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COMPARATIVE ANALYSIS OF TERMINATION FEES / BREAK-UP FEES IN M&A TRANSACTIONS IN FRANCE AND THE UNITED STATES

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The recent takeover battle between Netflix and Paramount Skydance for the acquisition of Warner Bros. Discovery (WBD) is noteworthy in several respects, not merely because of the extraordinary financial stakes involved.

It also provides a useful lens through which to examine one of the key features of the Agreement and Plan of Merger entered into between Netflix and WBD on December 4, 2025, namely the termination fee regime applicable if the transaction fails to close.

While termination fees are a well-established feature of U.S. M&A practice, they remain far less prevalent in France. This contrast warrants a brief comparative analysis.

Overview of the Break-Up Fee Mechanism

Termination fees, also commonly referred to as break-up fees, are contractual provisions that predetermine, on a lump-sum basis, the financial consequences of actions by a contracting party that result in the failure to complete the contemplated transaction or the non-performance of a contractual commitment.

Their primary functions are:

- to compensate the prospective acquirer for costs incurred in connection with the transaction, including due diligence expenses and advisory fees, if the transaction does not proceed; and
- to deter opportunistic behavior by the target company or by competing bidders seeking to intervene in the transaction process.

Termination fees are also frequently structured to allocate regulatory or antitrust risk, providing for indemnification where the transaction is blocked or delayed by regulatory or competition authorities.

In large-scale transactions, negotiation of termination fee provisions becomes a core risk-allocation tool and a strategic signal to the market, particularly in transactions involving publicly listed companies.

Two principal categories may be distinguished:

- Break-up fee: an indemnity payable by the target company (target termination fee) or by the seller if it elects not to proceed with the transaction, or if it accepts a superior competing offer.
- Reverse break-up fee: an indemnity payable by the acquirer where the failure of the transaction is attributable to the acquirer, including due to financing failure, failure to obtain regulatory approvals, a negative shareholder vote, or an unjustified decision to abandon the transaction.

Break-Up Fee Practice in the United States

In the United States, termination fee practice is longstanding and highly structured. Delaware courts, in particular, supervise these mechanisms through close scrutiny of directors' fiduciary duties, including the obligation to maximize shareholder value.

Termination fees are routinely used in leveraged buyouts and large-cap private transactions. They are also common in public company transactions, with disclosure and transparency requirements ensuring that their structure and quantum are fully visible to the market.a)

a. Break-Up Fee Payable by Netflix to WBD

If the transaction ultimately fails due to specified external causes, in particular a prohibition by competition authorities, Netflix would be required to pay WBD a break-up fee of USD 5.8 billion.

This amount represents a significant portion of the transaction value, approximately 8 percent of WBD's offer value, and materially exceeds the averages observed in transactions of comparable size. It reflects Netflix's acceptance of substantial regulatory risk through a so-called "regulatory hell or high water" commitment.

b. Break-Up Fee Payable by WBD to Netflix

The agreement also provides for a termination fee payable by WBD to Netflix in the amount of USD 2.8 billion in the following circumstances:

- rejection of the transaction by WBD notwithstanding a favorable shareholder vote; or
- acceptance by WBD of a superior competing offer, for example from Paramount or another bidder, despite a firm commitment having been entered into with Netflix.

Beyond the Netflix–WBD transaction[1], U.S. market practice shows that public company transactions typically include break-up fees in the range of approximately 2.5 to 3 percent of transaction value. Reverse break-up fees may reach 4 to 7 percent of the target's value, particularly where antitrust risk is significant.[2]

Given the magnitude of these amounts, boards of directors should agree to such provisions only following careful assessment of their consistency with the company's corporate interest. Their existence and quantum must also be taken into account when evaluating the attractiveness of a competing offer.

In this respect, it is notable that among the arguments advanced by WBD's board to reject Paramount Skydance's competing proposal and to refuse to characterize it as a "superior proposal," two termination fee-related considerations were emphasized:

- in the event the transaction fails for antitrust reasons, Netflix "has agreed to a record-setting termination fee of USD 5.8 billion, significantly higher than Paramount's USD 5 billion break-up fee"; and
- acceptance of Paramount's offer would trigger a USD 2.8 billion payment by WBD to Netflix, which Paramount had not undertaken to compensate.[3]

Break-Up Fee Practice in France

In France, break-up fees are less systematic than in the U.S. market.[4] They remain a minority feature but are nonetheless observed in a significant proportion of private transactions,[5] particularly mid-to-large cap transactions involving auction processes with Anglo-American investors or private equity funds[6], or transactions presenting heightened regulatory or competition risk. By contrast, small-cap transactions more commonly rely on traditional exclusivity arrangements or cost reimbursement mechanisms.

Break-up fees operate within the legal framework governing the termination of negotiations, shaped in particular by the Manoukian decision, which limits recoverable damages to incurred costs and excludes compensation for loss of opportunity to conclude the transaction.

The central issue under French law is the legal characterization of the break-up fee.

Courts have addressed this issue in the context of commitments to tender shares to a public offer.[7] In that setting, the agreed indemnity was characterized not as a penalty clause, due to the absence of a punitive purpose and the absence of faulty performance by the debtor, but rather as a withdrawal clause (clause de dédit) (Versailles Court of Appeal, December 21, 2006, SA Accor Casinos v. Der Krikorian).

This distinction is critical:

- Penalty clause: the court may reduce or increase the amount if it is manifestly excessive or derisory (Article 1231-5 of the French Civil Code);
- Withdrawal clause / immobilization indemnity: the payment constitutes consideration for the right not to conclude the transaction and, in principle, escapes such judicial control, subject to possible recharacterization.

Accordingly, a break-up fee must be structured in a proportionate manner, consistent with the company's corporate interest, and clearly framed as consideration for exclusivity or immobilization rather than as a sanction for wrongful non-performance. Its purpose is not to punish the termination of negotiations but to allocate the costs of the negotiation process. A poorly structured break-up fee may be recharacterized as a penalty clause if it appears intended to sanction a fault rather than to compensate for the exercise of a contractual right.

In practice, beyond the overarching requirement of consistency with the corporate interest, several specific factors limit the use of break-up fees in France:

- Labor law considerations: where a break-up fee is included in an exclusivity undertaking or a put option letter binding the seller and the prospective purchaser, its amount must not be excessive. An excessive amount may be viewed as effectively preventing the seller from abandoning the transaction. If the target's

works council (CSE) has not yet issued its opinion on the contemplated transaction, such a constraint could constitute an offense of obstruction under the French Labor Code. In this context, the break-up fee must not be set at a level that effectively transforms a preparatory commitment into a binding sale.

- Securities law considerations: with respect to public offers involving listed companies, the French Financial Markets Authority (AMF) does not prohibit break-up fees but ensures that they do not create an excessive deterrent effect on potential competing offers.

Where a break-up fee payable by a listed target company is provided for in a merger agreement with the offeror, or where a break-up fee payable by target shareholders is provided for in tender commitments, the amount must be set at a level that does not prevent the filing of a competing offer, in accordance with the principle of free competition among offers (Article 231-3 of the AMF General Regulation). Since a competing offer may only be declared compliant if it increases the initial offer price by at least 2 percent, this threshold is generally accepted as the maximum permissible indemnity level for a target company.

With respect to indemnities potentially payable by the target company, market practice provides several examples, although their overall occurrence remains limited.[8] The AMF must, however, take such provisions into account when assessing the compliance of a public offer. To date, there is no AMF decision establishing a general principle expressly commenting on or regulating break-up fee clauses in public offers. Nevertheless, in the context of Capgemini's 2019 offer for Altran[9], the AMF expressly noted in its clearance decision *"the existence of a termination indemnity ('break-up fee') payable by the target company to the offeror, in particular in the event of a favorable opinion on a competing offer, in the amount of EUR 75 million (…) representing 2 percent of the target's equity value at the public offer price, and therefore not impeding the free competition of offers and overbids referred to in Articles 231-3 and 232-7 of the General Regulation."*

Such indemnities may also be included in tender commitments to a public offer. While these commitments must be revocable in the event a competing offer is filed, they may be coupled with an obligation to pay an indemnity in the event of non-tender. Here again, the amount must remain proportionate and reasonable. Where the commitments relate to shareholdings that do not, in practice, prevent the success of a competing offer, the AMF appears willing to accept higher indemnity percentages, as illustrated by the Accor Casinos decision of 2006.

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[1] For an illustrative example, see the LVMH/Tiffany Merger Agreement, which provided that Tiffany could, subject to certain conditions, accept a superior proposal upon payment of a termination fee of USD 575 million (transaction value of approximately USD 16 billion).

[2] Other mega-deals involving significant regulatory risk likewise reflect elevated levels of reverse break-up fees. By way of example:

(i) 6.6 percent of transaction value in the proposed 2018 merger between Broadcom and Qualcomm;

(ii) nearly 10 percent (USD 4.2 billion) in connection with AT&T's proposed 2011 acquisition of T-Mobile USA, a fee that AT&T ultimately paid following the U.S. Department of Justice's successful challenge to the transaction;

(iii) an antitrust reverse break-up fee of USD 3.5 billion, representing approximately 5 percent of transaction value, in the 2023 Microsoft / Activision Blizzard transaction;

(iv) in the Disney / 21st Century Fox transaction, an antitrust reverse break-up fee of USD 2.5 billion (approximately 3 percent of target value), combined with a conventional break-up fee of USD 1.52 billion payable if Fox were to abandon Disney's offer in favor of a competing bid;

(v) a termination fee of USD 3.2 billion, representing 10 percent of transaction value, in Alphabet's proposed acquisition of Wiz announced in March 2025.

[3] Warner Bros. Discovery press release dated December 17, 2025.

[4] More generally in Europe, termination fee practice is also far less developed than in the United States. In the United Kingdom, the Takeover Panel has adopted one of the most restrictive approaches. Since 2011, a listed target company is prohibited from taking any action capable of frustrating a public offer, including any measure creating a cost or penalty likely to deter a potential bidder, unless the Panel expressly grants its consent in exceptional circumstances. Permitted exceptions are limited to arrangements solely reimbursing reasonable and properly incurred costs, or arrangements that do not restrict the target board's ability to recommend a competing offer (Rules 21.1 and 1.2 of the Takeover Code).

[5] By way of example, in the context of the proposed combination of BPCE and Generali's asset management subsidiaries, the parties initially contemplated bilateral break-up fees in the amount of EUR 50 million (see Generali press release dated September 25, 2025).

[6] French mid-market transactions involving only privately held companies rarely give rise to detailed public disclosure of contractual provisions.

[7] In the context of Accor Casinos' public offer for Compagnie Européenne des Casinos (CEC), a shareholder holding approximately 17 percent of the target's share capital had undertaken to tender its shares to Accor Casinos. That undertaking was revocable in the event of a competing offer, subject to an obligation to pay an indemnity to Accor Casinos if the shares were tendered to the competing offer.

[8] Illustrative examples include: the 2020 tender offer by Worldline for Ingenico, which provided for an indemnity of EUR 100 million payable by Ingenico if it recommended a competing offer or failed to issue a favorable reasoned opinion on Worldline's offer (transaction value of approximately EUR 7.8 billion); Nokia's 2015 exchange offer for Alcatel, which provided for an indemnity of EUR 300 million payable by Alcatel in the event of acceptance of an alternative offer (transaction value of approximately EUR 15.6 billion), as well as a EUR 400 million indemnity in the event of termination resulting from the failure to obtain regulatory or antitrust approvals; Holcim's 2014 public exchange offer for Lafarge; Green Mobility's 2021 tender offer for Europcar.

[9] AMF clearance decision dated October 14, 2019.