Where to File? Merger Control and Foreign Direct Investment Multi-Jurisdictional Analyses

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On December 10th, 2024, the International Committee of the American Bar Association's Section of Antitrust Law hosted a webinar to provide a crash course in merger control and Foreign Direct Investment (FDI) multi-jurisdictional analysis. This was the very first session of a seven-session "Crash Course in Global Merger Control," organized by the International Committee and co-sponsored by the Mergers and Acquisition Committee of the section. The series, which will run through the end of February 2025, is designed for junior lawyers and economists interested in international mergers related work. The sessions tackle the basics of merger control and review process in general, as well as outlines information specific to various jurisdictions around the globe.

This session kicked off the series by discussing practical tools for performing multi-jurisdictional filing analysis and multi-jurisdictional investment control, and understanding where filings need to be made worldwide. Moderated by Mélanie Perez of Covington & Burling in Brussels, the panelists were Stefan Kirwitzke of Hogan Lovells in Brussels and Andreas Mildner of Gibson Dunn in Frankfurt.

Mr. Kirwitzke started the webinar by emphasizing the importance of multi-jurisdictional merger filing analysis as one of the first steps in advising on a proposed transaction. Noting the recent and ongoing proliferation of merger control regimes, Mr. Kirwitzke discussed taking a three-steps approach to multi-jurisdiction merger analysis: (i) determine whether the transaction is notifiable; (ii) determine which filing thresholds are potentially triggered by the proposed transaction; and (iii) get access to information that allows for the quantification of the threshold.

According to Mr. Kirwitzke, in order to start with a multi-jurisdictional merger filing analysis the merger practitioners must first determine whether the transaction is notifiable. While some jurisdictions only look at the level of shareholding acquired, many other jurisdictions require a notification when a change of control occurs. The notion of control refers to the ability to exercise decisive influence on undertakings, which then may correspond to a single undertaking (“Sole Control”) or multiple undertakings (“Joint Control”). To decide which filing thresholds are potentially triggered by the deal, most authorities examine the parties’ revenues. This is justified by the possible effects of the deal on customers in a given jurisdiction. Assets and market shares, as either additional or standalone measures, are also used by some authorities to determine whether a notification is required for the transaction. Lastly, following the determination of the potentially triggered thresholds, Mr. Kirwitzke explained that merger practitioners need to access the threshold information from internal and proprietary sources, third-party data banks, or online resources. Jurisdictions are varied regarding the calculation of the parties’ relevant revenues. In most cases, authorities base their thresholds on sales to customers located in the jurisdiction within the last audited financial year or calendar year.

Mr. Kirwitzke closed by going through multiple examples that illustrate the implementation of the three-step approach. For instance, one such illustration assumed a four-party transaction with the first party acquiring some shares of the rest of the parties. Given the hypothetical jurisdictional thresholds, revenue data from all four parties worldwide, and any changes in control as the result of the deal, Mr. Kirwitzke led the analysis and calculated in which stream of the transaction, and based on what threshold, a notification is required. Mr. Kirwitzke caveated this by noting that when the results of such calculation are close to the thresholds, verifying key factors in the data, such as allocation of revenues and exchange rates, must be considered.

Mr. Mildner continued the webinar by introducing multi-jurisdictional filing assessment in foreign investment control. FDI screening is associated with national security and public policy concerns, and therefore requires mandatory and often suspensory filing investigation. Various measures, such as commitments, blocking decisions, and divestment orders, can be imposed by authorities if risks are considered to be present, and the parties may mitigate risks through negotiation and coordination across jurisdictions to get clearance. The filing assessment of FDI is generally driven by domestic political developments and Mr. Mildner emphasized that the required information is often not contained in data rooms. For example, many jurisdictions worldwide implemented emergency FDI during the COVID-19 pandemic to protect the production and supply of medical equipment.

Mr. Mildner then detailed heterogeneity in FDI screening and recent developments across jurisdictions (e.g., maturity, scope). Even within the European Union (EU), Mr. Mildner noted, FDI remains subject to national laws and there is no full harmonization across the EU. There are countries, including the United States, Canada and Australia that have a more mature FDI screening mechanism in place which are – as is the case for many jurisdictions – undergoing changes. FDI screening regimes differ across the jurisdictions. Examples of these differences include whether the regime covers minority acquisitions, whether it covers greenfield investments, how certain types of assets deals are treated, and how indirect investments are treated. Time frames, such as filing deadlines and how the review ultimately goes, also largely depend on individual national security risk assessment. As a result, the whole FDI review process can take from a few weeks to over a year.

According to Mr. Mildner, similar to a multi-jurisdictional merger filing analysis, an FDI filing assessment can be formulated in a four-steps approach. First, one needs to determine whether to qualify the investor as a "foreign" person; this depends on whether the directly acquiring entity is "foreign," or whether there are foreign third parties (directly or indirectly) invested in that entity. Second, notification requirements are typically triggered by the acquisition of (i) shares in target companies having a domestic legal entity and/or other domestic presence and activities or (ii) certain types of domestic assets. Third, one needs detailed description of the target's domestic activities, because mandatory filing obligations occur where the activities are considered sensitive in the relevant jurisdictions, and concern national security or public order. Finally, to examine whether a transaction triggers a filing, one must examine the relevant filing thresholds. Where they relate to voting rights, as a rule of thumb, thresholds are often set to 10% or

20% (depending on the sector, they can even be lower). In some circumstances, there are also other considered elements such as special governance rights (i.e., veto rights, golden shares, and director appointment).

In a case study illustrating these steps, Mr. Mildner presented an example in which a Japanese private equity (PE) investor intended to acquire all assets related to one business segment of a privately-owned US company. This company had aerospace system equipment assets, with research and development activities, production facilities, and intellectual property rights. He discussed in this context the four-steps approach and detailed the type of information related to which counsel may be required to engage with local counsels to determine filing requirements. Mr. Mildner emphasized that FDI filing triggers differ from those of merger screening by being more qualitative and by requiring more detailed and jurisdiction-specific information.

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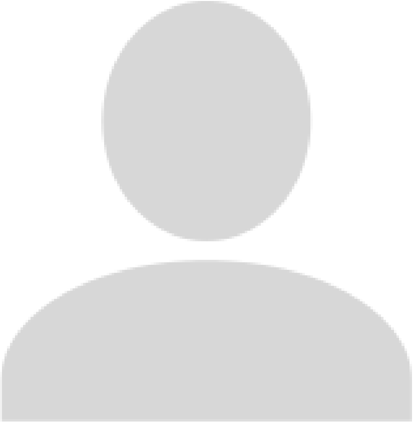

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