Cross-Border Acquisitions Present Issues Not Found in Domestic Deals – Part 1

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The merger and acquisition market has been robust for quite a while. Many deals have a cross-border element, either because a non-U.S. purchaser is acquiring a U.S. target (an inbound deal) or a U.S. purchaser is acquiring a non-U.S. target (an outbound deal). Although purely domestic transactions have many common issues with cross-border deals, the latter also present considerations not present in domestic deals. These include:

Antitrust and Competition Law Filings

Inbound deals. An acquisition may require a filing under the Hart-Scott-Rodino Antitrust Improvements Act. This filing is made with the Department of Justice and the Federal Trade Commission to enable them to review transactions for potential antitrust concerns. Filing is mandatory for transactions meeting the filing thresholds. The thresholds include a size-of-parties test and a size-of-transaction test. The size-of-transaction threshold is adjusted annually for inflation and for 2019 is $90 million; no filing is required for deals below that amount. A 30-day review period applies, though filers can request early termination, and the period can be extended by another 30 days if the government requests additional information. Failure to file when filing is required results in very steep penalties (in excess of $42,000 *per day*). Filing fees are also significant and vary depending on the size of the transaction, ranging from $45,000 to $280,000. HSR includes extensive regulations interpreting the filing requirements.

An outbound transaction can also be subject to HSR filing requirements if it will confer control of significant U.S. business (for example, acquisition of a foreign company with U.S. operations).

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Outbound deals. Acquisitions in other countries will typically require compliance with foreign competition law restrictions and requirements. Compliance with more than one regime may be necessary for a single deal. For example, an acquisition in the European Union requires compliance with EU competition law and may also require compliance with competition law of particular countries, such as Germany.

CFIUS

For inbound deals, the Exon-Florio Act (Section 721 of the Defense Production Act of 1950) authorizes the President or his designee to investigate acquisitions by foreign acquirors of companies engaged in commerce in the U.S. to determine the effect on national security, and authorizes the President to prohibit such acquisitions, or direct the Attorney General to seek divestiture or other appropriate relief for already completed transactions, that are determined to threaten U.S. national security. By executive order, the President designated the Committee on Foreign Investment in the United States ("CFIUS") to conduct investigations. CFIUS is composed of cabinet-level and other officials.

The CFIUS regulations provide for voluntary notification of acquisition transactions. The regulations establish a 45-day review period following submission of a notification and a subsequent 45-day investigation period (if an investigation is undertaken), and require a final report within 15 days thereafter. CFIUS notifications are filed jointly by the acquiring and acquired companies and must provide extensive information about the transaction, the acquiror and the business being acquired. Information is required not only for the entities involved in the transaction but also for intermediate and ultimate parent companies and certain owners of foreign acquirors, as well as officers of subject companies. Preparation and filing of voluntary notifications is typically a very time-consuming task requiring gathering and assembling of large amounts of information and coordination between acquiring and selling parties.

After a transaction clears a CFIUS review, it is insulated from further action except where the initial review was based on incorrect or incomplete information. In contrast, a transaction that does not undergo a CFIUS review may be investigated, and action taken, at any time, even long after it has closed.

Historically, CFIUS' review of foreign investments has been limited to transactions involving *controlling* stakes by foreign persons in U.S. companies. However, 2018 CFIUS amendments made several significant changes to the act.[1] Among these are expansion of CFIUS' jurisdiction to include certain *non-controlling* investments, including joint ventures, made by foreign persons in U.S. businesses involved in critical technologies, critical infrastructure or sensitive personal data. For some such transactions, filing of a mandatory declaration (shorter than a voluntary notice) is required. CFIUS has been conducting a pilot program since the fall of 2018 for certain mandatory declarations.

Export Control

Export control issues most frequently arise in inbound deals but can also arise in outbound deals. A U.S. business dealing in products or services listed on the U.S. Munitions List must be registered under the International Traffic in Arms Regulations ("ITAR"). Export licenses are required for export of products or services, including technical data, subject to ITAR.

Acquisition of a company that is an ITAR registrant requires a 60-day advance notice to the Department of State's Directorate of Defense Trade Controls. A notice of completion of the transaction must also be sent to the DDTC within five days following completion.

U.S. Export Administration Regulations govern certain "dual use" products or services, which may have both government and commercial applications, included in the U.S. Commercial Control List. These also require export licenses and are subject to the same "deemed export" issues that arise with respect to ITAR.

Handling of technical data is fraught with potential problems. Providing access to technical data (including in due diligence) to a non-U.S. person will be deemed to be an unlicensed export, meaning a registrant may violate the law simply by a site visit, by including technical data in an e-mail sent to a non-U.S. person or even by discussing it in a phone call. Technical data transferred to an acquiror's server located outside the U.S. can also constitute an unlicensed export. So, too, will providing it to a non-U.S. person serving as an officer or director of an acquiring company, even if the acquiror itself is a U.S. subsidiary of a foreign company. This can also happen in the post-closing integration phase, for instance if non-U.S. personnel of an acquiror are granted access to restricted areas of the target company's facilities or to technical data.

Significant civil and even criminal penalties can apply for unlicensed exports under ITAR or EAR.

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[1] Additional rulemaking for full implementation of these changes is required by February, 2020. Proposed rules were issued in September, 2019 and have yet to be finalized as of December.