Data Segregation, Migration, and Integration in M&A

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Data Is a Key Asset and Value Driver in M&A Transactions

Data is undoubtedly a highly valuable asset in M&A transactions today: it acts as both a key competitive differentiator and a strategic asset class. Companies have only begun to unlock that value by focusing increasingly on data in their corporate acquisitions. With the potential and benefits from data, there are some inherent issues and risks too.

Raising Specific Legal Issues

Data is a complex asset class, so in an M&A transaction, issues of data privacy and compliance, data ownership, data exclusivity and professional secrecy will certainly arise. The structure of the transaction will determine whether the data must be segregated from the seller's environment, be migrated from the seller to the buyer, or be integrated into the buyer's environment. In addition, each phase of the transaction cycle requires proper legal analysis and documentation, i.e. Due Diligence, identifying and obtaining third-party consents under licenses and relevant contracts, information of and consent by data subjects under the GDPR, relevant clauses in the SPA/APA, closing documentation, transitional services agreements (TSAs), service-level agreements (SLAs), archiving, data retention, and legacy.

Addressing Issues at the Right Time

A carve-out – being the deal structure in which the particularity of handling data is most explicit – entails addressing various separation steps at the right time in the transaction cycle. Identifying, extracting, and migrating applications and data are crucial steps in this cycle. This is particularly the case for shared applications and/or data, especially those that need to be physically or logically separated to ensure business continuity. In this respect, a distinction should be made between transferring relevant data and protecting confidential critical data, such as business information and personal data.

The APA usually represents the reference point for identifying the data that should be migrated from the seller to the buyer. Each of the identified data set must be linked to real data storage locations. Mostly they are stored digitally in source systems that contain both structured (ERP system, R&D applications, CRM…) and unstructured data (emails, personal drives, SharePoint...). Each type of data requires a migration strategy involving the identification, segregation, and transfer of the relevant data.

Migrating data from source systems to defined systems can be complicated by highly intertwined business with mixed data, absence of link between APA and the data source, large number of data sources, high effort in separation of data migration. Therefore, a successful segregation, migration and integration of data requires all parties involved having a good knowledge of their data and IT systems. Continuity of the business will also entail identifying early in the process what IT services, costs and level of support is required post-closing.

Finally, post-migration handling of data by the seller and the buyer must comply with legal requirements after closing in the transition phase.

Reserving a Seat at the Table for IT – from the Start

It is important that the IT department be involved from the very beginning and made fully aware of what the deal is aiming to achieve. This to avoid inaccurate cost and time estimates, as well as unplanned data segregation, migration and integration issues. All work streams, HR, finance, IT, operations, sales and legal departments should be brought together to identify interdependencies and decisions that affect multiple business functions. In more complicated or highly-data-driven transactions, a seller might want to outsource the entire or part of the IT role.