An M&A Odyssey:

A Communicator's Guide to Foreign Investment Reviews

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strategic advisors

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A communicator's role in the changing face of cross-border M&A

Deal structure and value matter, but perception can be king in crossing the finish line.

Can you really obtain CFIUS approval? How long will MOFCOM review take? Does the Florange Act have an impact here? What does your BMWi approval path look like? How will you look in the ICA review?

Beyond being a seemingly odd set of questions with strange acronyms, the answers to these questions are increasingly important arbiters of success in cross-border transactions. Global communicators need to understand how to answer these questions and work with a growing array of stakeholders to help successfully guide cross-border transactions to success.

For years the world has grown "smaller" as international commerce increasingly results in global interconnectivity. Supply chains for almost any product crisscross international lines on their way to the global consumer.

This shrinking effect has unleashed new economic benefits and incredible innovations. In the last few years, however, the world started to feel the pinch of our globalized economy as governments sought to protect national boundaries.

One of the more profound impacts of this shift has been on cross-border M&A, which has quickly become a target of governments looking to re-assert some control over their sovereignty and protect their homegrown companies and national security. As a result, in the deal economy, the last two years have been marked by dramatic firsts and significant evolution.

As the global economy undergoes major change, communicators need to be nimble, forward-looking and carefully nuanced when communicating how a cross-border deal can be approved and successfully close. The right messaging needs to speak confidently about a transaction's ability to achieve long-term success, while also being tailored to not run afoul of the increasingly stringent and unpredictable political and regulatory processes that dictate their fate.

To understand this changing M&A environment it is helpful to look at a transaction pitting a global behemoth against a regional player. Recognizing the changing winds, a small Kansas company put cross-border M&A in a new light when it took on the global giant of Ant

Financial in launching a competing bid for MoneyGram. The bid was remarkable because it put the opaque regulatory body known as the Committee on Foreign Investment in the United States (CFIUS) at the center of its bidding strategy. While the Kansas company ultimately lost the bidding war, by proactively questioning Ant's ability to secure approval from CFIUS the plucky Kansans were able to eventually thwart a competing bidder from buying a rival based solely on national security concerns.

The deal was an early signal that underlying global tensions would increasingly be swept up in foreign investment reviews for cross-border transactions, raising the bar for approvals from Germany to China.

In the last year alone, we've seen the stunning block by the United States of Broadcom's purchase of Qualcomm. This was followed by China's block of Qualcomm's deal for of NXP. Germany brought Europe into focus when it moved to block State Grid Corporation of China's acquisition of 50Hertz.

Now governments around the world are not only using existing tools but actively expanding their powers to review foreign M&A making national security reviews a significant hurdle in closing cross-border transactions.

The amorphous, stakeholder-driven nature of foreign investment reviews puts communicators front and center. Deal structure and value matter, but perception can be king in crossing the finish line.
That means the communicator's role in securing deal approval has risen once again. No longer can companies rely strictly on messages of value, structure or process. The reputation of foreign companies has become a vital tool to successful M&A. What is your relationship to your home country? What is your track record in local markets? Who are your leaders? Can they be trusted? Is your company a responsible global citizen? These are questions that can soothe political concerns or inflame protectionist tendencies.

Early preparation is key to leading an effective and successful process. This workbook is intended as a practical tool for communicators to understand the standard approval process, the shifting local landscape and what those local stakeholders expect from foreign acquirers. In this first edition, we have collected a view into eight countries representing some of the world's largest economies and where we have seen an active dialogue about shifting sentiment on foreign acquirers.

We firmly believe that effective communications allows local realities to drive global planning. There are some global tips for beginning to build an approach to supporting cross-border M&A.

1. **Know how the process should work.** Every stakeholder will want to know a proposed transaction's path to closing. Simply being able to articulate that process is key to providing assurance there is a clear path.

2. **Know how the process <u>could</u> work.** As norms shift, it is equally important to understand how the standard process could change. What sorts of political pressures can be applied to impact the outcome? Can a 90-day review turn into 200 days? While you can't anticipate every twist and turn, understanding recent case studies can help create more effective and proactive communications.

3. **Build a story beyond value that is market specific.** When governments are looking to assert increased authority, understanding and respecting cultural norms is paramount. Small slights and misunderstandings can quickly become fuel behind broader patriotic concerns.

4. **Engage, in-person and often.** While every market has different expectations, there is universal truth behind in-person interactions. Try to build time for your lead executives to meet with community leaders, local media and develop a reputation for engaging with key constituents.

Country by Country Summary

Canada

Unlike most Western countries, Canada has a long and proud history of intervening in foreign M&A. The ICA gives the Canadian government fairly broad powers to review transactions on the relatively amorphous definition of "net benefit to Canada." However, Canadians are dropping some of their protectionist history of late and seeking to encourage more inbound M&A.

USA

CFIUS is the key to success in the United States. The secretive committee leads a highly confidential process that is taking longer to review transactions. There is increasing political pressure for CFIUS to use its sweeping and recently expanded powers to defend a growing list of American national security interests.

France

The French government has never been shy about becoming involved in M&A. New legislation should provide more clarity to a formal process, but communicators should always be aware of how public opinion and political inclinations can develop outside of standard ascribed processes. The pending harmonization of reviewing foreign acquirers across the European Union may not dissuade the French government's interest in M&A but will add further structure to the process.

Germany

Federal Ministry for Economic Affairs and Energy or "BMWi" has tremendous ability to impact M&A but the country's longstanding embrace of global trade has made action from the regulator strikingly rare. Recent action against a Chinese acquirer has reminded the market of the regulator's power and marked a turning point in the political debate over unfettered cross-border M&A.

Spain

Much like France, Spain balances an openness to foreign investment with a protection of strategic sectors such as energy, telecommunications or infrastructure. With no formal review process of foreign acquirers, a transaction can be subject to political winds and an array of regulations that can frustrate or block deals. Pending harmonization of reviewing foreign acquirers across the European Union may help create more of a formal process in Spain.

United Kingdom

The walls to foreign acquirers have not been erected in the United Kingdom … yet. There is a long, and often times proud, history of being a welcome home for foreign M&A. However, as recently as June 2018, the UK Government has published updated rules and concluded consultation on a White Paper protecting national security from hostile actors' acquisition of control over entities or assets. The UK Government will use the responses to refine any proposals ahead of the introduction of primary legislation.

European Union

New rules still working their way through the EU parliamentary system are likely to improve coordination but will not replace a final verdict from the home country. Communicators will need to be mindful of broad EU concerns, but should commit the majority of time and effort on FDI in the home country.

China

It is all about MOFCOM in China, an opaque regulator with broad powers to block deals against the national interest. As the country inches toward opening its doors up to outside investment, it finds itself forced to respond to closing borders in the West. Communicators should remain mindful of local sensitivities and the unique role of the press in society.

Japan

Culture is king in Japan. Instead of a complex regulatory framework to review inbound M&A, Japan is governed by a business community that runs on long-term relationships. As the country begins to welcome more inbound M&A, those willing to learn and respect the culture are likely to find a path to successful dealmaking.

Key Terms

For the purposes of this guide, the following terms are used broadly and their general definitions are outlined below:

- Acquirer: An investor or company foreign to that of the target that purchases a stake in the target that would be deemed relevant for FDI review.
- Stockholder: Public equity holders of target company or acquirer.
- Target: The organization subject to the acquisition or relevant investment from the foreign acquirer.
- Elected official/regulators – Representative of the local governmental organizations involved in reviewing or commenting on any FDI process.
- Media – Refers to the local countries public press.

Canada

Unlike most Western countries, Canada has a long and proud history of intervening in foreign M&A. The ICA gives the Canadian government fairly broad powers to review transactions on the relatively amorphous definition of demonstrating "net benefit to Canada." However, Canadians are dropping some of their protectionist history as of late and seeking to encourage more inbound M&A

What you need to know about the process

The Investment Canada Act ("ICA") is the Federal law governing substantial foreign direct investment in Canada.

Although the ICA gives the government the ability to prohibit foreign investments of "significant" size, its mandate is to review such transactions in a manner that encourages investment and economic growth. In general, any acquisition by a "non-Canadian" for control of a Canadian business, or Canadian subsidiary, is either notifiable or reviewable under the ICA.

ICA decisions are based on whether the investment presents a "net benefit to Canada," including whether the proposed transaction poses a detriment to national security. To determine the net benefit to Canada, the ICA assesses the expected impact on economic activity in Canada, participation by Canadians in the business and competition. An important consideration when investing in Canada is the nationalist and regional sensitivities that can arise and are elevated by the media or special interest groups. The protection of cultural entities, such as newspapers, telecommunications and broadcasting companies is built into the Act as well, with a threshold triggering an automatic review of only $5 million in value.

Regional interests can also influence the success of foreign investments in Canadian businesses. In 2012, Lowe's offer to acquire the Quebec-based hardware chain Rona happened to coincide with a provincial election. Rona's Board rejected the offer, and its largest shareholder, the nationalist-oriented pension fund Caisse de dépôt et placement du Québec, increased its ownership. This opposition was bolstered by Quebec politicians and media, causing the deal to flounder. When Lowe's returned in 2016 with a richer offer, they also included terms to maintain Rona's Canadian headquarters in Quebec, keep the Rona brand and the majority of Rona's employees.

Despite the case study outlined above, it is important to note that the vast majority of direct foreign investments in Canada are approved.

What your stakeholders will want to hear

Stockholders – Stockholders are generally familiar with the Canadian review process and the cultural sensitivities to foreign acquirers. Successful deals will communicate an understanding of the role that public opinion and stakeholder interests play in the government's approval of foreign direct investment. Demonstrating how any of those risks are mitigated in the deal announcement is critical. As an example, when the retail drugstore chain Rexall was purchased by U.S.-based McKesson Corporation in 2016, McKesson communicated that they would retain the Canadian management team and continue to invest in the Canadian business.

Media – As the foreign investment review process is relatively transparent, the media takes great interest in high-profile acquisitions. Media outreach should be a component of the communications strategy, bearing in mind that their principal concern is the "net benefit to Canada" clause in the Act. Media will also be sensitive to the concerns of various stakeholders, such as labour and local interests, and will bring these forward if newsworthy.

Elected officials/regulators – Government leaders and the concerns brought to them from their [regions / constituents] can come into play in decisions on direct foreign investments. The relatively amorphous definition of "net benefit to Canada" allows for politics to play a fairly significant role in the outcome. For instance, when BHP Billiton announced the acquisition of Potash Corp in 2010, it was overturned by the federal government, citing "no net benefit." Key to this decision was the objections of the provincial government and the Saskatchewan Members of Parliament — all from the ruling Conservative party. Building relationships in both national and regional governments are vital to securing approval of any foreign inbound M&A.

How global protectionism is impacting the process

Historically, Canada has had a protectionist attitude toward foreign investment, particularly in aerospace, telecommunications, cultural industries and certain agricultural sectors. Recently, however, Canada has been bucking the global trend and seeking to reduce some of its barriers to foreign M&A. The current government has been actively soliciting international trade and investments in the face of growing protectionism from the United States, and has overturned decisions on investments blocked by the previous government. Along with the recent free trade agreements signed with Europe, Asia and North America, the threshold for review under the ICA has been increased to $1.5 billion for investors from those regions. It is expected that this new threshold will result in a 50% reduction in the number of transactions reviewed by the ICA.

United States of America

CFIUS is the key to success in the United States. The secretive committee leads a highly confidential process that is taking longer to review transactions. There is increasing political pressure for CFIUS to use its sweeping and recently expanded powers to defend a growing list of American national security interests.

What you need to know about the process

As a communicator you will need to understand CFIUS (Sif-ee-us), a secretive regulatory body reviewing inbound cross-border M&A in the United States. In certain transactions, other federal and local state regulatory bodies may have a say in the outcome of a deal, though these reviews are not fundamentally based on the foreign nature of the transaction.

CFIUS consists of eleven regulatory agencies and is led by the U.S. Department of Treasury. The process is strictly confidential but the Committee's primary role is to review if the transaction poses a risk to U.S. national security. Through a number of paths, CFIUS can dramatically impact a transaction by requiring divestitures, restructuring or other remediation, in addition to blocking a deal outright. On rare occasions, the committee can even cause a transaction to be unwound after it has closed.

Because CFIUS review is a confidential process, it is virtually impossible for outside stakeholders to accurately gauge the progress of a particular transaction undergoing CFIUS review. In fact, CFIUS takes pride in its confidentiality, thus making open commentary or speculation on the process a detrimental action for foreign buyers. The challenge for communicators is to give stakeholders confidence in the outcome without being seen as prejudging or revealing the status of the review process.

Because CFIUS can legally both review and enforce changes to a transaction even after it is closed, most companies voluntarily put a transaction through review between announcement and close. The review process involves a dialogue between Treasury staff and transaction counsel that results in a formal review that is subject to specific timetables. When CFIUS commences a formal review, it has an initial 45-days to determine if the transaction is cleared or if it would like to conduct a formal investigation that can take an additional 45 days or more. At the end of the formal investigation CFIUS will make a formal recommendation to the President to block or clear the transaction, sometimes with remedies that have been negotiated during the process. The President then has 15 days to make a final determination. To gain more time for review, CFIUS may ask the parties to rescind their filing and re-file so as to restart the timetable. Recent regulation aims to help CFIUS more efficiently move through this process.

What your stakeholders will want to hear

Stockholders – Stockholders are wary of CFIUS risk because of the Committee's ability to unilaterally impact a transaction regardless of the outcome of other regulatory reviews. While risk tends to be low for most deals, stockholders will want to understand why the buyer fit the criteria to secure CFIUS clearance. It is helpful to emphasize past CFIUS clearances from the organization or management team and how the business being acquired relates to national security issues.

Media – For the most part, U.S. media do not pay much attention to CFIUS approval, as the confidential review process makes it challenging to credibly report any updates. However, media inquiries and stories related to CFIUS can be cause for concern in the deal approval process. Merging companies should avoid direct commentary on CFIUS stories and engage selectively on background. Media will also want to understand why CFIUS clearance is likely based on past CFIUS clearances from the organization or management team and how the business being acquired relates to national security issues.

Elected officials/regulators – Most national regulators have direct input into the CFIUS process by either participating on the Committee or being added as an "observer" to a particular review. It is important for these regulators to understand the company under review so they can credibly participate in the review process. Elected officials have no direct say on merger reviews in the United States. However, in recent years politicians have sent public and private letters to the US Treasury Secretary intended to impose political pressure on the CFIUS process. It is critical the company demonstrate a willingness to go through a thorough review and show an appreciation and understanding of US national security issues as it relates to the transaction in meeting with certain elected officials.

How global protectionism is impacting the process

In many ways, the United States is a global driver of rising protectionist tendencies. It is no surprise then that a recent debate in the U.S. Congress has led to the expansion of CFIUS powers as elected officials look to CFIUS to take a more active stance in protecting perceived American interests. This expansion has led to a greater awareness of CFIUS as a deal risk among media and investors. Moreover, CFIUS approval has become an increasingly political process with elected officials raising alarm and calling for the Committee to take action.

Almost any foreign deal now will need to articulate some path to CFIUS clearance on announcement and those with high CFIUS risk may find more immediate investor and media scrutiny. Perhaps most importantly, CFIUS will soon need to provide a detailed report to Congress on an annual basis that outlines details on each case reviewed. For transactions that are quietly deemed a risk, this new disclosure may prove a long-term reputation challenge.

France

The French government has never been shy about involving themselves in M&A. New legislation should provide more clarity to a formal process, but communicators should always be aware of how public opinion and political inclinations can develop outside of standard ascribed processes.

What you need to know about the process

In France, economic patriotism or protectionism has come in many guises. In the past, the French government has already played the national "champion" card such that cross-border M&A were blocked or hampered. For example, in 2015, the French government was openly opposed to the acquisition of Alstom's electricity generation assets by General Electric. They even indirectly solicited Siemens to make a competing offer for Alstom's assets. In the end, the deal was completed with a number of commitments secured by France from General Electric.

Although foreign direct investment in France is not and will not, as a rule, need to be authorized, the sensitive nature of certain investments is assessed. Since 2004, a prior approval by the Ministry of Economy and Finance is required for FDI affecting public order, safety or national security, whether made by EU or non-EU acquirers.

Once notification has been received, the Ministry of Economy and Finance conducts a review of the reported transaction, which must be completed within two months (otherwise the authorization is deemed granted). In practice, the review process provides the French government with the opportunity to impose conditions on or changes to the terms of the proposed investment to safeguard national interests. In particular, the Ministry has broad authority to impose conditions on the business. Decisions are subject to full review by administrative law courts. In addition to the Ministry process, acquirers should also be mindful of the unique rights given target organizations through the Florange Act.

What your stakeholders will want to hear

Stockholders – It is well known to stockholders that seeking approval of a transaction in France can be an uncertain affair. Most stockholders will be initially wary of the path to close and the expected conditions placed on a deal, especially if the foreign acquirer is relatively unknown or perceived as opposed to French national interests. It is critical to communicate that the transaction was conceived at the outset with an understanding of France's political and patriotic nature. This will help give stockholders comfort in case French media and the political climate create inevitable noise that can challenge the outlook to a transaction closing.

Media – French media pay a lot of attention to the French government's authorization of foreign acquirers. Even if the review process by the Ministry of Economy and Finance is confidential, its conclusions are public. And the government is keen to promote in the

media the conditions it wants to impose to acquirers in order to gain a leverage during negotiations. Media inquiries can thus be cause for concern in the deal approval process and strong relationships should be established with key journalists from the beginning of the negotiations (first to raise the profile of the acquirer, highlight the success of its past business operations, promote its ethics and quality governance framework etc. and then to comment selectively on or off-the-record if needed). Furthermore, French media tend to be patriotic as well and will want to know if jobs will be maintained or even created in France, activities offshored or not. The impact and potential benefits for France will always be scrutinized.

Elected officials/regulators – It is important that elected officials and regulators understand the acquirer, its strategy and ambitions in France so they can participate in the review process and support the offer. On the other hand, acquirers must show that they understand and respect the established process in France and share a convincing strategic rationale supporting their deals.

How global protectionism is impacting the process

The French government has often been involved in the most important M&A processes involving foreign acquirers. It is little surprise then that France is moving ahead with legislation that will extend and diversify governmental powers to review and control foreign acquisitions.

The future PACTE legislative bill (Action Plan for Business Growth and Transformation) aims to empower businesses to innovate, transform, grow and create jobs. It was presented to the Council of Ministers on June 18th, has been under examination by the National Assembly since the beginning of September and should be voted before the end of the year.

Major changes expected under the PACTE bill:

- The list of protected business sectors might again be extended;
- A mechanism would be provided to monitor commitments taken by an acquirer upon making a pre-approved transaction with more efficient breach penalties;
- The Government's ability to exercise special rights where it owns shares in a company (not uncommon in France) will be expanded; and
- The Defense and National Security Council would be vested with new monitoring duties, while Bpifrance and the Agence des Participations de l'Etat would be able to release funds to protect French companies.

The Ministry of Economy and Finance will continue to be considered as a deal risk by media and stockholders, and its opinion will always be taken into account and brought into the public arena. Although President Macron has offered a more liberal, globalized stance on M&A it is unlikely that France will become an easy place for cross-border transactions any time soon.

Germany

Federal Ministry for Economic Affairs and Energy or "BMWi" has tremendous ability to impact M&A but the country's longstanding embrace of global trade has made action from the regulator strikingly rare. Recent action against a Chinese acquirer has reminded the market of the regulator's power and marked a turning point in the political debate over unfettered cross-border M&A.

What you need to know about the process

In Germany, the Federal Ministry for Economic Affairs or "BMWi" is tasked with foreign investment reviews. There are two factors that put a transaction onto the radar screen of the BMWi: the acquiring organization is located outside the territory of the EU/EFTA region and the transaction results in the ownership of at least 25% of voting rights of the company residing in Germany.

Unless the transaction involves a critical infrastructure protection program there is no general obligation for organizations to obtain approval for an acquisition. The BMWi can choose to start a review process within three months after the day it obtains the acquisition agreement. It is possible to apply for a binding certificate of non-objection from the BMWi in advance. If the Ministry does not open a review process within two months, the certificate shall be considered granted. The acquisition may be restricted or prohibited only within four months after the full set of documents has been completed.

BMWi shall involve other federal ministries concerned in the particular case within the scope of their respective competences. Action against transactions is relatively rare because the issuance of orders or prohibitions may require the consent of the entire Federal Government for deals not in a critical-infrastructure protection program. This provision underlines the exceptional nature and high bar the country puts on applying restrictions or prohibitions of foreign direct investments.

Since July 2017, the BMWi has significantly tightened the monitoring of the acquisition of German companies by foreign investors and lowered the bar to intervene in M&A transactions. The 9th ordinance amending the Foreign Trade and Payments Ordinance, for example, stipulates a mandatory obligation to report certain takeovers as part of the cross-sector audit. The associated nationwide reporting requirements increase the administrative workload of companies and delay the time required for transactions: Between October 2004 and July 2017, the BMWi examined a total of 383 purchase transactions and initiated a formal review in 36 cases. Between July 2017 and May 2018, however, 62 acquisitions were investigated and 39 cases were initiated for review.

What your stakeholders will want to hear

Stockholders – Stockholders generally view BMWi risk as low given how rare it is for the ministry to act and the general positive attitude of German politics towards globalization, free trade and the mostly free flow of capital. Nevertheless, recent decisions of the German authorities to block a potential investment of Chinese investor State Grid Corporation of China (SGCC) from acquiring the German grid operator 50Hertz have raised awareness amongst stockholders concerning the ability of BMWi to "torpedo" deals in strategically relevant industries. It is thus helpful for companies and financial sponsors to explain the characteristics of the review process as well as the tools that BMWi has at hand to influence the outcome of a potential deal. Given the political nature of how BMWi acts, it is equally important to emphasize the unlikelihood of political interference.

Media – German media expressed some surprise at the recent decision to block SGCC given the seamless acquisition of German robotics company KUKA by Chinese conglomerate MIDEA in 2016 – although this deal is widely perceived as a wake-up-call for German politics. Accordingly, German media shows some sympathy for a more restrictive political approach on foreign investments. Foreign acquirers should therefore approach selective media as early as possible with a reliable, transparent and dialogue-oriented backgrounding approach, explaining the strategic rationale as well as their own business model and track record. Nevertheless, directly addressing political decision makers through the media is not advisable.

BMWI/other ministries – The Ministry for Economic Affairs and Energy is in charge of the official approval process. It is important that staff and leadership of the ministry know and understand the acquirers. Transparency is key. Background talks can start early with State Secretaries as well as department leadership. During the review process the BMWi might request information from other ministries, such the Foreign Office.

Elected officials/regulators – Elected politicians have no direct input in the approval process, but it is a good idea to include leadership and key politicians of a certain policy field in dialogue process. However, it is common that politicians sent public and private letters to the BMWi leadership intending to put political support for a certain investment. It is critical to be available for access and present in Berlin in order to be transparent.

How global protectionism is impacting the process

Due to the increase of Chinese investments in Germany, a political debate has started about the review and approval process. The Minister for Economic Affairs and Energy has communicated plans to further tightening of German foreign investment controls. The German Federal government is considering lowering the formal threshold for investment audits from 25 to 15 percent. Public resistance to this has not been heard so far. In view of growing economic uncertainty about protectionist tendencies in other parts of the world, this is unlikely to change in the future. Furthermore, ongoing negotiations at EU-level which will eventually lead to a harmonized approach towards foreign direct investment in 2019 show that regulators will not only look at investments into "critical" sectors, but might also examine "strategic" sectors, as well. The German government has welcomed the EU Commission's initiative.

Public debate in Germany started when the BMWi blocked SGCC from acquiring 50Hertz, based on the experience that the government has not had much at hand to block MIDEA's acquisition of KUKA in 2016. Surprisingly undiplomatic and in plain language, the German federal government justified the decision with a "high interest in protecting critical energy infrastructures for security policy reasons. The German people and German economy expect a secure energy supply." As one of four grid operators, 50Hertz secures the power supply of around 18 million people. While there is some ambiguity about other foreign markets, the message to Beijing is clear: The time when investors from the Far East were able to acquire German companies largely unhindered is over.

Spain

Much like France, Spain balances an openness to foreign investment with a protection of strategic sectors such as energy, telecommunications or infrastructure. With no formal review process of foreign acquirers in place, a transaction can be subject to political winds and an array of regulations that can frustrate or block deals.

What you need to know about the process

Similar to its northern neighbor France, Spain closely follows potential changes to strategic companies in the country. But this does not mean Spain is closed to outsiders. In fact, it is quite the opposite. In the first half of 2018, it is estimated that foreign investors represented 80% of the total investment in Spain.

The Spanish Government does not have a clear-cut process to reviewing M&A with foreign acquirers. All transactions involving a public company are subject to review by the market supervisor CNMV and Spanish anti-trust review, when it is a relevant sector with a low number of competitors.

Despite this, in practice, the Government is very cautious around transactions in strategic sectors for the country such as energy, telecommunications, and infrastructure. Something especially relevant when the process could affect companies with a history of direct government ownership. In this type of transaction, the Spanish authorities follow the process carefully, and they can require the compliance with industry-specific regulations.

Moreover, Spain also has powerful regional governments that can seek to exert political influence in the national government's view of a transaction. While these regional governments lack an ability to directly intervene in the process, communicators should be aware of their strong influence and ability to sway the views of the national government.

The takeover case of Abertis is a good example to understand how Administrations can demand to know the intentions of foreign companies before a transaction is commenced and how they can apply industry-specific regulations. In this transaction, Atlantia, an Italian tollroad and infrastructure conglomerate, made an offer to acquire Abertis, a Spanish peer. Some Spanish ministries publicly expressed their doubts about the offer, demanding the CNMV to revoke it on the grounds that based on land transportation sector regulation, it was necessary for Atlantia to request permission from the Ministry of Industry before opening the official process with the CNMV.

What your stakeholders will want to hear

Stockholders – Stockholders are well attuned to how the Spanish Government reviews foreign M&A and are generally comfortable with the approval process given the country's openness to foreign investment. If a transaction will impact a strategic sector, it is very important to demonstrate to stockholders that you have a fluent relationship with the national Authorities to explain the objective of the deal. This means demonstrating a sensitivity to local issues such as keeping local brands and retaining employees or headquarters.

Media – Spanish media follow transactions closely and are most sensitive to foreign acquirers when it seems there will be a loss of jobs or brand identity. Given the uncertain political approach to a transaction, a negative narrative about the transaction in the media can be directly detrimental to securing approval. Regional media are critically important given the political influence of regional governments. Working productively with media to educate them on the transaction and the acquirers commitments to the country is of critical importance.

Elected officials/regulators – It is important to approach key administrations, both at the national and regional level, at an early stage of the process. If possible, inform them of the acquirer's goal, explain the deal rationale and demonstrate the company's commitmentcommitment to the territory in which it operates and to the target company and it's region. Local sensitivity is key for an operation to be successful in Spain. It is also important to highlight the value and importance that the acquirer and its team have for the joint project. Details such as maintaining the headquarters and the stock market listing in Spain as well as presenting an investment plan for the region or keeping part of the management team convey a reassuring message to both national and regional administrations.

United Kingdom

The walls to foreign acquirers have not been erected in the United Kingdom … yet. There is a long, and often times proud, history of being a welcome home for foreign M&A. However, as recently as June 2018, the UK Government has published updated rules and concluded consultation on a White Paper protecting national security from hostile actors' acquisition of control over entities or assets. The UK Government will use the responses to refine any proposals ahead of the introduction of primary legislation.

What you need to know about the process

The UK economy has a proud reputation as one of the most open economies in the world. As of 2017, the UK had the third-highest inward foreign direct investment globally. But new rules came into effect in June 2018 amending the so-called 'threshold tests" for Government intervention in the military, dual-use, computing hardware and quantum technology sectors. The recent changes allow ministers to intervene on certain grounds when the target business's UK turnover is more than £1 million. They also remove the requirement that a merger or takeover in these sectors lead to an increase in the parties' combined market share before the government is able to intervene.

In addition, the Government (Department for Business, Energy & Industrial Strategy) has completed a consultation on a White Paper in October 2018 to "protect national security from hostile actors using ownership of, or influence over, businesses and assets to harm the country. The reforms will be proportionate and focused in their application, with each case following a clear and predictable process."

The other important regulatory body in situations where an offer is made for a quoted UK company is the Panel on Takeovers and Mergers, aka 'the Takeover Panel.' The Panel regulates every transaction dealing with a UK-based or traded company. However, the Panel simply focuses on ensuring stockholders are treated fairly in a deal process, and that a proper process is adhered to, enabling a level playing field for all shareholders.

What stakeholders will need to hear

Stockholders – Stockholders historically have not worried much about the regulatory review process in the UK. A history of little to no intervention has created the market with no real concerns. However, the possibility of tightened rules following from the recently published White Paper and a changing political climate create higher communication risks in many respects. Even before the new framework is effective, it will be important for communicators to recognize that all foreign M&A is at risk of being a political hot button, regardless of the sector they operate in. Messaging and strategy needs to be cognizant of the political climate and speak to its possible concerns even if there is no clear regulatory risk.

Media – UK media are generally not against foreign takeovers (with the Daily Mail probably being an exception) but will always want to be seen as patriotic when it comes to a target. It is also true that the bidder's origin can play a role. With the Financial Times Lex and Reuters Breakingviews columns born in London, expect close scrutiny of takeover terms, and by the influential investor columns in the UK national media, e.g. Daily Telegraph (Questor) and Times (Tempus). Overall, the regulatory approval process, both domestic and international, is followed closely and the media will report on every new milestone. This scrutiny will be heightened by the introduction of new rules, with the media keen to question the government over their proper application once ratified.

Elected officials/regulators – While regulators are more predictable, due to their nature, UK politics have shown repeatedly to be entirely unpredictable. Communicators should consider the company's media profile in the UK and relationships with leading political figures prior to a deal being announced. In a strong media market like the UK, it can be difficult to set a narrative about your reputation once a deal is public.

How global protectionism is impacting the process

Due to the on-going Brexit issue, UK politics are in a state of prolonged unpredictability. It also means that the Government is considerably occupied with this issue and the process for putting the White Paper into law could be delayed. Given the new rules published in June, and the expected new rules from the White Paper not agreed, any cross-border transaction can be fraught with regulatory and reputational uncertainty.

At the time of the compilation of this document, the new rules have only been outlined in the White Paper, and not been published as a draft legislative text, nor put to parliament for approval and therefore do not apply yet. It is also unclear at this stage in how far the consultation on the White Paper has influenced the original draft text.

The UK Government intends to bring the UK closer in line with other countries' regimes. It is also important to note that the new regime is only related to national security. National security is not the same as the public interest or the national interest.

There has also been talk that the new rules could be retro-fitted to deals already announced or cleared. This could create immense complications for acquirers and uncertainty for acquisition targets that have already started with an integration process.

Commentary about the European Union

New rules still working their way through the system are likely to improve coordination but will not replace a final verdict from the home country. Communicators must be mindful of broad EU concerns, but should commit the majority of time and effort on FDI in the home country.

Henry Kissinger once made a point in asking the question, which number to dial if he wants to call Europe. Much has happened since. The integration of the old continent has developed tremendously and so has the effort to harmonize regulation concerning foreign investments. Foreign direct investment reviews are now also becoming a matter for the integrated continent.

While the EU has always had one of the world's most open investment regimes, the European Commission decided in early 2017 to set up an integrated framework to ensure an aligned review process of foreign direct investments in its member countries. This decision was mainly triggered by a letter from the French, Italian and German Economic Ministers.

The approach – which is still in discussion and expected to become binding legislation in 2019 – reflects that foreign investments have massively increased over the past years. In addition to rising protectionist tendencies, the EU is particularly focused on how the amount of money flowing into Europe was not accompanied by an increase in transparency concerning the owner structure of the acquiring vehicles.

The currently debated proposal of the EU commission, which already has passed through several hurdles to date, aims at harmonizing the review and approval process for foreign direct investments into European Companies from companies, funds, governments from outside the EU. Core of the proposal is that member states will be empowered to screen foreign investments into critical infrastructure and strategic technologies.

The proposal does explicitly leave the final decision to allow or block an investment in the hands of the respective national government and only adds an additional information exchange mechanism on EU level. Unlike in merger-control the EU commission will not be empowered to decide on FDI. But debates are ongoing as some member states fear that establishing this level of exchange would open up a backdoor to allow the Commission to have a say in transactions. The German Bundesrat, for example, has raised concerns that the EU proposal will no longer allow Germany to decide autonomously on the basis of its own foreign trade rules with regard to the review of direct investments.

The aim is to reach an agreement on a final text by the end of the year so that the regulation can be adopted before the European Parliament elections of 23-26 May 2019. The proposal is based on Article 207(2) TFEU, which means that it is not subject to a subsidiary check by national parliaments. Once adopted, a Regulation is directly applicable in all EU Member States. In the event of a conflict with a national law, the regulation takes precedence.

While Kissinger may have his telephone number, a conference call is still advisable in calling Europe.

China

It is all about MOFCOM in China, an opaque regulator with broad powers to block deals against the national interest. As the country inches toward opening itself up to outside investment, it is confronting increasingly closed borders in the West, necessitating some response. Communicators should remain mindful of local sensitivities and the unique role of the press in society

What you need to know about the process

In China, inbound M&A filings are submitted to MOFCOM (Ministry of Commerce of the People's Republic of China), which oversees all mergers in the country. In certain cases, some other regulatory bodies such as the National Development and Reform Commission (NDRC), the State Administration of Industry and Commerce (SAIC) may affect the outcome of the transaction. For specific industries such as education, healthcare and medical industries, the Ministry of Education, the China Food and Drug Administration and the State Administration of Press, Publication, Radio, Film and Television could enact some regulatory oversight as well

MOFCOM has a statutory review period of 180 calendar days with an initial review period of 30 days (Phase I), commencing with the acceptance of the filing by MOFCOM. In practice, the period between notification and acceptance of the case is unpredictable. The pre-acceptance period normally takes up to six to eight weeks or longer depending on the complexity of the transaction along with other factors, and can be shorter if the transaction is straightforward.

At the end of the initial Phase I review period, MOFCOM must either issue a written decision to clear the transaction or issue a written notice of 'further review.' If the notifying party does not receive any written notice of further review at the end of the review period, the transaction is considered cleared. If the notifying party receives such a notice, the review period can be extended for another 90 days (Phase II). In certain circumstances, the 90-day Phase II review period may be extended by another 60 days. However, some conditional clearance decisions show that MOFCOM can in practice take a longer time than the maximum statutory review period of 180 days to finish its review.

What your stakeholders will want to hear

Stockholders – Despite the relatively opaque process, stockholders generally view MOFCOM approval as limited risk. Most announced transactions have carefully considered China's existing rules prior to announcement. However, as protectionist instincts grow it is important to manage stockholder expectations of the deal timeline, especially when the deal falls into "restricted" or "prohibited" categories, which could possibly involve national security issues in China. Communicators should convey background information and past examples of successful mergers of the buyer to stockholders of the target company, particularly if they involve the acquirer.

Media – National sentiment is critical in China where media directs the public opinion. Sentiment in national media could possibly represent the stance of the Chinese government. As a communicator you must understand national sentiment and how it could potentially impact your deal. High-profile deals must comply with local legislation carefully and respect local culture, (e.g. the Taiwan autonomy issue) to avoid creating negative sentiment, which could then be amplified by media and, as a result, affect the outcome of the deal approval process.

Regulators – Besides MOFCOM, certain regulatory bodies such as Ministers of specific industries could make direct impact the approval process, especially when it comes to sensitive sectors that involve national security. It is important for the acquirer to appear to be cooperative and credible with regulatory bodies throughout the review process and in turn, to communicate its policies and measures to comply with local legislation and national security concerns.

How global protectionism is impacting the process

In 2017, the Chinese government announced updates to foreign direct investment policies and legislation aimed at opening up the country a bit more to outside investment. Under the new policy, foreign and domestic M&A will go through the same process. The updated Foreign Investment Catalogue reduced the number of sectors on the "restricted" and "prohibited" list by one third (from 93 to 63), including high tech and green tech sectors. More importantly, the government is expanding the "negative list" system, which restricts sectors such as broadcasting, beyond Free Trade Zones to the entire country, which will reduce scrutiny on inbound investments that fall outside of the negative list.

However, China is planning a tighter control in response to the recent tension in the acquisition of sensitive technologies between China and certain western countries. In response to the rise of global protectionism and the increasing tension in trade between China and the west, especially the United States, China is planning to enforce tighter control on foreign stakes in Chinese companies. Inbound M&A could face broader national security reviews following recent efforts by the US, Britain and Germany to prevent Chinese acquisitions of sensitive technologies. The proposed amendments to existing investment rules would expand the universe of foreign investments covered by China's formal national security review process.

Japan

Culture is king in Japan. Instead of a complex regulatory framework to review inbound M&A, Japan is governed by a business community that runs on long-term relationships. As the country begins to welcome more inbound M&A, those willing to learn and respect the culture can find a path to successful dealmaking.

What you need to know about the process

Despite the image of the Japanese M&A market as being closed to foreign companies, Japan's takeover laws are relatively light in comparison to that of Europe and the United States. The real challenges are not regulatory but lie in a business culture that relies heavily on long-term relationships.

Recent protectionist tendencies seen in the United States and elsewhere have so far not emerged in Japan. On the contrary, the series of friendly private equity deals that characterized 2017 convey increased openness to foreign acquisitions of low-performing companies and to the carve-out and internationalization of non-core businesses of traditional Japanese conglomerates.

Barriers to unsolicited bids remain firmly in place, however, and in contrast to the many friendly deals that have taken place unhindered, Japan has yet to see a successful unsolicited takeover. As a communicator you will need to understand the importance placed on relationships in business in Japan and how structural defenses, rather than protectionist legislation, can be used to block unwanted advances. Despite recent developments in corporate governance, including the adoption of the Corporate Governance Code in May 2015 and its revision in June 2018, entrenched relationships between management and shareholders through cross-shareholdings—which account for approximately 45% of shares listed on the Tokyo Stock Exchange—remain a significant obstacle.

What your stakeholders will want to hear

Stockholders – Stockholders will always be a bit wary of a foreign company's ability to navigate Japan's corporate culture. The adoption of the Corporate Governance Code has had a significant impact on M&A in Japan. Its full title: Japan's Corporate Governance Code, Seeking Sustainable Corporate Growth and Increased Corporate Value over the Mid- to Long-Term, underscores the focus on sustainable growth and value creation, and it has become increasingly important that companies explain to their stockholders how a proposed merger would achieve this goal.

Media – Japanese media are typically interested in what an inbound acquisition means for the flow of intellectual property or personal data out of Japan and the implications for the target company's management and employees. Recent inbound transactions have been dominated by private equity funds, so the conversation has also focused on the acquirer's experience in the industry, its long-term commitment to the investment and the benefits to the target.

The cross-border M&A landscape in Japan is still evolving and there is a small but growing pool of journalists with the expertise to understand and report accurately on the financial implications of a given deal. The result can be an oversimplification in how debt, cashflow and synergies are reported, so it is beneficial to make financial experts available to brief key journalists on background and ensure the information on your press release and publicly available materials is understood.

Elected officials/Regulators – Elected officials typically have no direct say on merger reviews in Japan and, as noted above, Japan's regulatory framework provides more favorable conditions to acquirers than that of other advanced economies. However, mergers or takeovers involving target companies operating in or adjacent to areas of national interest will attract close regulatory attention and politicians may make their views publicly known, particularly if there are national security or employment concerns. In certain cases, moreover, a powerful bureaucracy can work against a foreign acquirer targeting a strategically important Japanese company by encouraging (pressuring) other Japanese companies to make a counterbid. The lack of interest among Japanese companies in bidding for Toshiba Memory in 2017 revealed that the bureaucracy's influence over the private sector may have weakened in this regard, but its endorsement still carries weight, and it is essential to have appropriate lines of communication open with the relevant ministry during the bidding process.

About The AMO Network – Local Expertise, Global Reach

AMO is the leading international network of strategic communications consultancies, providing best-in-class financial communications advice and counsel for corporations and institutions in the most important markets around the globe.

We provide thoughtful counsel to corporate boards and executives. Our mission is to help them achieve critical business goals through our powerful influence in local markets, our deep sector expertise, our broad global perspective and our ability to collectively provide seamless project management to our clients around the world, particularly in the key financial centers of Europe, Asia and the Americas.

Our best-in-class approach brings together local-market leaders with unrivalled knowledge of stakeholder perceptions, financial markets and transformative company events, ranging from cross-border transactions, large-scale crises, activist situations, and regulatory matters to bankruptcy and restructuring situations.

AMO is unique among international networks because it is founded on the strength of a partnership between national local agencies, each best-in-class in their markets, that has produced meaningful results for its clients for 17 years.

The network was founded in 2001 by three like-minded corporate and financial PR agencies in London, New York and Paris who shared a common owner, Havas Group. Today, AMO is comprised of 11 member agencies spanning six continents and 27 countries, employing 1,200 counsellors in 50 offices around the globe.

The AMO network has consistently featured at the top of the global M&A advisory rankings over the last 15 years. Last year, AMO agencies advised on almost 300 M&A deals worth approximately €240 billion.

AMO is backed by Havas, one of the world's largest global communications groups, founded in 1835 in Paris.

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