COMING TO AMERICA - EUROPEAN M&A DEAL TRENDS ARE INCREASINGLY FOUND IN U.S. DEALS

Louise Farrer │ Deloitte LLP │ UK
Michel Gélinas │ Davies Ward Phillips & Vineberg LLP │ Canada
Meredith Haviland │ Foley Hoag LLP │ USA
Joerg Lips │ CMS Hasche Sigle │ Germany

Abstract

A. Introduction
The program focuses on M&A seller-friendly deal terms originating from Europe which are increasingly found in the U.S. in the context of cross-border deals. Transactions featuring these seller-friendly deal terms are not yet common, and the program’s objectives are to discuss some of these deal terms so that U.S. attorneys become familiar with them, identify the issues relevant to their client in the context of a particular transaction, and provide some drafting tips to ensure that their client’s interests are adequately protected. With the current deal environment, including the prevalence of auctions and increased sell-side private equity activity (both primary and secondary exits) some of these seller-friendly deal terms may eventually become commonplace in America.
B. Specific Deal Terms

1. Vendor Due Diligence Report/ Fact Book (“VDD”)
   A VDD is typically found in a competitive auction process or a dual-track process, when preparing a company for an initial public offering while simultaneously pursuing a third party sale. In Europe, the VDD is typically provided to prospective buyers on a reliance basis, with the accounting or law firm preparing the VDD capping its liability vis-à-vis the prospective buyers. The VDD report helps to speed up the process by providing prospective buyers with a comprehensive analysis and detailed information about the company that is being sold. The panel will identify situations where VDDs can bring substantial benefits to the seller, compare how accounting firms and law firms approach VDDs and discuss why the practice of permitting third parties to rely on VDDs has not been followed by law firms in the U.S. The panel will also discuss how a law firm’s liability can be managed when providing a VDD on a reliance basis.

2. Locked Box Mechanism
   The locked box is a popular closing mechanism for M&A transactions across Europe, but many sellers and buyers are still unfamiliar with this mechanism. In a nutshell, the locked box approach removes price uncertainty associated with a post-closing working capital or other adjustment, as the seller and buyer negotiate a fixed price when signing the purchase agreement based on the agreed upon locked box balance sheet. The panel will discuss, among other things: when using a locked box is appropriate; how it affects the buyer’s due diligence; how it impacts R&W insurance; as well as a number of drafting points, including the interim covenants to prevent unauthorized leakage between the signing date and the closing date.

3. Deal Certainty and Limited Conditionality
   When it comes to deal certainty and limited conditionality, European purchase agreements are often subject to limited closing conditions. While the situation varies depending on the
specific European jurisdiction, the seller (unless it is in a weak negotiating position) will seek limited closing conditions such as those required by applicable law or regulation. A seller will resist a no material adverse change condition, a financing condition or any condition that requires warranties to be accurate or pre-closing covenants complied with at closing. In the U.S., such closing conditions are customarily found in purchase agreements. The panel will discuss these market differences, and how to bridge the gap between U.S. practice and European practice in the context of a cross-border transaction.

C. Conclusion
While the deal terms described above remain uncommon in America, they are increasingly seen, particularly in the context of cross-border deals with Europe. Some of these trends have migrated to other parts of the world. For example, the locked box mechanism is now seen in Asia, and may be coming to America next. Given the predictability of the locked box mechanism and the fact that it virtually eliminates purchase price adjustment disputes, it is surprising that this approach is not more common in America, especially in transactions involving a private equity seller. As a result, it is important for U.S. attorneys to be aware of these trends and understand how they can impact their deals.

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