Danish-American Business Forum

Cross-border M&A: Strategy, tips and country comparisons

28 October 2010, Copenhagen, Denmark

ISSUES	UK PERSPECTIVE	US PERSPECTIVE	DANISH PERSPECTIVE
1. Basic M&A value-propositions and drivers			
Industry sectors	a. Basic M&A value propositions are much the same across all relevant countries (i.e., with little difference between the UK, US, DK or other). b. The **life sciences** industry is incredibly IP driven - the most important value attribute is achieving product exclusivity. Thus, the IP pipeline problems of large life sciences companies drive strategy for many transactions. One analyst says life sciences industry giants should abandon R&D and buy other companies. Says licensing would yield 3X the returns with less risk. Predicts many majors will cut R&D budgets by 40% in next 2 yrs. Notes 74% of Lilly 2009 sales covered by patents that expire in 7 yrs. Morgan Stanley analyst, Andrew Baum, NYT 1 Oct 2010. Yet, some (eg, Lilly) disagree. Also, the life sciences ROI timeline is longer (8-10 yrs from start to commercial product) than other industries. c. The **cleantech** industry struggles to make the near to medium term financial/economic case, as compared to traditional players. Other problems include obtaining equity and debt financing for new companies, obtaining project finance for cleantech facilities, issues of scalability, price and technology competition from China, managing the disruptive effects of cleantech solutions, etc. d. The **financial services** industry is pushed to “its back foot” by the turmoil in the last two years of turmoil in the sector, current economic doldrums generally, regulatory reform, etc. Many of the larger banks that benefited from 'bail-out 'funds are, under pressure from government backers, strengthening their balance sheets through large scale disposal of business assets. There is an active M&A market for credit card, mortgage and loan portfolios with purchasers often being financial institutions that avoided bail-outs or private equity backed new players in the market e. The **manufacturing industry** is in many sectors struggling with overcapacity which is seen to lead to transactions in order to reduce the overall capacity in the sector and reduce the supply/demand gap.		
VC or PE as Sellers/Buyers	VC-owned and PE-owned companies are “born to be sold”: a. VC/PE Seller’s management already has a “sell” mindset. b. VC/PE Sellers’ investment inventory may be “overripe” (given the M&A bulge 3-5 yrs ago). c. VC/PE Sellers may want to enhance their funds’ historic ROI in preparation for raising a new fund. d. PE Buyers need to use “dry powder”, i.e., to deploy callable capital before expiration of investment periods, and also to increase management fees. Significant overhang of PE funds in European market driving up valuations as PE houses fight over deals that allow significant placement of funds.		

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<tr><th>ISSUES</th><th>UK PERSPECTIVE</th><th>US PERSPECTIVE</th><th>DANISH PERSPECTIVE</th></tr>
<tr><td></td><td colspan="3">e. Alternatives to M&A for Seller PE firms include

(i) planning for IPOs and for post-IPO sales. However, there may be little appetite for IPO's in Europe. This is hampering exits by PE houses looking to return funds to LP's in the agreed investment life cycle of their funds. However, in Denmark, IPOs have been at a historical highs in terms of value, and with several successful IPOs of Danish companies in 2010 it is possible that there will be more in the near to mid-term.

(ii) doing leveraged dividend recaps, where portfolio company borrows large amounts to fund dividends to the PE firm (note: 56 firms issued $23b in 2010 to date). In October 2010, PE backed firms paid out $1.7b of dividends while taking on $4.6b of new debt. In August/September, it was $2b of dividends. Drivers include beliefs in more solid cash flows, and also the concern that the top US tax rate on dividends may rise to 20% from 15% in Jan 2011. WSJ reports (14 Oct).

(iii) doing “secondary buyouts”, where one PE firm sells to another (25% of all 2010 PE deals, being 4X all of 2008/9). But principal PE owners (pension funds/sovereign wealth funds) may disfavor. NYT 30 Sept.

f. Comparison of VC/PE to corporate M&A – Can a PE firm bid a higher price than a corporate, given the corporate’s ability to price its own business synergies? Are corporate’s more conservative, or do they simply know the market better than PEs? Some believe that PE firms have done at least as well as corporate M&A in bidding for deals. Historically the high leverage used by PE firms seems to have pushed prices to a level where many corporate have not been able/willing to follow. The credit crunch seems in a number of cases to have improved the corporates’ ability to match PE firm prices.</td></tr>
<tr><td>When buyer is much bigger than the target - small cap compared to large cap M&A</td><td>a. PE houses giving portfolio companies power to conduct bolt-on acquisitions as a means to spending the overhang without incurring significant PE team time on smaller deals.

b. Problems with small company M&A include:

* Sellers’ Inexperience: - often family-run businesses, or early stage companies with inexperienced management teams, not accustomed to deal procedures

* M&A causes acute resource drain - executive time, market opportunities, exposure of IP or confidential info, transaction expenses, etc.

* Sellers’ have multiple individual shareholders and poor corporate governance. Leads to more potential</td><td>a. IPO slowdowns have made small company M&A more active, i.e., small cap companies see M&A as a more likely exit for investors than an IPO. And, the depressed pricing on stock markets has reduced the historic lift pressure that IPO pricing had brought to corporate buyers of small companies (i.e., where IPO valuations were higher, and prompted corporate buyers to pay more).

b. Problems with small company M&A - same as UK and Denmark</td><td>a. Even in Denmark large international IPOs seem to be attractive. But appetite for smaller company IPOs hardly exists. M&A is the preferred route for companies with values below EURO 1 bn.

b. Problems with small company M&A include:

* Same as UK.

* Also, professional Buyers sometimes fail to identify and address the small Seller’s key issues. Hence, encounter difficulty in negotiating transaction documents as Seller’s focus and key issues can differ from those of a professional Seller.</td></tr>
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	liabilities associated with shareholder disputes, litigation, HR issues, poor contractual documentation.		
Differences between public and private Sellers/Buyers	**a. Public sellers:** * More complex and costly from a regulatory, take-over code and listing rules perspective. * More effective and focused process - more publicly available information, sophisticated management teams used to conducting transactions, standard documentation with less room for negotiation. **b. Private companies** (especially if smaller) often require much more "hand-holding". May be a "once in a lifetime deal" with emotional baggage; and there may be significant inexperience as to acceptable market practices and deal terms. Thus, can be more time consuming.	**a. Public Sellers:** * Similar to UK on greater complexity, cost, and process focus. * But, slower than private Sellers due to regulatory issues. But there are techniques to reduce processing time when Seller is a public company – in US, a traditional acquisition agreement with a public Seller takes 4-5 months; but a "negotiated tender offer" can be much speedier (half as much). b. Similar to UK.	**a. Public sellers:** * Similar to UK. b. Similar to UK.
Corporate spinoffs, etc. as Sellers/Buyers	a. Spin-offs quite prevalent by way of hive-down prior to sale (where company #1 transfers to a subsidiary). Can be an effective method of assigning multiple customer contracts through consented intra group transfer with subsequent sale of corporate entity. May be able to avoid consent to assignment, even if triggers change of control provision. Once the deal is completed, customer leverage has gone even if they have termination rights on change of control. b. More complex for Buyer than buying a	a. Spinoffs, split offs, etc. from a corporate parent can be part of (or a prelude to) an M&A deal. Similarities to a UK hive down.	a. Spin offs, split offs and other complex transactions structures have increased in recent years, mainly driven by the lack of financing.

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	standalone company. Key issues, e.g., timing, asset/liability allocations between parent/subsidiary, IP sharing, employee rationalization, tax issues, director liability, corporate governance.	b. Similar to UK.	b. Similar to UK and US.

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2. Valuation/price			
Cross border v. *In-country deals*	a. Cross-border M&A is tougher than in-country M&A. Tyrannies of distance, different business cultures, lack of planning, etc. b. Most significant deals in UK are now cross border deals as EU is significant business market. UK more familiar with cross border deals than U S counterparts. c. UK style documentation is becoming more prevalent on European deals.	a. Same as UK as to cross border being tougher than in-country M&A. b. USA probably has proportionately more *in-country* M&A than do EU countries, simply because larger numbers of buyers and sellers are available *in-country.* Not quite as much need to go *cross border.* c. US style documentation is becoming more common than previously on cross border deals.	a. Same as UK as to cross border being tougher than in-country M&A. b. Given the limited size of the Danish market, a large share of M&A activities are cross border focused. c. Similar to UK.
Effect of – *financial measures, accounting, taxes on value*	a. UK GAAP prevalent on UK deals although US GAAP is used by some US entities operating in the UK b. Need to take considerable care with releasing security over assets purchased, unwinding cross guarantees and considering effects of group hire purchase agreements especially if cross border group of companies. c. Stamp duty of 0.05% avoided on asset sales although need to ensure VAT exempt through nature of assets or ensure a "transfer of a going concern." d. Need to consider the VAT effects of any transitional services to be provided and whether factored into cost of acquisition. VAT increases in 2011.	a. Projected revenues/EBITDA, at net present value. For life sciences, NPV must be adjusted for probability of completion of drug pipeline. b. Comparable company transactions. c. Net asset value, net working capital, and net debt (including pension liabilities. d. Transaction premiums (for public deals). e. Role of purchase/hire contracts, financial or operational leases. f. Role of accounting differences – eg, US GAAP hits a US	a. The US perspective (to the left, here) also applies to the Danish market. Danish GAAP is very much align with IFRS and hence there is limited difference to other countries that have adopted IFRS as accounting policies. b. Due to the size of the Danish market directly comparable company transactions are often limited and thus a more European view is often applied. c. Pension liabilities are seldom an issue in Denmark due to the general structure of the pension system. d. See para a, above. e. See para a, above. f. See para a, above.

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		buyer's P&L with a post-deal P&L charge for good will following an M&A deal. Gives a UK buyer an advantage over a US buyer, as UK buyer puts the entry on its balance sheet, not its P&L. g. U.S. Sellers are incented to complete deals before 2011, due to 2011's possible increase in capital gains tax rates.	
Closing or completion adjustments	a. Lock-box mechanisms being used in a number of financial services transactions where purchase price based on historical data-cuts. b. Principal completion adjustments usually within 60 days with regular subsequent true-ups, up to a year later. Especially prevalent for financial services, payment processing and online retail businesses, where fraudulent transactions and charge-backs may take time to flow-back	a. Recent survey shows ~70% have post-closing price adjustment, of which ~50% use two or more metrics. Enterprise value is adjusted by =/- working capital and debt adjustments, with former being current assets – current liabilities (excluding tax assets and liabilities in 30% of cases). SRS July 2010. In a few cases (~20%), the purchase price adjustment is not implemented unless the adjustment exceeds a threshold.	a. Purchase prices are often structured as Enterprise value (EV) less net debt and adjustment for net working capital differences (higher or lower than a normal level). b. The purchase price is either determined based on a historical balance sheet date (*locked box method),* subject to adjustment at closing for any leakage via dividends or payments to Sellers; or based on the actual balance sheet at the closing/take-over date (*completion accounts method*). c. In both cases the definition and assessment of net debt and net working capital are critical issues to be covered in the due diligence process. d. Buyers' comfort with locked box increases when other deal elements are more important than balance sheet, time between sign/close is relatively brief, in an auction, and when balance sheet is historically reliable (eg, in contrast to split offs).
Effect of – *strategic rationales on value*	a. Desire to spend overhang for PE houses or portfolio companies given remit to acquire bolt-ons. b. Opportunities to clear the deck of shareholders and creditors through "pre-packs". c. Some distressed opportunities, but lots of cash rich buyers looking for a bargain. Not as many as people had anticipated.	a. For life science companies, filling IP pipeline. b. Cost savings from synergies, eg, being able to scale up and thus amortize down. Or newly created revenues from synergies. c. Vertical integration. d. Expand geographic/market footprint.	a. Market position. Not that many life science deals.

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	Banks are loathe to become business owners and operators even where covenants breached.		
Validating value – auctions	a. Auctions are common because: * Avoid exclusivity to one buyer. * Get better price - are multiple PE buyers in the market looking to dispose of overhang. b. Dynamics include: * Buyer can offer favorable deal terms during bid process although most buyers aware that price is key determining factor rather than document mark-up. *Each potential Buyer has risk of paying considerable costs before knowing whether it is the preferred bidder.	a. Similar commonality to UK, with additional rationale that auctions permit Board to show that it has complied with duty to obtain best price reasonably available for stockholders. b. Dynamics similar to UK.	a. Similar to USA and UK. b. Similar to USA and UK.
Validating value – fairness opinions	a. Becoming more prevalent for larger transactions and bids situations where investment bank involved.	a. Fairness opinions common when board of directors is concerned about fiduciary duty.	a. Similar to UK and USA but not as prevalent.
Earn outs	a. Earn-outs prevalent on UK transactions especially where personnel haemorrhaging and customer termination considered a significant risk.	a. Earn outs and/or milestone payments - increasingly common to bridge differences in value expectations between Buyer/Seller. E.g., "customer risks" or other risks related to the relevant "market" and thereby the earnings of the target. Recent study shows 25% of deals have earn out. Most common metrics revenue and/or milestones (~40%), and duration lasts as long as 12 months (~20%), 24 months or less (~50%), or even >60 months (32%). SRS July 2010. b. Also, used by Buyers to incentivize Seller managers who will stay with the Buyer to achieve certain post-merger goals.	a. Similar to UK and USA. However, even though earn outs are often proposed in the draft documentation and are discussed, earn outs are often not retained in the final transaction documents.

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Special allocations, eg, to key personnel	a. Retention payments provided by Seller are more common (to ensure earn-outs and payment of deferred consideration). b. Also common to fold key personnel into Buyer ESOPs. However, difficulties (eg, in taxes) can be encountered in implementing an ESOP designed in Buyer's country for Seller's people located in Seller's country.	a. Not uncommon that minor portions of acquisition consideration or success fees are allocated to key personnel. b. As to Buyer's employee stock purchase plans, similar to the UK.	a. As to allocations, similar to USA. b. As to Buyer's employee stock purchase plans, similar to the UK.

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3. Pre-merger "people planning"			
Employee retention issues	a. Retention payments often made by Seller rather than Buyer. Seller wishes to ensure that business will not fracture post completion and affect post-closing payments to be made by Buyer to Seller. b. EU wide directives mean that protections on employees much greater than in US. US purchasers often have not factored planned employee reduction costs into purchase price.	a. Similar to UK. b. US parties not accustomed to legally mandated severance rules.	a. Direct retention payments made by Sellers in order to ensure that business will not fracture post completion are not yet common in Denmark. b. Similar to UK.
Integration into buyer's corporate culture	a. Integration can be an issue where deal is in effect cross-border. b. Minimal cultural integration issues where same country/same sector.	a. Incorrect to assume that there are no business cultural differences, just because Buyer and Seller personnel mix well socially, and speak excellent English. b. Some differences that appear to be "cultural" are in fact driven not by culture in a social sense, but by regulation.	a. Similar to UK and USA… b. Similar to UK and USA. Understanding of cultural differences (and to some extent basic differences in regulation) is unfortunately often overlooked.
Reporting, style, comp, HR effect of regulations	a. UK companies are not accustomed to the strictness of US internal control requirements.	a. Public buyers' SEC reporting responsibilities and internal controls require targets to comply with strict, post-transaction reporting requirements. b. Adjustments by reason of overlapping or conflicting GAAP.	a. Danish companies are not used to the strict requirements of US rules on internal controls, and related matters. Eg, Sarbanes Oxley requirements are much more comprehensive than what is seen in Denmark.

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4. Basic deal structures			
General	a. Know your counterparty. Eg, a Buyer must carefully consider whether the Sellers' goals might affect deal structure, eg, if Sellers are a family, you are buying their heritage. Becoming more of an issue for cross-border EU deals where significantly more long-term family owned businesses.	Same as UK.	Same as UK.
Buy assets or shares.	a. Still a mix of assets and shares deals. b. Asset Buyers more concerned about historical liabilities associated with the business. Although complex and time consuming (e.g., assignment of customer contracts), results in cleaner liability profile for Buyer and less reliance on Seller's warranties.	a. Stock deals more common than asset deals; but driven by tax, accounting, legal and business issues that are specific to each deal.	a. Asset vs. Stock deals is mainly driven by legal and tax implications. Stock deals are most common in Denmark as this is most practical and provides seller with a clean cut. b. Asset deals provide some tax benefits to the buyer but have often larger disadvantages for the seller. c. Capital gains realized by the Seller on the transfer of shares in Subsidiary Investments (shareholdings of 10 % or more) are tax exempted.
Pay with cash, stock, notes, Seller financing	a. Fewer stock deals taking place as mistrust of buyer stock values and potential for volatility. At the same time, significant cash in the system, especially from PE houses with significant funds overhang.	a. Debt markets - seem starting again to permit M&A financing, for those with good cash flow, but at lower ratios than in the past, and with more security.	a. Debt markets - Danish small/mid cap market sees Seller financing to support the deal. Given Buyers' difficulties in financing the purchase price in M&A deals, Sellers are sometimes themselves providing financing (for 2-3 years, with % varying by transaction) or taking shares in the buyer, to get a deal done. Eg, when a family owned business and there's no "next generation", the vendors sometimes are forced to support up to 40-50% of the deal, just in order to get a deal done. Similar to earn out, but different. b. In a corporate law perspective, payment structures are limited by the prohibitions on financial assistance and self-financing.
Triangular mergers and	a. UK does not have the US concept of "merger", where one company acquires	a. In the U.S., Seller "merges into" Buyer (or into its subsidiary), and is absorbed (at which point Seller ceases	a. A Danish company can be merged into or with another Danish company and/or another company in

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other structures	another. However "scheme of arrangement" is similar albeit rarely used, as is the "cross border merger" that is now possible between a UK and another EEA state (so, assets/liabilities of Seller go to Buyer, and Seller company is legally absorbed).	to exist). This is a "forward merger" that becomes *triangular* if the Buyer's subsidiary is involved. OR, Buyer (or its subsidiary) "merges into" Seller (or its subsidiary), and is absorbed (at which point Buyer or the Buyer subsidiary ceases to exist). This is a reverse merger, and is also a reverse *triangular* merger if the subsidiary is used. One key benefit of this type of merger is that the Buyer essentially can inherit the Seller's attributes, and yet sidestep the need to obtain certain third party consents or transfers of regulatory approvals that Seller may hold.	another jurisdiction within the EU/ EEA. However, absent such a merger, a Danish company is not allowed to redomicile to another jurisdiction. Thus, it is generally not possible to change the jurisdiction of incorporation/registration of a Danish company (except that a Danish company which has status as a so-called SE-company would be able to redomicile but only to a jurisdiction within the EU).
Exclusivity, eg, no-shop/no-talk, go shop, deal uncertainties, break up fees	a. Absent an auction, most UK deals involve some form of exclusivity. Buyers are reluctant to move forward and incur costs without this in place. Generally, would include a no-shop/no-talk provisions. b. Break fees less common unless the buyer has come from a bid process, in which case considered a fair punitive measure on buyer if forgone other bidders that may no longer be waiting in the wings.	a. Reverse break-up fees (Buyer pays if it does not close, eg, due to financing failure) have become more common, especially if a Buyer's dropping out will significantly harm the Seller. Percentage often lower during any go-shop period. Prompted by broken deals during recent financial crisis, and/or by Sellers wanting to pressure Buyers to overcome regulatory hurdles. b. Targets usually agree to exclusivity via *no-shop/no-talk* (~80%). Sometimes a buyer pays exclusivity fees, even with an optional fee to extend the exclusivity. But Sellers need fiduciary duty "out" for deals that are not direct purchases from stockholders or simultaneous sign/close deals. SRS Jy 2010. Targets often pay break up fees if sell to a new (second) Buyer, during a *go-shop* period after exercising its 'fiduciary out". Common 2-5%. Driven by fiduciary duties, Ie, board of directors duty to maximize value to stockholders. c. Various measures to increase likelihood of deal closing e.g., pre-closing voting agreements by management, by Board, by large inside stockholders; or Board agreement to recommend the deal to stockholders, subject to fiduciary duties.	a. Similar to UK. Exclusivity more usual at the end of an auction, and not very widespread otherwise. b. During the last two years, more common to give exclusivity to one potential bidder for a limited period. Number of potential buyers is more limited, and the potential buyers (both PE and corporates) are reluctant to spend a lot of time and money on auction processes given the risks that the money goes "down the drain". Break fees are not common.

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Escrows	a. Increasingly common to offset potential warranty claims as buyers become more concerned about future financial soundness or existence of warrantors. Especially common where indemnities have been given regarding specific issues identified during DD. b. Deferred consideration also prevalent on transactions for similar reasons and where buyer does not wish to lock-up funds in escrow.	a. Increasingly common to set aside an escrow of price as sole remedy, especially when expect difficulties in enforcing claims, eg, when Seller is public company or a trust or a foreign party in an inconvenient jurisdiction), or when Seller is VC/PE firm. b. Holdbacks are less common than escrows.	a. Not uncommon to set aside an escrow of price as sole remedy, especially when expect difficulties in enforcing claims. b. Similar to USA.

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5. Deal process, Deal protection			
Due diligence	a. Electronic data-rooms more often than not with strict data-room rules and purchaser monitoring for disclosure and buyer knowledge purposes b. IP due diligence re patent portfolios becoming more important and requiring in-house patent attorneys that can liaise with legal teams. c.. Cross border may mean multi regulatory/licensing. Even in EU, same directives result in dissimilar regulation and application. d. Vendor diligence reports common. e. DD is lengthy and carful. "Buyer beware" still prevails.	a. Genie can't go back into bottle. Sellers should protect key/critical data against harm from over-disclosure during diligence. Partial solutions are electronic data rooms and multi-phased disclosures. Difficult to reinsert genie in bottle after Buyers see IP runway, marketing strategy, etc. b. Life sciences requires more due diligence than other industries, both due to science and due to regulatory requirements (eg, FDA). c. Even if target is located in a lower-regulatory environment, the product is a global product and thus must meet the highest standards applicable anywhere. d. Vendor due diligence reports are uncommon in the US. Perhaps Sellers don't want the upfront expense, and also because Sellers and their advisers want to avoid the potential liability that comes with having Buyer rely on a Seller due diligence report. It's about "risk management". e. Same as Danish perspective.	a. Same as under UK and US perspective. b. Similar to UK and US. c. Similar to UK and US. d. Danish sellers in all larger transactions commonly deliver vendor due diligence reports to bidders. Because: * "Up fronts" the work in intensity, timing, and identifies key issues early, reducing risk that buyers "high ball" the price, and then lower the bid as diligence is conducted, * All potential buyers in an auction will need to do the same diligence, * Wish to limit the number of times the same Seller work is done, * Seller will do a better job than the buyers, as it knows the business the best, * Minimizes disruption for Seller's executive team in responding to lengthy and continuing diligence questions. e. In recent years the economic uncertainties, increased financing bank requirements etc. have led diligence processes to be more lengthy and thorough.
Process issues	a. Information memorandum and Auction procedures, if transaction is initiated as an	Similar to UK	Similar to UK/USA.

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	auction process. b. Term sheets common for Private M&A transactions and bids c. Confidentiality Agreements with exclusivity. d.. Data-room rules with issues regarding data-protection and contractual confidentiality provisions proving problematic e. System access agreements if IT systems need to be reviewed by buyers f. Share Purchase Agreement or Business Purchase Agreement f. Disclosure Letter g. Transitional Services Agreement. h. Banker engagement i. Presentations by management, board		
Consents/appr'l by Seller's stockholders	a. Seller's stockholders do not need to approve transaction; sellers must approve the transaction which may or may not require shareholder or investor shareholder consent	a. Seller's stockholders must approve the transaction, either through a shareholders vote (eg, to approve a merger) or through voting with their feet (e.g., in a direct stock purchase as in a private negotiation or in a tender offer). Buyers will condition transaction on specified shareholder approval (and often also on maximum shareholder appraisal rights). b. For public targets, two alternatives: (i) Pros/cons: Single-step merger is *usually much slower, more market risk.* Two-step can be *twice as fast, mainly by avoiding SEC prior review and avoiding stockholder*	a. In general Seller's stockholders do not need to approve transaction; sellers must approve the transaction which may or may not require shareholder or investor shareholder consent. b. On public targets two alternatives: "Single step"- <u>Merger without prior control</u> in target: Generally, a prospectus-type document must be drawn up and approved by the FSA if shares are offered (in

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	c. Drag-along provisions can usually force minority shareholders to sell. These are common in VC and PE owned Sellers.	*meeting.* (ii) Details: <u>Single Step:</u> SEC reviews proxy statement 60 days, then 30 days for stockholders meeting for >50% approval. Buyer not own or control anything until closing. <u>Two-step</u>: 1st, Buyer gains control via "negotiated tender offer" to stockholders without *prior* SEC review. 2nd, Buyer forces merger, by voting its >50% Target shares. And, will sidestep need for stockholder meeting entirely if get >90%, either through attractive price and/or using "top up option" to purchase *new* shares from Target. 90% ownership permits "short form" merger. Buyer risk that partly owned Target for short time post-tender and pre-vote. c. Similar to UK on drag alongs.	whole or in part) as consideration to the shareholders. Shareholder consent required at general meeting (2/3 majority), see a) above. "Two step"- <u>Merger following tender offer</u>: 1st, Buyer gains >90% control via "voluntary tender offer" to stockholders (requires FSA review of tender documents). Tender offer may be subject to obtaining 90% control. 2nd, Merger may be completed by decision Targets board of directors <u>or</u> Buyer initiates squeeze out procedure to gain 100 % control in Target (4-5 months). General meeting required to elect Buyer representatives for the Target board and for delisting (>50% majority). c. Similar to UK on drag alongs.
Consents/appr'l *by customers,* *by 3rd parties*	a. Consents to assign can be problematic. Novations in theory required to transfer the burden of the contract under UK law. b. But novation in practice often overlooked, but hive-downs can overcome some issues regarding obtaining customer consent.. c. Clauses that forbid a change of control usually a hollow threat.	a. "Consent to assignment" clauses require careful review (eg, does a "change in control" constitute an impermissible assignment), and can force a restructuring of transaction. Especially important when Seller has a key in license or key customer contract. b. Reverse triangular merger one of the most common solutions to an "assignment" of contract problem.	a. Essentially same as US.
Consents/appr'l by regulators	a. Competition/antitrust rules: becoming more problematic as markets and territories in-country, becoming more	a. Antitrust: The required regulatory clearance affects transaction timeline.	a. Antitrust/competition. Similar to UK.

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	narrowly defined (requirement of competition and antitrust clearance to be considered). b. Take-over panel	b. Securities: The SEC usually becomes involved if Buyer is issuing shares in payment, or if Buyer is making a tender for the Seller shares. c. Approvals by CFIUS (Committee on Foreign Investment in the US) re security issues.	
Representations/ warranties, indemnification, sunsets, caps, baskets, remedies for problems	a. Warranties generally on a common-law basis not and indemnity basis as per US. b. Similar to US. c. Indemnities limited to specific issues identified during DD where pound for pound reimbursement more appropriate. d. Triggers/baskets for claims are common. Some baskets are merely triggers, others are tipping thresholds (i.e., claimant gets first dollar protection). Caps are common, sometimes at purchase price, sometimes at escrow amount. e. Warranty insurance still uncommon, but increasing.	a. Reps/warranties often divided into categories that expire/sunset on different dates. b. The incremental benefit of reps/warranties from public Sellers is not large, because most disclosure is already in publicly filed documents. c. Commonly, reps must be true "in all material respects" (>60%), except for inaccuracies not yielding a MAE (~40%) (but excluding capitalization reps). Scrape to prevent double materiality. MAE/MAC commonly covers future prospects (40%) and are f*orward looking,* reasonably expected to have MAE (>70%). But exclude from MAE certain changes (general, laws, GAAP, Agmt, etc.), but no carve out if *disproportionate* on Seller (>80% include). d. Similar to UK. e. Some Buyers purchase rep/warranty insurance.	a. It is not uncommon that reps/warranties expire/sunset on different dates. b. Similar to US. c. Similar to UK. A key issue with respect to MAE clauses has been whether to include the MAE clause as a condition precedent. If included, the focus is typically on (i) the scope of the effect (i.e. target's condition, business, operations, assets, results, prospects, etc.), (ii) the monetary threshold/calculation of the MAE in DKK/EURO, and (iii) the exclusion of certain general events (e.g. general market developments). MAE events are almost always defined objectively and not confined to "Seller's knowledge" or the like, when it comes to determining whether a CP for Closing is fulfilled. d. Similar to UK. e. Warranty insurance still uncommon, but increasing f. Restrictive covenants on the seller re non-

ISSUES	UK PERSPECTIVE	US PERSPECTIVE	DANISH PERSPECTIVE
	f. Restrictive covenants on the seller re non-competition, non-solicitation is the norm.	f. Sellers can be required to agree to noncompetition in connection with sale. g. Sellers try to prevent gotchas/sandbagging – where Buyer makes post-closing claim based on inaccuracies Buyer knew about before closing. Sellers succeed about half the time. SRS Jy 2010.	competition, non-solicitation is the norm.

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