Top Ten Mistakes in Cross-border M&A

28 October 2010, Copenhagen, Denmark

1. Poor Pre-Merger Planning for Post-Merger Integration

- When key personnel are not sufficiently incentivized to achieve post-merger success. Eg, when Seller fails to use a "*double trigger*" acceleration clause in stock options or other large compensation structures that are granted in the period before M&A begins; or if Seller fails to build milestone goals into the post-closing compensation. *[Double trigger = executive gets acceleration of vesting/payment if there is BOTH a change in control and also he is fired within 6 months.]*
- When Buyer fails to identify all of Seller's key functional experts who are needed to fulfill the post-merger business plan.
- When Buyer fails to transfer due diligence knowledge *from the Deal-team to the integration-team.* Absent this transfer, the Deal-team moves on to new targets and deals, and the knowledge is lost.
- When Buyer does not define synergies measurably, and does not require post-closing reporting, to closely monitor whether synergies are achieved, and if not, then to take action.

2. Errors in Time Management

- When Seller does not optimize for M&A – i.e., does not realize that "pre-merger" planning begins a year or more before the intended date of the merger.
- Problems of too little and too much. Either Buyer and/or Seller is unrealistic, failing to allocate sufficient time and resources (especially, executive resources) for deal completion. Or, the parties allow the process to command the deal, slowing things unnecessarily – deal fatigue arrives, and poisons the deal.
- Consequences can include deal fatigue due to unrealistic expectations on timetable, leading to price pressure and deal cratering. Eg, Seller might fail to anticipate and manage the large volume of email and other inquiries by Buyers' various specialist teams, a risk that is common when the Buyer is a large company and the Seller is a far smaller, venture funded company.
- Or, Seller might fail to use techniques such as virtual data rooms to overcome geographic and other impediments to efficient deal timetables.

3. Buyer's Over-optimism

- When Buyer overpays.
- Perhaps when Buyer misses (or, is late in identifying) deal-breakers or other negative information/red flags, or misinterprets data, eg, because time pressures deriving from a wish to preempt a competitor. Can result in spinning of wheels without traction, incurring costs and process without result.
- Or when Buyer inadequately measures, defines or analyses "synergy savings" or strategic benefits.

• In larger auction processes with high completion for the target there is always a risk for ending up with a “winner’s curse”.
4. Poor data security and segmentation
• When Seller prematurely discloses its most sensitive information to bidders who do not become the Buyer and yet walk away with sensitive market or technical data that inevitably harms Seller’s position. • Seller should segment and time-manage the data disclosures so that the most critical data is reserved for “later” in the process, for only the most serious bidders and the actual Buyer.
5. 'Gotchas' *[“I have got you”]* are overlooked
• Where simple changes in wording can also change liability from a “*common law basis*” (seller reimburses actual loss suffered resulting from diminution in value of the assets) to “*indemnity basis*” (i.e. seller puts right irrespective of cost), with unintended consequences. • Where Seller does not require Buyer to refrain from making *post*-closing claims based on *pre*-closing facts of which Buyer was well-aware *pre*-closing. • Where Buyer agrees to notify Seller of claims as soon as reasonably practicable . . . . .but when claim arises, Seller successfully argues that Buyer was not sufficiently quick even though within agreed time periods. • Buyer allows Seller to slip force majeure provisions into transaction documents whose wording seems innocuous but can undermine Buyer’s warranty protection, eg, acts of god can include everyday acts of the parties. • Parties sometimes overlook boring “boiler plate provisions” – but need review because change the nature of the commercial terms either intentionally or inadvertently. E.g., fail to carefully limit accountant arbitrator provisions for “closing/completion statements” to accounting issues, and not to alter the deal or legal attributes.
6. Over-engineered documentation
• “Less *can be* more”. More words does not always bring more clarity. Mark Twain said “I do not have time to write you a short letter.” • Overly complex, poorly written documents can become contradictory, actually increasing chances of legal disputes. • Risk that it is only the lawyers that fully understand the transaction documents.
7. Seller allows excessive post transaction risk
• Where Seller allows warranties to be on an *indemnity basis* (i.e. seller puts right irrespective of cost) rather than *damages basis* (seller reimburses actual loss suffered resulting from diminution in value of the assets). • Where Seller allows warranties to be on a *risk allocation basis* rather than for purposes of disclosure (e.g. IP validity). • Where Seller allows escrow and deferred consideration to a degree risks loss of key employees and customer disaffection, such that Buyer benefits from upside while downside is underwritten by Seller.
8. Buyer forgets transitional services

• Where Buyer forgets to require transitional services – eg, when the target s a carve out of a large group and has relied on other group-provided services and cannot really stand-alone from day one without them.
9. Poor management of the professional advisors team.
• When a Buyer short-changes key areas (IP, HR/employees, compliance, etc.). • "Coverage gaps" - large deal, multiple teams, different topics, various locations, but "single lawyer or legal team" knows entire deal; or different advisors (accountants, lawyers, investment bankers) are not permitted to collaborate. • Buyer fails to clearly inform advisors about key areas (eg, strategic rationale for and the value drivers behind the transaction), so that advisers' reports and recommendations are not as useful as wished.
10. Poor understanding of the significance of business culture differences
• Buyer implements restructuring that is perceived as harsh, thereby reducing Seller's employee confidence and causing post-merger attrition. • US buyers fail to anticipate financial costs (imposed by regulatory requirements) of downsizing EU workforces, and fail to factor costs of redundancy into post closing business economics. • When Buyer tries to "over-integrate" – i.e., fails to recognize that *in some cases,* Target will be more successful post-transaction if it is allowed to preserve its independent operation and its unique culture.

CONTACT INFORMATION

	Albert L. Sokol, **Conference Chairman** Edwards Wildman Palmer LLP Tel +1 617.951.2237 asokol@edwardswildman.com		**David Ramm** Edwards Wildman Palmer UK LLP Tel +44 207 556 4513 dramm@edwardswildman.com		Niels Kornerup **Bech-Bruun** **Tel +45 72 27 35 75** **nk@bechbruun.com**

	Jacob Holm Transaction Services, Deloitte Financial Advisory Services +45 36 10 37 57 jaholm@deloitte.dk		**Kim Bøttkjær** FIH Partners Investment Banking + 45 72 22 47 11 kib@fihpartners.com