GLOBAL MERGER CONTROL AND FOREIGN DIRECT INVESTMENT CONSIDERATIONS ASSOCIATED WITH CROSS-BORDER TRANSACTIONS

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Recent developments regarding global competition enforcement and foreign direct investment, or FDI, review regimes have created uncertainty for cross-border transactions. Specifically, global merger control authorities have become increasingly aggressive in "calling in" transactions under so-called "voluntary" regimes and a number of FDI review regimes recently have been established or expanded. These developments have resulted in more complicated due diligence processes, global merger control and FDI filing analyses, and contract negotiations associated with cross-border transactions. To ensure that cross-border transactions can be successfully completed, this added complexity demands the exercise of judgment and close coordination between the parties and their respective antitrust and FDI teams. This article summarizes the recent developments regarding the global merger control environment and global FDI review regimes, highlights the practical implications of these developments for parties involved in cross-border transactions, and discusses the overlapping considerations created by the global merger control and global FDI review regime analyses.

I. INTRODUCTION

Cross-border transactions are beset with more uncertainty and potential for delay than ever before. Only a few decades ago, companies involved in cross-border transactions faced notifications to just a handful of competition authorities, triggered by relatively objective filing tests. As competition enforcement spread, so did filing jurisdictions and potential notification obligations, with the result being that it was no longer unusual for a major cross-border transaction to trigger upwards of 40 filings, based on less certain filing thresholds such as those depending on a target company's market share in a particular jurisdiction. As logistically difficult as that process was, managing it pales in comparison to the current wave of uncertainty crashing over companies involved in cross-border transactions.

This escalation in uncertainty is driven by two overlapping trends, one within global competition enforcement and the other stemming from new review regimes targeting foreign direct investment, or FDI. Within competition enforcement, so-called "voluntary" regimes, such as those in the United Kingdom, Australia, and New Zealand, are becoming increasingly aggressive in "calling in" transactions based on speculative theories of harm, while the relatively predictable consumer welfare standard is under attack. At the same time, a significant number of major jurisdictions have established, or have significantly expanded pre-existing, global FDI review regimes that scrutinize the nature and substance of a target company's business and activities undertaken in a particular country and the identity and nationality of the relevant foreign investor, and that empower governments, in some cases, to block or restrict cross-border transactions when these considerations conflict with often vaguely-defined national security, national interest, or other strategic concerns.

Now more than ever, then, managing notification requirements and strategy in cross-border transactions requires the serious exercise of judgment and the close coordination of the relevant parties to the transaction and those parties' antitrust or competition and FDI teams, as this article explains. Part II will provide a brief overview of the global merger control environment. Part III will provide a summary of the recent developments in global FDI review regimes and highlight three of the key issues in these FDI review regimes. Part IV will discuss the overlapping considerations created by the global merger control and FDI review regime analyses.

II. GLOBAL MERGER CONTROL

Merger control review seeks to prevent anticompetitive transactions from occurring. While the contours of what constitutes an anticompetitive transaction vary across jurisdictions (and over time), generally regulators purport to prevent transactions that would result in consumer harm from higher prices, reduced quality, less innovation, reduced product variety, or worse service. Antitrust and competition regulators will typically reject claims from parties that the regulator is seeking to stop a deal on a non-antitrust/competition basis.

Merger control regimes are often suspensory: parties cannot close until they file with the regulator and obtain clearance or waiting periods expire. Closing in the absence of those conditions can result in the closing have no legal effect in a jurisdiction, fines, or criminal penalties, depending on the jurisdictions. Regulators are increasingly reaching out to parties when a deal has not been filed in their jurisdiction to confirm that a filing was not required.

In suspensory regimes, there are rules setting forth when a deal must be notified to the regulator. In the U.S., the criteria is based on the size of the transaction and the size of the parties, but in most jurisdictions, the criteria depends on the Parties' local sales or assets in a jurisdiction. (Put differently, the criteria typically does not depend on an actual competitive assessment.) There are some jurisdictions where filings depend on market share screens. However, assessing market shares can be very difficult — "antitrust markets" may differ from the markets the business team uses in the ordinary course; there may be no precedent for the market's scope; and parties may not have market share data for a particular jurisdiction. In those situations, careful consideration is required to determine if a filing is required or if the parties have credible arguments for why they did not file.

Parties can sometimes be reluctant to file in certain jurisdictions. Even if there is no competitive concern, there is the possibility that a filing opens up the parties to a prolonged, baseless investigation that delays closing. This risk is a significant concern in nascent regimes where there is little precedent or insight into their procedures and approach.

More recently, the major development has been that nominally volunteer regimes cannot be treated as simply optional filings. Notable voluntary regimes include the United Kingdom, Australia, and New Zealand. Those regimes are increasingly demanding that parties make filings and delay closing while they conduct investigations. In the UK's case, this has extended to asserting jurisdiction over transactions that seemingly lack clear ties to the UK. For instance, the UK Competition and Markets Authority ("CMA") asserted jurisdiction over the proposed acquisition of

Farelogix Inc. by Sabre Corporation despite Farelogix Inc. having no direct sales in the UK or to UK customers. The UK CMA claimed that Farelogix supplied services in UK merely because it sold services to American Airlines, which, in turn, used those services to enable interline arrangements with British Airways, and Farelogix granted British Airways to those services for free.[2]

III. FDI REVIEW REGIMES

A. Recent Developments

As noted above, governments around the world, particularly in Europe, have recently amended their pre-existing FDI review regimes, or established new FDI review regimes, to accomplish some or all of the following: (1) provide relevant government authorities with jurisdiction to review transactions or expand existing jurisdiction to review additional transactions, (2) impose additional mandatory notification requirements, and (3) empower governments to impose conditions on, or block, FDI deemed contrary to a jurisdiction's national security, national interests, or other strategic or important considerations. While many developments in the FDI space started before the COVID-19 pandemic, they were turbocharged by strategic considerations created by the pandemic (i.e. protecting important healthcare-related supply chains, including, for example, personal protective equipment). In some cases, these FDI review regimes exist in parallel, or are connected, to other restrictions on foreign investment (i.e. "Negative List"-type restrictions that prohibit, or restrict to certain thresholds, foreign ownership in companies involved in certain industries or activities). New and enhanced FDI review measures continue to be proposed and considered, so the global FDI landscape remains very fluid.

In Europe, there have been significant developments at the European Union and EU member state levels. First, the European Union adopted a new FDI regulation that went into effect on October 11, 2020. The regulation does not provide the European Commission with the power to block or prohibit transactions, but instead lays out a common framework for FDI reviews by individual EU member states and increases cooperation among EU member states in the FDI review process, including, most notably, through the so-called "consultation" process pursuant to which all EU member states are made aware of transactions notified to an EU member state. Second, following the adoption of the EU FDI regulation and consistent with that regulation, a number of EU member states have enhanced pre-existing, or adopted new, FDI review regimes, including France, Germany, Italy, and Spain. Additionally, outside the European Union, the United Kingdom recently adopted a new FDI review regime that came into force in January 2022 and that subjects transactions in certain strategic sectors to a mandatory filing requirement.

A number of other key jurisdictions, including, for example, Australia, Canada, China, India, Japan, New Zealand, and South Korea, have well established FDI review regimes.

B. Key Elements of FDI Review Regimes

Although a comprehensive review of global FDI review regimes is beyond the scope of this article, this section will address three key elements of these regimes – the coverage or jurisdiction of the regimes, the scope of the applicable mandatory filing requirements under the regimes, and filing and review timelines under the regimes.

First, a jurisdiction's FDI review regime can apply if the target company has at least some presence or activity within the jurisdiction. The existence of a local subsidiary in a jurisdiction is generally sufficient to trigger that jurisdiction's FDI review regime, but different FDI review regimes take various approaches to whether the presence of local branch offices (without a local subsidiary), assets or operations, employees, or sales within a jurisdiction are sufficient to trigger the FDI review regime. Some FDI review regimes apply more broadly than others. Even when a transaction involves a target company with a local subsidiary in the relevant jurisdiction, some FDI review regimes only apply if there is a direct change in ownership of the relevant subsidiary (i.e. those regimes exclude from their jurisdictional scope transactions that involve a change in ownership at the upper-tier, foreign parent entity level without any direct change in ownership of the local subsidiary).

Additionally, some FDI review regimes include valuation or ownership percentage thresholds, meaning that a transaction would only fall within the scope of the FDI review regime if the value of the activities in a particular country or the value of the transaction in the relevant jurisdiction exceed a certain amount, or if the foreign investor is acquiring a certain ownership percentage (in addition to jurisdiction, such thresholds may apply in determining whether a mandatory filing requirement is triggered). Further, certain jurisdictions have different thresholds depending on the activities of the target (for example, Australia has lower value thresholds for so-called "national security businesses") or the nationality or type of the foreign investor (i.e. foreign government investor versus non-foreign government investor).

2 UK CMA, Anticipated acquisition by Sabre Corporation of Farelogix Inc., Final report, April 9, 2020, at 58, available at https://assets.publishing.service.gov.uk/media/5e8f17e4d3bf7f4120cb1881/Final_Report_-_Sabre_Farelogix.pdf.

Second, regarding mandatory FDI filing requirements, many FDI review regimes focus on similar kinds of transactions raising national security or national interest-related concerns. For example, subject to any applicable thresholds, a mandatory filing is triggered under many FDI review regimes when a transaction involves a target company involved with (1) defense-related or otherwise sensitive export controlled materials, (2) the production of material used in connection with, or the management of, essential public services, supply chains or critical or sensitive infrastructure, or (3) sensitive personal data or personal identifiable information. Additionally, in light of the COVID-19 pandemic, some jurisdictions expanded their mandatory filing requirements to cover medical- and medical supplies-related businesses, including businesses involved in the manufacturing and/or supply personal protective equipment.

However, there are not uniform definitions of these concepts across jurisdictions. The definitions that do exist populate a spectrum ranging from the very specific to the very opaque. For example, Germany has very specific definitions of data storage-related services that are potentially subject to a mandatory filing requirement. Other jurisdictions, meanwhile, define "national security" or "national interest," for example, incredibly broadly, giving their FDI review authorities significant discretion to decide what is, and what is not, subject to mandatory filing requirements, which can create significant uncertainty for parties involved in cross-border transactions. Further, the mandatory filing requirements in some jurisdictions apply to sectors and activities that would not traditionally be considered national security-related, including, for example, media or land acquisitions.

Third, filing and review timelines vary dramatically across FDI review regimes. Some filings must be made pre-closing, while other filings can be made post-closing. Under some FDI review regimes, the parties are not permitted to close a transaction until the relevant government approval is obtained. While some FDI review regimes, similar to the Committee on Foreign Investment in the United States ("CFIUS") regime, have clearly established and predictable timelines, the timeline for review in other jurisdictions can be unknown. Given these timing issues, it is important for parties to consider whether an FDI review analysis is required as early as possible in the deal timeline and factor any filing requirements into the commercial analysis of a potential deal.

IV. OVERLAPPING CONSIDERATIONS IN THE GLOBAL MERGER CONTROL AND FDI REVIEW REGIME ANALYSES

Although the merger control and FDI review regime analyses are distinct processes, they are often considered together in cross-border transactions. This section will address three primary ways in which the merger control and FDI review regime analyses overlap - specifically, due diligence considerations, filing decisions, and closing condition considerations.

First, merger control and FDI review regime due diligence is often conducted simultaneously. There is good reason for this overlap, as similar due diligence can be leveraged for both analyses. Most obviously, when starting the analyses, the first step is generally the same – determine the relevant universe of jurisdictions to be considered. Information about a target company's global presence (including the locations of its subsidiaries, branch offices, employees, sales, or intellectual property) can be relevant for both analyses. Conducting this due diligence together can create a more efficient deal process. However, it is important to keep in mind that there are differences in the type of information that is relevant to each analysis. For the merger control analysis, economic data on sales, revenue, and market share is typically most relevant. FDI review regime analysis is generally more focused on the nature of a target company's activities (for example, sales and marketing, research and development, and/or manufacturing), whether the target company is involved in a sensitive sector or activities for purposes of the applicable FDI review regime, and whether the target company has any government (particularly defense or security-related) dealings.

Parties need to make sure that they are thinking about what information is necessary for both analyses, drill down on unique issues presented by the specific deal (i.e. if a target company has government dealings, fully understanding the nature and extent of those dealings, including whether the target company is a unique or "sole source" provider of any products, materials, or services), and ensure that relevant antitrust and FDI review personnel are involved as early as possible. Since the level of detail required for the FDI review regime analysis can be significant, and different information may be required for the FDI review regime analysis for different jurisdictions, parties would be well served to initiate this due diligence as early in the deal timeline as possible.

Second, whether or not a merger control filing is being made can affect and influence the decision of whether to make an FDI filing. In some cases, the FDI filing decision will be clear – the transaction will clearly trigger a mandatory FDI filing or not. But more frequently, given the ambiguity of the FDI review regimes in some jurisdictions, the inconsistency between the letter of the applicable law and the operation of the FDI review regime in practice, the difficulty of clearly fitting transactions or the activities of a target company into the rigid language of the applicable regime, or the possibility of submitting a voluntary filing even when a mandatory filing is not triggered, the FDI filing decision is often more art than science. In addition to the formal legal analysis, the decision often hinges on considerations such as the extent of a target company's activities in the relevant jurisdiction and how essential such activities are to the enterprise as a whole, whether there is any actual capital inflow to the relevant jurisdiction, and the risk tolerance of the relevant parties. Whether a merger control filing is being made is another relevant consideration. Indeed, parties should assume that there will be information sharing and consultation across government authorities within a jurisdiction. An FDI filing (even a voluntary one) is potentially more likely to be advisable where a parallel merger control filing is being made and the target company's activities potentially could be considered to be covered by that country's FDI review regime.

Third, to the extent that a merger control and/or FDI filing is determined to be required or advisable, parties should consider whether they need or want any necessary government approvals (or, expiration of any applicable waiting periods) to be conditions to closing the transaction. Similar to the filing decision discussed above, this decision will be impacted by a variety of considerations, including the requirements of the applicable FDI review regimes, the materiality of the relevant jurisdictions (i.e. how much of the transaction and/or target company value is associated with the relevant jurisdictions), and the risk tolerance of the parties. Since closing conditions often speak to regulatory approvals generally, parties should be conscious of whether any merger control filings and any FDI filings require different or unique treatment in the closing conditions. Including approval under an FDI review regime that has a more uncertain or unpredictable review timeline, for example, can creates closing risks.

V. CONCLUSION

FDI review regimes have matured and become a significant regulatory issue applicable to most cross-border transactions, joining competition review regimes that have become increasingly complicated by voluntary notification and call-in mechanisms, which jurisdictions are employing aggressively. Although frequently grouped (or perhaps tacked onto) global competition review, FDI analysis now exists as a truly standalone, parallel process that can independently complicate, and, in some cases, threaten, deal considerations. There is every indication that the global FDI review landscape will continue to be active and evolve going forward, with key jurisdictions continuing to reform and expand their FDI review regimes and actively using their authorities to scrutinize, and in some cases ultimately prevent, transactions they deem objectionable. This latter risk is not abstract or hypothetical. For example, in late 2020, the French government blocked the acquisition of a French photo-sensor imaging technologies company by a U.S. company, and in April 2021, the Italian government blocked a Chinese takeover of a semiconductor company.

Despite the independent challenges and risks created by global competition and FDI review, as discussed above, these regimes remain linked as a practical and substantive matter in most deal processes. This linkage creates its own challenges. Parties to cross-border transactions need to be aligned not only on process, including the due diligence and analysis investment each party is willing to make, but also, and perhaps even more importantly, in their strategic perspectives and risk tolerances when filing or notification decisions are, as they are increasingly tending to be, more art than science.

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