

Anatomy of a Deal: Good Things Come in Small (and Very Complicated) Packages

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Acorda is a biopharmaceutical company focused on developing therapies that restore function and improve the lives of people with neurological disorders. Acorda recently completed the acquisition of Biotie Therapies, a Finnish company with several drug development programs, including tozadenant, a Parkinson's disease therapeutic in late stage development that fully aligns with Acorda's neurology focus. The deal was the first-ever acquisition of a dual-listed Helsinki Stock Exchange/NASDAQ company. This was thus new territory for Acorda's experienced in-house and external legal, business development, finance, and accounting teams, as well as other outside advisors. While this novelty initially seemed like it would be no more than an interesting footnote to the deal, it turned out to be one of the key drivers both for deal structure and for a number of business terms.

Prior to the acquisition, Biotie was a small R&D-stage company without any marketed products. We agreed to purchase Biotie for almost \$400 million in cash. While there is no such thing as a routine M&A deal, this all-cash acquisition might have initially appeared to be a typical M&A transaction. Step by step, however, complexity mounted as we looked closer at the company and had to navigate through transaction specifics.

Factors unique to Biotie and its Finnish heritage would figure prominently, including the dual Finnish/U.S. listing, the presence of employees in both Finland and the U.S., and a corporate structure that includes subsidiaries formed in Finland, the U.S. and other countries. Deal structure and timing deviated from typical U.S. deals, and were driven largely by Finnish corporate law, the intertwining of Finnish and U.S. securities laws, and other cross-border complexities. A myriad of other cross-border legal, finance and tax considerations challenged us throughout the deal, and even today have an ongoing impact as we work through the post-closing integration process. Our experience with this unusual deal has demonstrated, yet again, that complexity is often driven by considerations unrelated to deal size.

Background

Acorda markets three U.S. Food and Drug Administration (FDA)-approved therapies. Ampyra (dalfampridine) Extended Release Tablets, 10mg, is Acorda's most significant marketed product, generating approximately \$500 million in net sales in 2016. Acorda's strategy is to continue growing as a fully-integrated biopharmaceutical company, focusing primarily in the areas of Parkinson's disease, migraine and multiple sclerosis. Acorda has a pipeline of novel neurological therapies and is seeking growth by advancing these programs and also by acquiring later-stage programs that capitalize on Acorda's central nervous system expertise.

Competition for assets in the biopharmaceutical industry is intense, and it takes tremendous effort to identify pharmaceutical development programs that have the necessary strategic fit. Research and development programs must, of course, be in alignment with a company's areas of therapeutic focus. Target programs must also be sufficiently advanced to fit within its development pipeline and overall business strategy. Acorda's current acquisition focus is on late-stage, or Phase 3, development programs. These programs are at the last human clinical trial stage before potentially filing an application to obtain FDA approval in the U.S., or potential approval from regulatory authorities in other countries. Having survived through Phase 1 and Phase 2 human clinical trial testing, Phase 3 programs are less risky, but the lower risk translates into higher price. Even at Phase 3, the risk of pharmaceutical development failure is notoriously high, so we need to look at any potential acquisition target from a risk-adjusted valuation perspective. Importantly, this analysis needs to look at the full cost of these programs, which includes not only the purchase price, but also the substantial investment needed to hopefully complete the clinical trial studies required to obtain regulatory approval. Even if we identify an acquisition target that meets all of these requirements, it may not be for sale, and even if it is, it may not be available for the right price or on acceptable terms and conditions.

In 2014, Acorda identified Civitas Therapeutics as a company having such strategic fit. Civitas was developing a late-stage Parkinson's disease therapeutic referred to as CVT-301. Parkinson's disease is a progressive neurological disorder that causes a range of symptoms including impaired movement, muscle stiffness and tremors. Parkinson's disease affects approximately one million people in the U.S. and 1.2 million Europeans. As Parkinson's disease progresses, people with the disease experience OFF periods, which are characterized by the re-emergence of symptoms. OFF periods can occur even when an individual's treatment regimen has been optimized. CVT-301 is being developed as a self-administered, inhaled formulation of levodopa for the treatment of symptoms of OFF periods in people taking an oral levodopa regimen, the current standard of care for the treatment of Parkinson's disease. Acorda's acquisition of Civitas would enable Acorda to leverage its scientific and commercial neurological expertise to further develop and hopefully commercialize CVT-301, if approved by the FDA. With Civitas on the brink of completing an initial public offering, Acorda preemptively made an offer and quickly signed and closed the acquisition between September and October 2014.

After completing the Civitas acquisition in late 2014, Acorda continued to seek growth through acquisition while progressing its internal drug pipeline, with the lead being the newly-acquired CVT-301 program. It took more than a year to find the next target, but in late 2015, we formally launched diligence and negotiations for the acquisition of Biotie. Coming on the heels of the Civitas acquisition, Biotie presented an exciting strategic opportunity because it has two development programs in Parkinson's disease, and the combination of these programs with CVT-301 could position Acorda to be an industry leader in Parkinson's disease therapeutic development.

Biotie's most advanced drug development program was tozadenant, an oral therapeutic in Phase 3 development as an adjunctive treatment to levodopa in Parkinson's disease patients to reduce OFF time. Tozadenant is expected to complement CVT-301, because tozadenant is being developed as a chronic therapy for reducing overall OFF time, whereas CVT-301 is being developed for episodic use when OFF periods occur. Tozadenant is part of a class of drugs known as A2a receptor antagonists, which have the potential to be the first new class of drug approved in the U.S. for improvement of motor symptoms in Parkinson's disease in over 20 years. Biotie also has other earlier stage

development programs, including a potential therapeutic for the treatment of Parkinson's disease dementia.

Biotie presented an exciting acquisition opportunity for Acorda, but Biotie management was not looking for a takeover. Acorda did not learn of Biotie through outreach by investment bankers, which would have been typical. There was no auction, and Biotie was not being offered for sale. Rather, Acorda had identified tozadenant through its own diligence of the Parkinson's disease development landscape. Acorda would have to initiate a process by arranging for a meeting of the CEOs.

Biotie management knew they were developing a valuable portfolio of R&D programs, particularly tozadenant, but the markets had been tough on their stock in recent years. A potential deal concern was that investors might be reluctant to sell absent a substantial premium to the current, lower share price. Acorda knew that it would have to make a compelling offer, and be prepared to move at lightning speed, to preempt an auction and the risk of competing bidders. Assembling an experienced, talented deal team and ensuring an efficient board/management communication process were critical.

Acorda made an unsolicited offer to Biotie, and after some negotiation, the parties struck a deal for a purchase price that was almost double Biotie's market stock price. This added up to almost \$400 million in cash, which would have been small change for Big Pharma, but it was a substantial use of cash for a company of Acorda's size. In early 2016, at the same time we were feverishly proceeding with the Biotie deal, we handled a \$75 million equity raise to ensure the Biotie deal and our operations remained adequately funded going forward.

Finnish Acquisition Structure

Following our usual protocol, once the Biotie discussions commenced, we started to collaborate with other internal stakeholders, such as the business development and finance teams, to figure out the needed panel of legal and other advisors, workstreams such as diligence and document drafting, and the like. Certainly, the Finnish connection in this transaction was expected to add wrinkles to the overall process – local Finnish counsel would be needed, documents written in foreign languages would need to be translated, etc. We would soon learn, however, that the Finnish location of this much smaller company would not just add wrinkles, but would dominate the acquisition and business integration process. Fortunately, our choice of local Finnish counsel proved to be an excellent one and was critical to the success of this deal. Our local firm assigned a team of experienced lawyers with great command of all needed areas of Finnish law, such as corporate, securities, tax, and employment law. Importantly, they also understood the urgencies in a transaction such as this, with a continuous flow of issues that needed immediate attention. Despite the substantial time difference, they made themselves available whenever needed, a consideration that should not be taken for granted.

In late December 2015, as our company was in the middle of its week-long holiday shutdown, a core internal deal team along with outside advisors caucused on conference calls to resolve a potential deal-killing roadblock under Finnish corporate law. Well-travelled merger and other structures used in the U.S., which could be completed with simply a majority stockholder vote, are untested under Finnish law. We had no interest in paving new legal roads in Finland. We were counseled that the only tested and reliable Finnish acquisition structure would involve a two-step transaction, starting with a cross-border tender offer and then concluding with an arbitration procedure available under Finnish law to squeeze-out stockholders that did not participate in the tender offer. Despite the absence of any unexpected complications delaying the deal, this multi-step process took more than a year to complete and be legally finalized.

Importantly, under Finnish law, the squeeze-out arbitration procedure would not be available unless Acorda first acquired at least 90% of the Biotie shares through one or more tender offers. This is an extraordinarily high threshold that created significant deal risk for both parties. Understandably, Biotie would not want to embark on this deal path only to have the transaction melt away because a high-but-not-high-enough percentage of shares were tendered. On the other hand, it would be totally unacceptable for Acorda to end up with majority - but not complete - ownership of a publicly-traded Finnish company. As 2015 came to a close, we paused momentarily to celebrate the New Year, unsure if we would be able to move past this critical hurdle.

We explored every conceivable alternative and the associated risks with our team of advisors. Successful deals require compromise and a practical approach to problem solving. In this case, however, Finnish law left little room to compromise – Acorda could not take the risk of living indefinitely with a partially-completed acquisition. Through further discussion, however, the parties found a way to achieve comfort with a 90% condition in the deal. Both parties came to recognize (correctly, as it turned out) that the substantial premium offered by Acorda would be strong incentive for stockholders to tender their shares. Also, Biotie had several large stockholders who could be expected to provide advance written tender commitments, representing more than a majority of the outstanding shares. As we returned to the office from our working holiday, we rolled up our sleeves and started planning for an intense diligence and negotiation period.

From Signing to “Finnish”

The acquisition was documented in the form of a Finnish “combination agreement,” which provided for the tender offer structure and included representations, warranties, and covenants. Following Finnish custom, the legal protections were much more limited, and more heavily qualified, than a U.S.-style acquisition agreement that we would have been more familiar with. This left us with fewer protections prior to completion of the deal, such as in the case of an adverse business development. However, this was not a U.S. deal, and we and others had to suppress the reflex to try to make it one, good advice to anyone handling a cross-border deal.

After completion of the deal, consistent with public company deals in both Finland and the U.S., Acorda would have no recourse against Biotie stockholders for breaches of representations and warranties. There would be no party to recover from if a problem were to surface after closing, and there would not be any holdback, escrow or any other form of security from which we could collect any damages. Diligence is always critical, but this type of deal structure places greater emphasis on the need to be thorough. These limitations should, of course, be considered by any board that is being asked to approve a deal. That said, a practical approach to risk analysis is very important, considering both the likelihood and potential magnitude of a problem. Inevitably, unexpected issues will arise after a deal is completed, but effective diligence and reasoned analysis can hopefully contain the risk of big surprises.

We signed the combination agreement and announced the deal on January 19, 2016, and then proceeded rapidly to move forward with the deal. Most importantly, we had to launch our tender offer. At this point, we needed help from Finnish and U.S. securities regulators, because Finnish and U.S. tender offer rules have inconsistent requirements such as timing provisions. We were effectively blocked from conducting the cross-border tender offer unless we obtained regulatory relief allowing us to proceed in a harmonious manner under both sets of rules. With our oversight, our Finnish and U.S. counsel coordinated their efforts to quickly get formal requests to both sets of regulators.

Having received the necessary relief, in March 2016 we launched the tender offer and awaited the results. Day by day, we reviewed tender counts to see if we would get to the

90% threshold. The drama continued until the end of the offer period, as holders don't typically rush to tender their shares. Fortunately, when the final count was in, approximately 93% of Biotie's shares were tendered and we knew we had a deal. We closed on the tender offer in late April, and then in May we closed on a second, voluntary tender offer at the same price, bringing us another approximately 4% of Biotie.

Acorda was now the owner of approximately 97% of Biotie. Despite our substantial legal control over the company, it remained a public company with minority stockholders, and we had to carefully navigate the maze of business and legal considerations that now existed. We immediately proceeded to initiate the Finnish squeeze out arbitration process for the approximately 3% of shares that were not tendered. Redeeming these remaining shares would be critical to our integration of the businesses of the two companies. Finnish counsel had alerted us to the potentially lengthy timeline of the arbitration process, which in practice proved to be an accurate prediction. We formally initiated the process in April 2016, and it was not legally finalized until almost 10 months later. Fortunately, under Finnish law there was a mechanism to acquire the remaining Biotie shares during the pendency of the arbitration process. In September 2016, while the arbitration continued, we completed the acquisition of 100% of Biotie in exchange for our provision of a security deposit for the remaining purchase price.

In the arbitration, we faced a real challenge from a small group of stockholders who rejected the price we negotiated in the combination agreement – they were seeking a much higher per share payout for the remaining 3% of Biotie. Ultimately, the arbitrators ruled in our favor and upheld our negotiated deal price. We did not think the legal or business arguments made by the stockholders had any merit, but we could not take this for granted ahead of the decision. Accordingly, we were forced to commit the time, resources, and fees to vigorously defend our deal price in written briefs and oral argument. The arbitrators issued a pricing decision in November 2016, which became legally finalized in February 2017 when no appeals were filed.

Did We Close Yet?

Not surprisingly, we were often asked if the transaction had closed and if Acorda owned 100% of Biotie. Unfortunately, the process described above made it very difficult to answer what would normally be a simple question with a clear answer. Was it April 2016, when we closed the initial tender offer? Was it September 2016, when we obtained title to the last of the Biotie shares during the squeeze out arbitration? Or was it February 2017, when the arbitration process was legally finalized?

As it turned out, the multi-step acquisition process meant there would be different answers to this question depending on the matter at hand. For some matters, the initial tender offer closing in April 2016 was a critical milestone, meaning that was the “acquisition” for legal, finance, or other some purpose because we acquired majority control. For other matters, “closing” meant the acquisition of the final outstanding Biotie shares in September 2016, when it became a wholly-owned subsidiary. And for still other purposes, we could not say the acquisition was legally completed until February 2017, when the Finnish authorities certified that the Finnish arbitration decision had not been appealed and was final and binding. Sometimes, it was difficult just to find the correct words to describe the status of our acquisition in a document.

During the squeeze out arbitration, many former Biotie stockholders whose shares were covered by the proceedings were similarly confused about the process. Many reached out directly to Acorda or Biotie, even though they were represented by a legal trustee in the proceedings. For example, some asked when Acorda would be purchasing or redeeming their shares, although we had already acquired ownership of their shares in September

2016. They also wanted to know when Acorda would be paying for their shares, and we could not provide an answer because it depended on the timing of the Finnish arbitration process. Even if we wanted to, legally, we could not work out payment arrangements with any former holders outside of the Finnish arbitration process.

From an operational perspective, the multi-step acquisition process created a dizzying array of issues for integration. Even in the best of circumstances, integrations present challenges and can be disruptive to organizations. As the Acorda and Biotie organizations were poised to coalesce and experience the synergies of combination, we had to consider issues coming from many angles that sometimes were at odds with integration. This included, for example, the implications of being a majority owner of a public company, Finnish legal governance requirements relevant to Finnish public companies, and operation of the business during the pendency of the arbitration process. The phased deal process forced us to implement an evolving integration process, where we found ourselves constantly evaluating next steps as the deal progressed.

But the delays also offered a silver lining. While our 2014 Civitas acquisition was completed in less than one month from signing to closing, that speed also resulted in integration challenges. In contrast, the protracted nature of the Biotie acquisition has given us the opportunity to take a thoughtful, step-wise approach to the integration. The pluses and minuses of each approach can be seen. Going faster in an acquisition means that the synergies of combining the two companies will be realized sooner, but the fast pace may lead to mistakes. On the other hand, while a more drawn-out approach can be challenging, the longer timelines give team members a greater opportunity to take into consideration all relevant factors.

After the completion of the first tender offer in April 2016, Acorda owned more than 90% of Biotie, effectively giving us full control over the company. Acorda and Biotie management were eager to get to work, from the highest level of joining the two reporting structures to more mundane things like changing building signs, email addresses, and the like to reflect that Biotie had become part of Acorda.

However, as noted, Acorda did not yet own 100% of Biotie. This meant that Biotie had to remain a public company with public stockholders. Also, Biotie had ongoing obligations to the holders of certain loans that, under Finnish law, could not be repaid. Based on advice from Finnish counsel, these and other considerations meant that we could start integrating, but only to a degree. For the time being, we could collaborate and coordinate, but we would have to remain at arm's length under a memorandum of understanding between the two companies. We also had to account for Acorda "services" – e.g., when an Acorda employee provided support for ongoing Biotie work – to ensure that we respected a separate and independent Biotie business. All of this was rather ironic, because the Biotie business stood to benefit greatly from synergies with Acorda. Biotie had a very talented team, but Acorda could supply additional resources and expertise needed to continue advancing the tozadenant and other programs. We followed the rules, but not without understandably creating some frustration.

We Aren't Done Yet

Fortunately, with the completion of the Finnish arbitration process, we can now say that we have completed this transaction. However, despite our 100% ownership of Biotie and this legal completion, we continue to face complex legal, finance and tax considerations that derive from the inherited Biotie organization and its corporate and asset structure. Although our integration is proceeding, these considerations have the potential to have long-term impacts on some aspects of our combination, and we still have a lot of work to do.

In addition, Biotie's cross-border presence will have a permanent impact on some aspects of our business. This is particularly the case in matters of employment, where Biotie has offices in both Turku, Finland, and California in the U.S. Throughout 2016, as we worked step-by-step through the acquisition, we identified and resolved numerous issues involving Biotie employees, for example, the timing and process for rolling them into Acorda salary and benefits, granting them Acorda equity, and the like. For all of these issues, we had to complete a dual analysis under both Finnish and California law. The Turku employees will have an ongoing impact, as we will need to continuously consider Finnish law governing issues such as those associated with their participation in our compensation, benefits and equity programs and Finnish and EU law on matters of data privacy.

Conclusion

Our work on the Biotie transaction has been both fascinating and challenging. Not surprisingly, in real time we were often operating under intense pressure and short if not immediate timelines. In the end, as we look back, the transaction successfully proceeded mostly as expected without significant delays. This is a testament to the quality of the internal and external teams on both sides of the transaction.

We could never have anticipated just how complex this process was going to be and how much effort would be required. Of course, it would not have made any difference on Acorda's decision to acquire Biotie. This was and remains an exciting acquisition for Acorda – Biotie's research and development programs, particularly tozadenant, have the potential to contribute substantially to Acorda's growth. If we are successful going forward, it will have been a small price to pay.
