary to obtain clearance**. P will give V's lawyers reasonable opportunity to review and comment on draft Amended Application before lodging, and P will give consideration to those comments*

If NZCC clearance is not granted under the Amended Application by [date] then V will, if satisfied that P has used all reasonable and efforts to satisfy clause X will grant P an extension...

If at the expiry of the Further Extension Period NZCC has not granted clearance, V may cancel ... or require P ...obtain a clearance from the NZCC, failing which the P must accept the NZCC position in respect of divestment and obtaining clearance on that basis....

Break fees

*“P must pay V or an amount equal to [loadsamoney] (**Break Fee**) if, in respect of the Regulatory Condition, this Agreement is terminated by either Party.*

P must pay V the Break Fee within 10 Working Days after such termination.

This clause has been agreed where P and V believe the Transaction will provide significant benefits to the parties and they acknowledge that if [it] does not proceed, V will incur significant costs. V requested provision for the Break Fee, without which V would not have entered this Agreement.

The Break Fee is an amount to compensate V for advisory costs, cost of management time, out-of-pocket expenses and reasonable opportunity costs incurred...”