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# US/UK M&A: MISCELLANEOUS/ COMMON ISSUES

In our final instalment of our US/UK M&A series we will explore some of the common issues in the M&A process and deal practice in the US and UK.

## Title warranties and covenants

Both US and UK SPAs often include a specific warranty relating to the ownership of the shares in the target. In the US, no title covenants are implied, and there is no concept of 'full title guarantee' in relation to the shares. In the US (and sometimes in the UK) it is also common for the SPA to contain a specific provision that the shares will be sold free and clear from any claims, liens and other encumbrances and that the seller has the full power and authority to do so. In addition, in the UK, shares are sold with either 'full title guarantee' or 'limited title guarantee'. Full title guarantee is the most common and implies statutory covenants for title that the seller (i) has the right to sell the shares; (ii) will do all that it reasonably can to give the title they purport to sell (at their own cost) to the buyer; and (iii) sells the shares free from all charges, encumbrances and adverse rights other than any charges, encumbrances or adverse rights that the seller doesn't know or could not reasonably be expected to know about.

## Anti-trust and national security clearance

If merger or foreign investment controls are relevant to the transaction, they will need to be factored into the timetable at an early stage and appropriate provisions included in the share purchase agreement. The UK operates a voluntary notification regime for the purpose of anti-trust clearances – although notification to the regulator (the Competition and Markets Authority) is recommended if the relevant thresholds are met, this contrasts with the mandatory regime in the US once the relevant thresholds are met under the Hart-Scott-Rodino regime.

In addition, the UK has recently introduced the National Security and Investment Act 2021 ("**NSI Act**"). The new regime is due to take effect early in 2022, and sets out a new, standalone regime enabling the UK Government to scrutinise and intervene in acquisitions and investments to protect national security in the UK. The regime applies to acquirers or investors from any country. When the regime is fully implemented, certain types of transactions in 17 key sectors will be subject to mandatory notification to a new Investment Security Unity within the Department of Business, Energy and Industrial Strategy. The NSI Act also contains provisions allowing the UK Government to 'look back' at deals from November 2020 onwards. Failure to notify acquisitions that fall within the new regime could result in severe penalties including both civil and criminal sanctions, and if a notifiable transaction is completed without approval, it is void (of no legal effect).

The US regime under the Committee on Foreign Investment ("**CFIUS**") contains a mandatory notification requirement where a foreign person 'gains control' over a US business; the definition of control is wide, so it potentially captures investments irrespective of the percentage of shares or voting interest being acquired. But, if the foreign person involved in the transaction is a national of Australia, Canada or the UK they are an 'excepted investor' and the mandatory filing is unnecessary. In addition, if there is a concern that a contemplated transaction may give rise to national security risks due to the nature of the business involved, the parties to the transaction often choose to notify CFIUS in advance to gain clearance in advance and obtain a 'safe harbour' letter.

## Restrictive covenants

It is common practice in both the UK and the US for the SPA to contain restrictive covenants including non-compete, non-solicitation and no-hire. However, there is a difference in practice in terms of the duration of these covenants, in the UK, three years is generally considered the maximum period that the courts are likely to accept, and it is not unusual for shorter periods to be agreed. However, in the US, the non-compete covenant is often expressed to last for between three and five years, and occasionally even longer.

## Transfer taxes

In the UK, share purchase transactions trigger a transfer tax in the form of stamp duty, this is (subject to limited exceptions) payable by the buyer at the rate of 0.5% of the purchase price of the shares. This is accepted market practice, and it would be unusual for the buyer to negotiate for the seller to pay some (or all) of this transfer tax. This contrasts with the position in the US where most share (or stock) transfers do not trigger a transfer tax. However, if a transfer tax is triggered in the US, the parties to the transaction often negotiate whether the tax is payable by the seller, the buyer or is shared between them.

## Signature of documents

In the UK, it may be necessary to sign certain of the documents as a deed. In the UK, documents can be signed as simple agreements or as deeds; deeds are a particular form of document which must follow strict signing formalities, which may include the necessity for the signature to be witnessed. In addition, the statutory limitation period for simple agreements is six years, whereas, for a deed this increases to 12 years. The US does not make this distinction in terms of signing formalities or the applicable

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limitation periods.

## Closing opinions and certificates of good standing

In the US, it is common practice to obtain legal opinions at completion, confirming that the relevant party to the acquisition agreement is duly constituted and has capacity to enter into the transaction documents and that the transaction will be valid, binding and enforceable.

In addition, in the US it is also customary to obtain a certificate of good standing at completion. The contents of the certificate of good standing varies from state to state, and it usually confirms the legal name, existence and status of the company. In some states, the certificate of good standing also contains certain tax information, if this is not the case, it is usually possible to run tax searches.

In the UK it is not customary to provide a closing legal opinion, and similarly, certificates of good standing are not usually obtained. A certificate of good standing for a UK company does contain any tax information and it is not possible to conduct separate tax searches.

## Funds flow

In the US, the use of paying agents to manage funds flow for completion of acquisitions is common practice. This is relatively unusual in the UK, and funds flow is usually handled between the legal advisers involved on the transaction – usually through their client accounts using undertakings. This practice in the UK means that the funds flow is often more straight forward than the US, as it removes the necessity for lender pay-off letters and setting up multiple electronic payment instructions.

## Terminology

Finally, some of the terminology used in the UK and US differs, we have listed below some common differences:

| UK | US |
|---|---|
| articles of association | bylaws |
| company | corporation |
| completion | closing |
| completion accounts | closing statements |
| deliver | furnish |
| disclosure letter | disclosure schedules |
| escrow | retention |
| ordinary share | common stock |
| share | stock |
| shareholder | stockholder |
| warrant | representation and warranty |

Lewis Silkin regularly works with US financial and corporate buyers on M&A deals across a wide range of sectors on UK domestic and cross-border transactions. We'd be delighted to discuss any questions you may have regarding UK deal practice at an early stage in any discussions you may be having in relation to possible UK acquisitions.

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