

Cross-Border Acquisitions: Top 10 Pre-deal Considerations

A Practical Guidance® Checklist by Sergio Galvis and Benjamin Kent,
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This checklist provides an overview of some of the key issues faced by acquirers of foreign businesses in cross-border M&A transactions and discusses steps that can be taken to address those issues in advance of a deal.

For information on M&A transactions in global jurisdictions, see [Public M&A in International Jurisdictions](#), [Merger Control in International Jurisdictions](#), [Tax on Inbound Investment in International Jurisdictions](#), and [Multilaw Global Business Entities Guide Resource Kit](#).

Introduction

While 2022 has seen a slowdown in dealmaking across the board (and cross-border acquisition transactions have not been spared), the volume of cross-border M&A activity has seen a significant increase in recent years. According to Refinitiv, cross-border M&A activity doubled in the decade or so between 2010 and 2021, with deal volume of \$919 billion representing 3.3% of the market in 2010 growing to deal volume of \$2.1 trillion representing 7.5% of the market

in 2021. Having an awareness of the issues that arise in cross-border dealmaking- is therefore a key part of any advisor's skillset.

Cross-border acquisition transactions can be an exhilarating but fraught experience. In addition to the usual considerations and negotiating points, the parties and their advisors must deal with a whole variety of added issues and concerns, some of which may not be particularly familiar to those working on the deal.

Key Issues and Preparatory Steps

While it is rare to be able to execute a complex cross-border acquisition transaction without hitting some snags, there are a number of preparatory steps that parties can take to help smooth the process.

1. Selecting Advisors

Selecting the right financial, legal, tax, and other advisors is one of the most important early decisions an acquirer makes. While the level of support required from advisors will vary depending on the internal resources available to the relevant acquirer, the rule of comparative advantage dictates that there will almost always be tasks, whether that be financial modelling, tax planning, or contract negotiation, that can be performed more efficiently by external advisors.

The importance of this decision is even more pronounced in the context of international acquisition transactions involving foreign targets where the acquirer may be unfamiliar with the target's jurisdiction and need significant support to get up to speed on relevant considerations.

Advisors with expertise in the particular jurisdiction are critical, but just as important are advisors with cross-border transactions experience who can help translate concepts that might seem alien into something that is understandable to the acquirer and makes sense within its frame of reference. Making sure acquirers pay close attention to these factors, as well as the need to find the right balance between local and international advisors, is key when counselling them on the selection of advisors.

Moreover, in some smaller jurisdictions that do not generate a significant number of transactions, there may be a relatively limited number of sophisticated advisors and moving quickly to engage them can be an advantage in a competitive acquisition scenario, such as an auction process.

2. Identifying Due Diligence Risk Areas

Preparing for due diligence is always a key part of any acquirer's checklist for a transaction, and a cross-border transaction is no different.

While the extent of the due diligence investigation performed in any particular transaction will vary based on a number of factors, including the identity of the parties and the time available, identifying potential risks in advance will help streamline the review process. This type of preparation can be particularly important in the context of a cross-border acquisition, as there are likely to be additional or different risk areas to review during due diligence that may not receive as much focus in a domestic transaction.

Frequent areas of focus in cross-border transactions include the following (a number of which are discussed elsewhere in this practice note):

- Jurisdiction-specific features that introduce unfamiliar risks, such as particular environmental, employment, or pension rules, or specific tax requirements
- The legal framework applicable to the target company, particularly if it is a highly regulated business, such as a financial institution, an energy or natural resources business, or a transportation company
- The terms of any governmental concessions, franchises, or other key permits from which the target business benefits (e.g., in an extractive industry) and the strength of any related legal protections
- Features that may have consequences for the transaction structure (e.g., employee approval requirements through works councils or other bodies) and foreign investment regulation

- Anti-bribery, anti-corruption, anti-money laundering, and sanctions compliance matters

This last item often requires particular focus, as the standards applicable to conduct in these areas can vary widely across the globe, and the consequences of getting it wrong can be very severe, particularly for acquirers with a nexus to the United States, which takes a particularly stern view of enforcement in these areas.

3. Tax Planning

Given the extent to which the economics of an investment can depend on applicable tax requirements, advance tax planning is essential in the context of a cross-border acquisition transaction.

There are many considerations to take into account beyond simply understanding the tax regime applicable in the foreign target's jurisdiction, which may itself be complex and require a deep dive into a variety of types of tax, including income taxes, capital gains taxes, royalty taxes, and value added taxes.

In particular, structuring the acquisition in the most tax efficient manner may require consideration of a number of factors, including:

- The availability of tax treaties between the target jurisdiction and the acquirer's home jurisdiction or other jurisdictions in which it could establish an acquisition vehicle
- Investment tax benefits in the target's jurisdiction
- Whether the target jurisdiction has punitive rules around investment from particular jurisdictions that it views as "tax havens" or otherwise
- Whether a portion of the investment in the foreign target should be made in the form of debt rather than equity (e.g., if the local tax regime favors shareholder or other affiliate debt by taxing interest payments on debt at a lower rate than dividend payments on equity) –and–
- The long-term stability of, and any significant anticipated changes in, the local tax regime

Of course, all the usual tax due diligence work will still need to be undertaken to understand the target business's existing tax structuring and any identifiable risks. If the target business has operations in multiple jurisdictions, this can be a complex and challenging task that can require significant advisory support, reinforcing the importance of selecting the right advisors.

4. Foreign Investment Regulations

Many practitioners will be familiar with the recent trend toward increased governmental scrutiny of investments by foreign nationals and the heightened concerns regarding the strategic implications of foreign ownership of critical assets that have been expressed by many governments.

For example, foreign acquirers of sensitive U.S. businesses have long had to contend with the risk of transactions being reviewed and potentially vetoed by the Committee on Foreign Investment in the United States (CFIUS), and recent changes to the framework underpinning that review process have expanded the scope of transactions that could potentially fall within CFIUS's jurisdiction.

Many other jurisdictions have also adopted or strengthened similar review and approval processes for businesses that are sensitive from a national security perspective, or otherwise of strategic importance to the particular jurisdiction, and some have started taking an expansive view of the types of businesses that are subject to review.

Understanding the extent to which there is a risk of a particular transaction being subject to a review process of this kind is of vital importance to planning any cross-border acquisition, as these review processes frequently lack transparency, and it can be extremely challenging to navigate them without the assistance of competent and experienced advisors.

5. Foreign Investment Protection

While it is important to be familiar with the potential risk to a transaction that could arise from a foreign investment review process, it is also important to become familiar with any applicable investment promotion schemes available in the target jurisdiction.

Encouraging responsible foreign direct investment, including in the form of acquisition transactions, is frequently a key policy priority of governments, particularly in developing economies. A number of different tools may be deployed in order to encourage investment, and some of these may be of particular interest to a foreign acquirer.

Simple financial incentives such as direct subsidies or tax benefits are often deployed, but other investment promotion schemes may be available. For example, a jurisdiction may permit a foreign investor to enter into an arrangement that guarantees the stability of the legal or tax regime applicable to that investor for a certain period of time, potentially with entrenched legal (or even constitutional) protection that restricts the government's ability to abrogate the agreement without significant legal or political cost.

Understanding in advance what protections or other benefits of this kind may be available in the target jurisdiction (and the extent to which those benefits are likely to be effective and respected by the relevant government) is important, as they can drive both value, the return on investment available to the foreign acquirer, and acquisition structuring. This is another area where good local advisors are key.

6. Political Risk

The extent to which politics can have an impact on a cross-border acquisition will vary greatly depending on many factors, including the institutional strength of the target business's jurisdiction, the perceived sensitivity of the target's business, and any historical or ongoing tensions between the acquirer's jurisdiction and the target's jurisdiction.

Transactions in jurisdictions without a strong tradition of protection of private property and a history of instability or governments that have taken expropriatory or other hostile action towards foreign investors will of course be of significantly higher risk than those in stable jurisdictions.

Analyzing political risk, and helping the acquirer to assess and price it, is one of the most important tasks performed by the acquirer's advisory team. This task requires more than just a view of the likelihood of hostile government action. Non-governmental actors, such as unions, environmental pressure groups, or simply customers and suppliers of the target business, may have interests that they believe would be affected by a particular transaction and so take action that seeks to prevent the transaction from occurring or make it more expensive for the acquirer.

Knowing in advance who are the likely opponents can help the parties to plan most effectively to address relevant concerns and construct the right transaction narrative to contextualize the transaction and explain it to all applicable constituencies.

7. Antitrust Approvals

Most acquirers will already be familiar with the need to perform an antitrust analysis to determine which merger control filings and approvals may be required for a particular transaction. And even a domestic transaction can require filings or approvals in multiple jurisdictions if the acquiring and target businesses have global operations and sufficient turnover to trigger filing requirements in the relevant countries or regions.

However, a cross-border transaction is more likely to require additional filings in jurisdictions with which the

acquirer may not be familiar and which introduce additional transaction risks that it is wise to deal with as far in advance as possible. In particular, the approval process in some jurisdictions can be very lengthy and may require the preparation of extensive documentary submissions with significant information that takes time to gather.

Ensuring the acquirer focuses on antitrust matters in its transaction planning is particularly important in the context of joint acquisitions by more than one party, as the governance arrangements to be applied to the target business by the acquiring parties can have a significant impact on determining the scope of the required filings and approvals, which frequently depend on the extent to which parties are determined to be exercising “joint control.” Acquirers should take into account applicable merger control requirements when negotiating those governance arrangements to ensure they do not unnecessarily create transaction risk that could be avoided.

8. Securities Laws

Another area of focus in a cross-border acquisition transaction should be the securities laws of the target company’s jurisdiction, particularly if the target is a public company, as the acquirer will need to know what obligations it may have to the securities regulators and the target’s security holders both in connection with the acquisition transaction and thereafter.

Many jurisdictions mandate stakebuilding disclosures, requiring an acquirer to make public announcements of any acquisition of securities that results in it legally or beneficially owning more than a designated percentage of the relevant issuer’s securities or voting rights. Regulations of this kind can have a significant impact on acquisition strategy that will require significant consideration.

Other rules that could be of relevance to an acquisition transaction include requirements to provide particular disclosures regarding the transaction or the acquirer to the target business’s securityholders and requirements to make mandatory tender offers for all of a target company’s securities once certain ownership thresholds are exceeded by the acquirer.

In addition, gaining a thorough understanding of the applicable securities law regime can also help to avoid surprises after the transaction, such as a requirement to continue to provide public disclosures regarding the target company after the transaction closes, or to provide public disclosures regarding the foreign acquirer.

9. Acquisition Structure

While any acquisition transaction requires some structuring, the additional considerations present in a cross-border transaction mean that even more thought is required to ensure the optimal structure. In particular, decisions need to be made regarding:

- The jurisdiction and corporate form of the acquisition vehicle
- The legal form of the acquisition transaction, for example whether it should be an asset acquisition, a share acquisition or a merger
- The form of the consideration to be paid and the timing for paying it
- The governing law of the acquisition agreements
- The competitiveness of the acquisition (whether it is an auction transaction) –and–
- Any relevant market practice

There are a variety of factors to take into account, including tax, regulatory approvals, financing, joint venture participation and governance, and future plans, and many of the issues discussed above will have a bearing on the acquisition structure that is ultimately selected.

10. Integration Matters

Integrating two potentially disparate corporate cultures is a challenge, and that challenge can be made all the more demanding in the context of a cross-border transaction, where the employees of the two companies may have very different cultural expectations.

Integration frequently takes a back seat during deal preparation, as it generally becomes relevant only once a transaction has closed, given “gun-jumping” and other relevant concerns. However, making initial preparations for integration up-front can pay dividends in the long run by anticipating potential problems and dealing with them in advance.

Having local expertise on the ground and personnel able to culturally translate across the business are key preparatory steps to take to ensure that integration proceeds as smoothly as it can.

Conclusion

Any acquisition transaction requires significant planning and preparation to ensure the right structure is adopted and execution proceeds as smoothly as possible. The additional considerations present in a cross-border acquisition make it

even more imperative to prepare as thoroughly as possible to avoid surprises. While that preparation may necessarily be iterative, as it is rarely the case that all the issues discussed above can be entirely bottomed out before even commencing negotiations with a counterparty, the more work that can be done up-front, the more likely it will be that the transaction will be successful.

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Sergio Galvis is a leading corporate lawyer in the United States who is known for his cross-border work, especially in Latin America. He joined Sullivan & Cromwell after graduating from Harvard Law School and clerking for the Hon. Lawrence W. Pierce, Second Circuit U.S. Court of Appeals, and has been a partner of the Firm since 1991. He is a member of S&C's Management Committee, oversees the Firm's recruiting function and leads its Latin America practice.

Sergio has worked with clients across more than 25 countries in Asia, Europe and the Americas on hundreds of significant matters in a broad range of practices, including M&A, project financing, capital markets, sovereign financing, workouts and restructurings, corporate governance, crisis management, investigations and disputes.

Sergio is involved with many not-for-profit and foreign policy organizations, including the Council on Foreign Relations and the Council of the Americas. He is a member of the Board of Trustee of the Hispanic Society Museum & Library in New York and of the University of the Andes Foundation. He was born in Colombia and speaks Spanish and Portuguese.

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