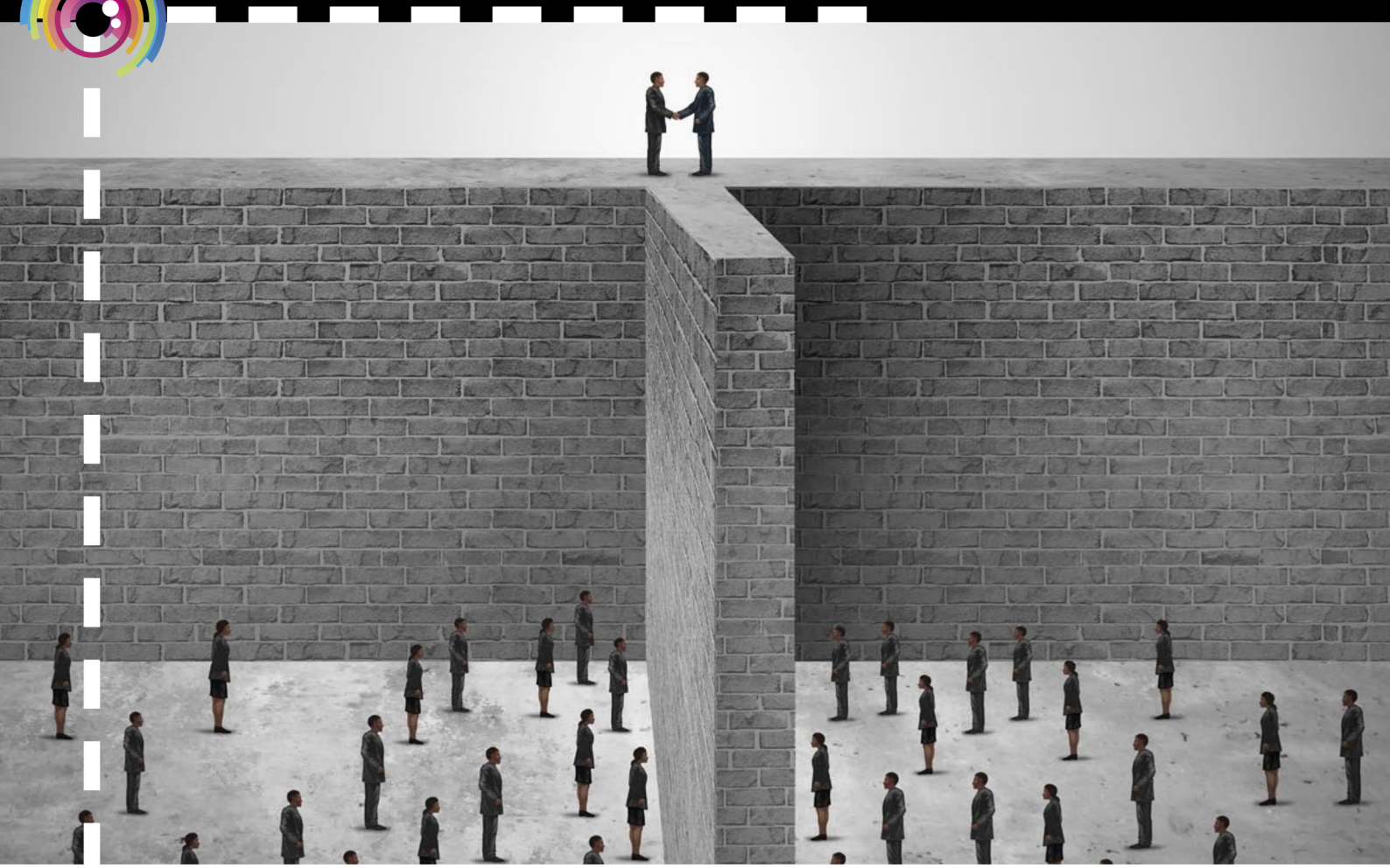

SELECT CHALLENGES IN CROSS-BORDER M&A TRANSACTIONS

BY Clare O'Brien and Rory O'Halloran

Select challenges in cross-border M&A transactions

Merger and acquisition transactions involving more than one jurisdiction can give rise to significant complexities that meaningfully impact transaction timing and structure. Given the critical importance of planning and execution in achieving a successful M&A outcome, a lack of attention to potential issues arising from transacting in different jurisdictions can be problematic. In addition to the obvious issues relating to different language and culture (which should not be underestimated) and the challenges of doing cross-border due diligence reviews, the different treatment of employee matters, regulatory approvals, takeovers and corporate mechanics often give rise to issues peculiar to cross-border transactions.

The applicable legal regime governing the transfer of employees in an M&A transaction can vary significantly by jurisdiction. Issues that may arise in this area, which vary depending on the transaction structure, include possible employee rights to receive an offer of employment from the entity that will be their employer post-closing or to receive certain statutorily mandated benefits generally associated with a termination of the employment. In certain circumstances, and absent careful transaction structuring, the latter can be implicated notwithstanding the intention that target employees continue on with the combined company post-closing. In addition, in certain countries, an acquirer may be restricted from terminating the employment of transferred employees for some period after the closing or materially changing the terms of their employment.

Transactions involving jurisdictions in which companies are required to have employee works councils can also raise issues. In particular, in certain European countries, including France and the Netherlands, companies are not permitted to enter into binding agreements providing for their sale before the works council consultation process is completed – in addition to delaying the timing of the execution of definitive agreements, engaging in these works council consultation processes can increase the risk of a leak (although there are statutory confidentiality obligations) and require additional documentation such as irrevocable offer letters (in which the acquiring company irrevocably offers to enter into the form of definitive sale agreement attached to the offer letter upon the completion of the consultation process) and an exclusivity agreement (in which the seller or target company agrees to deal exclusively with the potential buyer during the consultation process).

Regulatory approval regimes can also vary significantly by jurisdiction. For example, while most jurisdictions maintain some form of an antitrust/competition review and approval regime, a smaller number also maintain foreign investment review and approval regimes that apply to transactions involving a foreign acquirer – akin to the separate Hart Scott Rodino Antitrust Improvements Act and Committee on Foreign Investment in the United States (CFIUS) regimes in the US. These regimes are generally entirely separate and involve wholly different substantive considerations and review/approval timelines. Beyond

foreign investment, there is a wide variety of less common (and in some cases, unique) regulatory approvals that can be imposed on M&A transactions, depending on the jurisdictions, industries and parties involved. Without careful advance planning, these approvals can – at best – upset desired transaction timing and – at worst – give rise to an unexpected substantive impediment to consummating a proposed M&A transaction.

Depending on whether the transaction involves a publicly traded company or a privately held one, a cross-border transaction can also raise different timing and substantive issues. For example, it is important to understand the UK takeover rules early in the process for a transaction involving a UK public company – among other things, the potential transaction may need to be disclosed to the UK Takeover Panel early in the transaction process. In addition, a UK transaction is generally subject to many fewer transaction protection provisions and closing conditions than a comparable US transaction. In particular, a UK public company target cannot agree to a 'no shop' provision or give matching or topping rights to the acquiring company, and the acquirer's obligations to close are generally not subject to the conditions that the target company's representations are true and correct at closing or that the target has not suffered a 'material adverse effect'.

If the transaction consideration involves shares, adding a cross-border component may raise, at the very least, timing issues, including if financial statements prepared in accordance with different accounting standards have to be reconciled for purposes of preparing pro forma financial statements, or if an issuer's shares have to be registered in the US for the first time. In that regard, the structure of the transaction may be important – e.g., if the transaction is structured as one that requires court approval (such as a UK scheme of arrangement), the shares to be issued to the target company may be exempt from registration in the US pursuant to Rule 3(a)(10) under the US Securities Act of 1933.

If a non-US acquirer is required to register its shares in the US or to list them on a US stock exchange in connection with its acquisition of a US company, it (and all its directors, officers and subsidiaries) will become subject to the US Foreign Corrupt Practices Act, and may also be affected by the US sanctions regime following the closing (depending on the levels of entanglement between the US target company and its affiliates). Conversely, shareholders of the target US company may need to reconcile themselves to having fewer of the protections afforded to shareholders of US public companies by the US securities laws and stock exchange listing rules in respect of their post-closing shares in the acquiring company. In particular, if the issuer qualifies as a foreign private issuer, it is not required to comply with the proxy rules, to file quarterly reports of Form 10-Q or to have a majority of its directors be independent. In addition, foreign private issuers can follow their home country rules in respect of the composition of their compensation and nominating and governance committees.

Corporate approval requirements can also vary by

jurisdiction and will be highly relevant to the parties' ability to consummate a transaction in a timely manner. While less likely to be a 'headline' transaction issue, corporate approvals are often required for certain actions required to be taken in connection with the closing of the transaction and the failure to properly plan for them can lead to unexpected delays. For example, there can be significant differences in the procedures and timing requirements for removing and appointing directors across jurisdictions; certain jurisdictions also require the 'consularisation' or other authentication procedure (including via use of an apostille) of signatures on documents required for a closing. While ministerial in nature, these requirements are generally both inflexible and time consuming to comply with.

As the number of cross-border transactions increases, rules and practices are likely to become more standardised, as a result of which the number of issues that are particular to cross-border transactions should decrease. Until that happens, however, practitioners should be prepared to quickly identify the particular issues that are likely to affect their cross-border transaction so that they can be addressed quickly – while news of transaction complications or delay may not be welcome to clients, the sooner this news is delivered, the better it is likely to be received. ■

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