



2025 International Client Seminar

March 6-9, 2025

Everybody Wants to Rule the World

Cross-border M&A

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Introduction

This memorandum provides a framework for the panel discussion on international cross-border mergers and acquisitions (M&A) with a focus on the US, Canada, and Europe. We have attempted to highlight important legal, regulatory, and operational considerations that can influence decision making, the structure, execution, and integration of international cross border M&A transactions.

Although we are in uncertain times with respect to cross-border activities, cross-border M&A activity has grown year-over-year as businesses seek opportunities to expand into new markets, acquire complementary technologies, and achieve economies of scale. However, navigating the complexities of such transactions requires a thorough understanding of the legal and regulatory landscape and careful planning to mitigate risks.

Key Focus Areas

1. **Antitrust Regulation** – The importance of complying with antitrust laws in multiple jurisdictions, including challenges in coordinating filings and addressing competitive concerns.
2. **Regulation on Foreign Direct Investment (FDI)** – Increasing scrutiny by national security review bodies and strategies to obtain approvals while addressing sovereignty issues.
3. **Deal Terms** – Differences in law on certain key terms.
4. **Employment Integration Considerations** – Key issues related to employment law and cultural integration in the post-closing phase.

Antitrust Regulation

United States

In the United States, the Hart-Scott-Rodino (HSR) Act establishes a pre-merger notification process to ensure antitrust authorities have the opportunity to review proposed transactions for potential anti-competitive effects before they are finalized. Companies exceeding specific transaction thresholds must file detailed documentation, including financial and operational data, with the Federal Trade Commission (FTC) and the Department of Justice (DOJ). This process initiates a mandatory waiting period—typically 30 days for most transactions—during which regulators evaluate the potential market impact, including changes to competition, pricing, and consumer welfare. Regulators may extend this period by requesting additional information, a process known as a “second request,” which significantly increases the time and resources required for deal completion.

Effective February 10, 2025, the FTC implemented new rules significantly expanding the scope of information required in HSR filings. Companies must now include detailed narratives about business operations, supply chain dependencies, and prior transactions within the past ten years, as well as enhanced disclosures on labor and workforce impact. This change aims to provide regulators with a more comprehensive understanding of competitive dynamics and potential risks, particularly in sectors with heightened scrutiny such as technology and healthcare.

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Canada

In Canada, the *Competition Act* also establishes a pre-merger notification process in respect of acquisitions of Canadian companies. Acquisitions of Canadian companies that exceed the “party-size” threshold and “transaction-size” threshold are subject to pre-merger notification and review by the Commissioner of Competition to determine if they are likely to prevent or lessen competition substantially. The “party-size” threshold involves looking at the parties to the transaction and determining whether they, together with their affiliates, have assets in Canada or annual gross revenues from sales in, from or into Canada that exceed CDN\$400 million. For the “transaction-size” threshold involves looking at the value of assets in Canada of the target, or the gross revenues from sales in or from Canada generated by those assets and determining whether they exceed CDN\$93 million.

Where these thresholds are exceeded, the parties cannot complete the transaction until all required information is provided for review and the statutory waiting period of 30 days has expired or has been terminated or waived by the Commissioner. Much like a “second request” in the US, the Commissioner may issue a Supplementary Information Request (SIR) prior to the end of the 30-day waiting period. In such circumstances, the statutory waiting period expires 30 days after the parties have complied with the SIR.

Europe

Competition Law

After the leave by the United Kingdom of the European Union (EU) in 2020, twenty-seven European countries have remained in a political and economic union to ensure economic integration among its member states by creating a single market. While the EU is a political and economic union, it is distinct from a **federation** of states such as the United States, where states have surrendered a significant portion of their sovereignty to a central government. Instead, the EU is often referred to as a **supranational** organization, which means that it has some powers that extend beyond national governments.

In order to achieve a single market a framework of competition rules have been designed to maintain a fair and competitive marketplace by preventing anti-competitive behavior and ensuring that businesses operate on a level playing field. **EU competition law is enforced both at the EU level and at the national level**, which gives **member states a certain level of autonomy in applying these rules**, but within a framework that is aligned with EU objectives

The essential elements of EU competition rules are:

- Anti-Competitive Agreements (**anti-cartel rules**): This prohibits agreements between companies that restrict competition, such as price-fixing, market-sharing, or collusion. It also applies to concerted practices that harm competition.
- Abuse of Dominant Market Position: This prevents companies with a dominant market position from abusing that power to the detriment of competition, for example, by unfairly limiting access to the market, predatory pricing, or discriminating against certain customers
- Merger Control: The EU examines mergers and acquisitions that could significantly reduce competition, creating monopolies or dominant players. Mergers above certain thresholds must be reviewed by the European Commission.

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- State Aid Control: The EU controls government aid to companies, ensuring that state support does not distort competition by giving unfair advantages to certain businesses over others.

The European Commission enforces these rules, and violations can result in heavy fines, sanctions, and forced changes to business practices. It is important to understand that national competition authorities in each member state also play a role in applying EU rules within their respective countries.

Merger Control Notification

Mergers can be subject to either EU or national merger control rules.

The EU Commission must be notified of any merger with an EU dimension prior to its implementation. If the local notification thresholds are met, then companies must comply with the local notification requirements.

In principle, at EU level only subject to examination are larger mergers with an EU dimension if the merging firms reach certain turnover thresholds. There are two alternative ways to reach turnover thresholds. The first alternative requires (i) a combined worldwide turnover of all the merging undertakings of more than EUR 5,000,000,000; and (ii) an EU-wide turnover for each of at least two of the undertakings of more than EUR 250,000,000. The second alternative requires (i) a worldwide turnover of all the merging undertakings of more than EUR 2,500,000,000 ; (ii) a combined turnover of all the merging undertakings of more than EUR 100,000,000 in each of at least three member states; (iii) a turnover of more than EUR 25,000,000 for each of at least two of the undertakings in each of those three member states; and (iv) an EU-wide turnover of each of at least two undertakings of more than EUR 100,000,000.

In both alternatives, the EU dimension requirement is not met if each of the undertakings achieves more than two thirds of its EU-wide turnover within one and the same EU member state.

For the Netherlands – as an example - mergers without an EU dimension are subject to Article 29 of the Dutch Competition Act, under which the Dutch Authority for Consumers and Markets (*Autoriteit Consument en Markt* – ACM) must be notified of a concentration if both the combined turnover of the firms involved is more than EUR 150,000,000 in the calendar year before the concentration and at least two of the companies involved earned at least EUR 30,000,000 in the Netherlands.

Multijurisdictional Coordination

Coordinating regulatory reviews across multiple jurisdictions presents one of the most complex challenges in cross-border M&A. Each jurisdiction has its own rules, timelines, and analytical approaches, which can lead to conflicting requirements, delays, and added costs. Companies must navigate these disparities carefully to avoid regulatory pitfalls that could jeopardize the transaction.

To address these challenges, companies should begin by mapping out the regulatory landscape early in the process. This includes identifying all jurisdictions where filings are required, understanding the specific thresholds for notifications, and assessing potential overlaps in regulatory oversight. Early identification of key jurisdictions allows companies to allocate resources effectively and build a comprehensive regulatory strategy.

Pre-filing consultations with regulatory authorities can play a critical role in clarifying expectations and minimizing procedural hurdles. These consultations provide an opportunity to present the transaction framework, gather feedback, and address potential concerns proactively. Regulators may also offer informal guidance that helps streamline formal filings and review processes.

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Timing is another critical factor in multijurisdictional coordination. Companies should carefully plan submission timelines to account for differences in review periods and procedural requirements across jurisdictions. Aligning timelines where possible can help ensure that approvals are obtained in parallel, preventing bottlenecks that could delay closing.

Documentation consistency is equally important. Companies should prepare unified filing materials that address the requirements of multiple jurisdictions while tailoring specific sections to meet local legal standards.

Engaging experienced legal counsel and regulatory advisors is essential for managing complex reviews. These experts can help identify risks, draft persuasive filings, and respond to inquiries from regulators effectively. They can also assist in managing negotiations related to remedies or modifications needed to gain approval.

Finally, companies should anticipate scenarios where regulators may impose conflicting requirements. Establishing contingency plans, including alternative divestiture proposals or operational adjustments, can provide flexibility to address last-minute demands. Proactive planning and communication with regulators across jurisdictions ultimately increase the likelihood of a smooth approval process and successful transaction completion.

Regulation on Foreign Direct Investment (FDI)

National security reviews

National security reviews have become an increasingly critical component of foreign direct investment (FDI) regulations as governments aim to protect sensitive industries and technologies.

United States

In the United States, the Committee on Foreign Investment in the U.S. (CFIUS) is the primary authority tasked with reviewing transactions involving foreign investors to assess potential national security risks. Established under the Defense Production Act of 1950 and expanded by the Foreign Investment Risk Review Modernization Act (FIRRMA) of 2018, CFIUS operates under broad authority to evaluate acquisitions, mergers, and investments that may impact U.S. national security.

CFIUS reviews focus on transactions involving sectors such as defense, critical infrastructure, telecommunications, energy, data security, and advanced technologies, including artificial intelligence, semiconductors, and biotechnology. Transactions involving critical technologies subject to export controls or companies handling sensitive personal data are particularly scrutinized.

The review process begins with a voluntary filing by the parties involved, although certain transactions—especially those involving critical technologies or foreign government-controlled entities—require mandatory filings. The initial review period lasts 45 days, followed by a 45-day investigation phase if warranted. At the end of the process, CFIUS may approve the transaction, impose mitigation measures, or refer it to the President of the United States for a final decision.

Mitigation measures may include restrictions on data access, establishment of security protocols, mandatory audits, and appointment of compliance officers. In some cases, divestiture of certain assets may be required to address concerns. Failure to comply with mitigation agreements can lead to enforcement actions, including fines or forced unwinding of the transaction.

Given the complexity and potential consequences of a CFIUS review, parties are advised to engage experienced legal counsel early in the transaction process. Conducting a preliminary risk assessment, preparing detailed

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disclosures, and engaging in pre-filing consultations with CFIUS can help streamline the process and address concerns proactively.

International investors should also be aware of broader geopolitical considerations that may influence CFIUS decisions. Investments originating from countries perceived as strategic competitors, such as China and Russia, are likely to face heightened scrutiny. Companies should be prepared to demonstrate their commitment to U.S. operations, compliance with regulatory standards, and long-term economic benefits to mitigate such concerns.

In light of these challenges, early planning and transparency are key to navigating the CFIUS process successfully. Companies should incorporate national security reviews into their broader M&A strategy and remain flexible in structuring transactions to address potential regulatory hurdles.

Canada

In Canada, the Investment Canada Act (ITA) governs the review process for foreign investments. Acquisition of control of Canadian business are either reviewable or notifiable under the ITA. The acquisition of control of a Canadian non-cultural business by a foreign buyer is subject to pre-closing review where the target has an enterprise value of C\$1.386 billion or greater. The acquisition of control of a Canadian cultural business (publication, distribution or sale of books, magazines, periodicals or newspapers) by a foreign buyer is subject to pre-closing review where the book value of the Canadian business' assets is at least C\$5 million. Indirect acquisitions (e.g., acquisitions of a foreign corporation that has a Canadian subsidiary corporation carrying on the Canadian business) of control of a Canadian non-cultural business by a foreign buyer are not subject to review, regardless of size.

Where a transaction is subject to pre-closing review, the ITA the government with an initial period of 45 days to complete the "net benefit" review, i.e., a review in which the Canadian government satisfies itself that the investment is likely to be of "net benefit to Canada". The net benefit analysis takes into account a number of elements, including the effect of the investment on the level and nature of economic activity in Canada; the degree and significance of participation by Canadians in the Canadian business; and the effect of the investment on productivity, industrial efficiency, technological development, product innovation and product variety in Canada. If more time is required, the government can unilaterally extend this period for up to 30 days, with further extensions possible with the consent of the investor.

The ITA includes provisions allowing for the review of investments by non-Canadians that "could be injurious to national security". In contrast to the "net benefit" review, both controlling and minority investments are potentially subject to national security review. If a national security review is ordered, the government notifies the investor and the transaction cannot be completed while the review is ongoing. A review can also be ordered following closing. The expression "national security" is not defined in the ITA, but annual administrative reports released by the government provide helpful guidance.

Europe

The European Union (European Commission) operates under the EU FDI Screening Regulation (EU 2019/542), which creates a cooperation mechanism where EU Member States and the EU Commission are able to exchange information and raise concerns related to specific FDI made in the European Union.

The EU FDI Regulation lays out a number of guidelines that EU Member States must follow when implementing, modifying, or maintaining FDI screening mechanisms. The regulation does not require the EU Member States to implement a (new) FDI screening regime, but there is a legislative proposal that does an obligation to do so.

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Under the current EU FDI Screening Regulation, each EU Member State shall send a notification to the EU Commission and the other EU Member States if any FDI in its territory is being screened. The notification may include a list of EU Member States whose security or public order is deemed likely to be affected. Within 15 days following the receipt of that notice, other EU Member States need to notify the relevant EU Member State undertaking the screening of their intention to provide comments. The comments must be provided within 35 days following receipt of the initial notice.

Within 5 days after the 35-day period, the EU Commission may also issue an opinion addressed to the EU Member State conducting the screening. Where the EU Commission considers that FDI is likely to impact projects or programs of the EU interest on grounds of security or public order, the EU Member States undertaking the screening must take the EU Commission's opinion into careful consideration and give explanation if the EU Commission's opinion has not been followed.

For the Netherlands, the FDI screening mechanism became effective via the Vifo Act (*Wet Veiligheidstoets investeringen, fusies en overnames*) as per 1 June 2023. The Vifo Act applies to all transactions involving target companies that are (i) based in the Netherlands and (ii) supplying in the (a) vital infrastructure or undertaking in (b) sensitive technology or (c) business campuses.

Both the target company and its potential acquirer(s) are required to report the transaction to the Bureau for Investment Screening (*Bureau Toetsing Investerings*) (BTI). The BTI falls under the responsibility of the Dutch Ministry of the Economic Affairs and Climate.

The Vifo Act does not state when the notification to the BTI is due. Upon receipt of the notification, the BTI will examine whether the transaction can lead to a national security risk, in particular the continuity of vital processes, the prevention of undesirable strategic independencies, and the integrity and exclusivity of knowledge and information.

The BTI shall give its consent within 8 weeks upon receipt of the notification, which is also called the first phase. In the event that a formal assessment is required, then another 8 weeks will be added for further investigation, which is known as the second/review phase. The BTI can extend each phase with a period of 6 months. If the BTI requires additional information or want to schedule a meeting, then these periods will be suspended.

The Vifo Act states that the acquisition will be deemed void if the transaction is completed without BTI's approval. The exercise of the acquired rights by the investor will be suspended and a fine can be imposed.

Failure to comply with the notification obligation under the Vifo Act may lead to a direct suspension of all voting rights of the acquirer pursuant to the transaction. The target company will be obliged to cooperate with its best efforts. Furthermore, the BTI may require that a certain notification still need to be made by the parties involved within a period of 3 months after the transaction became known. The rights of the investor will in the meantime be suspended. The BTI may also impose an administrative fine with a maximum of 10% of the turnover.

Screening Thresholds and Criteria

Screening mechanisms vary significantly across jurisdictions, with thresholds often based on transaction size, industry, or foreign ownership levels. In the U.S., mandatory filings are triggered for investments involving critical technologies, critical infrastructure, and sensitive personal data. Canada applies thresholds based on enterprise value for economic reviews, but national security reviews apply regardless of value.

In the EU, thresholds are typically tied to industry sensitivity rather than deal size. Certain countries, like Germany

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and France, impose stricter thresholds for investments in high-risk sectors, including artificial intelligence, biotechnology, and defense technologies. Investors must carefully evaluate whether their transactions meet these thresholds and determine the need for mandatory notifications.

Additionally, transactions involving state-owned enterprises or entities linked to foreign governments are subject to enhanced scrutiny. The origin of the investor, particularly from countries perceived as geopolitical rivals, can further influence regulatory outcomes.

Approval Strategies

Securing approvals in FDI transactions requires early preparation and strategic engagement with regulatory authorities. Companies should identify potential risks and develop mitigation strategies well in advance of formal filings. This process may involve preparing detailed compliance plans, demonstrating economic benefits, and highlighting contributions to innovation and job creation.

Negotiating mitigation agreements is often central to gaining approvals. These agreements may include conditions such as restrictions on data access, divestment of sensitive assets, or establishment of security oversight mechanisms. Proactive dialogue with regulators can help shape these agreements to minimize operational disruptions.

Engaging stakeholders, including industry groups and policymakers, can also influence the approval process. Companies often highlight their commitment to transparency, governance, and long-term partnerships to build trust and alleviate sovereignty concerns.

Finally, contingency planning is critical for addressing potential delays or denials. Companies may prepare alternative deal structures, establish backup timelines, and assess the feasibility of restructuring transactions to satisfy regulatory requirements. Such flexibility ensures that deals can proceed even when unexpected obstacles arise.

Deal Terms - Differences in law on certain key terms

Generally, private M&A deals are conducted in a similar fashion in different jurisdictions. Canada and the US are especially similar, and US buyers can expect fewer surprises when doing a transaction in Canada than anywhere else. That said, engaging with local counsel early in the process can avoid unpleasant surprises. Issues surrounding permitting, licenses, regulatory consents, securities laws, shareholder rights, labor and employment issues, environmental matters, to name a few. It is fair to state that US M&A activity and trends heavily influence European M&A and are slowly being incorporated into European markets. On the other hand, local European business practices should be carefully observed given the fundamental differences between the US shareholder approach and the more stakeholder approach that is applied within several continental European countries (such as Germany, the Netherlands and Nordic countries). In this stakeholder approach there is a strong employee representation, sustainability and a long-term, stakeholder-focused approach to governance.

Another fundamental difference between the US and continental Europe is that it operates under a system of civil law which is distinct from the US legal system that is based on common law. Civil law is based on comprehensive written codes and statutes that provide a framework that judges interpret, but do not create thorough rulings. Legislation is the primary source of law. Judicial precedents are not as binding in civil law jurisdictions as they are in common law systems. Similarly, foreign entities wanting to do business in Canada should be aware that Canada has a dual legal system. Quebec, much like Europe, operates under the civil law system, whereas the rest of Canada operates under the common law systems. Notwithstanding that Quebec is a civil law jurisdiction, M&A

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deals are conducted in a similar manner to M&A deals in common law jurisdictions.

It also means that in the EU courts often apply **open norms** to interpret and apply laws that may be broad or flexible, allowing for a degree of discretion in their application. Open norms are provisions that are intentionally vague, giving courts some freedom to interpret them based on **context, policy considerations**, and evolving societal values. These norms are particularly relevant in the context of EU law, which frequently deals with **balancing competing interests** and ensuring harmonization across diverse legal systems of member states.

Commercial considerations

Commercial matters may also differ from one jurisdiction to another. For reasons explained above (the civil law system and open norm approach in the EU) many US clauses or concepts cannot be in European M&A and require local changes. Similarly, Canadian courts and laws may impose differing standards and interpretations to various aspects of an agreement. Below are a few examples of typical clauses or concepts that may differ in some jurisdictions as compared to what one would be accustomed to in the US:

Material Adverse Effect (MAE) Clauses

While Canadian courts have looked to Delaware in interpreting and applying MAE clauses, there are important differences. While Delaware previously required that an MAE arise from an “unknown” event, it no longer stands by that requirementⁱ. Canadian courts, on the other hand, maintain that an MAE should arise from an “unknown” eventⁱⁱ. Finally, while Delaware courts regularly caution that MAE clauses impose a “heavy burden” on the buyer, Canadian courts have given the ambiguous (and somewhat opposite) instruction that MAE clauses are to be “interpreted from the buyer’s perspective”ⁱⁱⁱ. It is very important to bear these differences in mind when drafting an agreement for a cross-border deal.

Sandbagging

Most states will enforce a pro-sandbagging clause and allow a buyer to claim on a breached seller representation and warranty even where the buyer had knowledge of the inaccuracy prior to closing. Caselaw on sandbagging in Canada is quite scarce and the few courts that have considered the issue have sent conflicting signals. In addition, these decisions predate significant developments in Canadian common law imposing duties of good faith and honest performance in contractual relations. In Quebec, the Civil Code has long held the duty of good faith in the performance of contracts as a fundamental principle and obligates parties to act honestly and fairly towards each other. Buyers can negotiate for a pro-sandbagging clause but it may be of limited value. Sellers can negotiate for an anti-sandbagging clause but it may be redundant. Common market practice in Canada is to remain silent on the issue.

Specific performance

Specific performance is generally an exceptional remedy under Canadian law with Canadian courts often reluctant to award it, even in the face of an express specific performance clause. Regardless of what M&A counterparties have contractually agreed, specific performance remains an equitable remedy at the discretion of the court. While the same is generally the case in the US, courts in certain states such as Delaware often exhibit a greater respect for the freedom of contract and deference to contractually agreed remedies than do their Canadian counterparts.

Contract interpretation

Should an M&A transaction be litigated, an important difference between US and Canadian law is the difference between the “four corners” and the “factual matrix”. Whereas Delaware courts adhere to the “four corners”

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principle whereby they generally seek to resolve contractual interpretation disputes, to the extent possible, without looking beyond the wording of the agreement, Canadian common law courts adhere to the “factual matrix” principle whereby overall context will generally be taken into account in every contractual interpretation dispute^{iv}. Meanwhile, under the Quebec civil law system, the literal meaning of the words in the contract is important, but Quebec courts, in application of the Quebec Civil Code, will also consider the context and common intention of the parties.

In the EU, as mentioned above, courts exercise a degree of discretion in applying laws that are broad and flexible.

Litigation

Canada is generally a less litigious environment than the US, including in connection with M&A. This is likely at least in part explained by Canada’s “loser pays” system whereby the successful party is often awarded a portion of their costs. Another explanation may be that damages awards are perceived to be lower in Canada than south of the border. Punitive damages are also very rare in Canada, requiring egregious facts and, even then, typically only give rise to modest punitive damages amounts. Finally, jury trials are very rare in Canada outside specific types of claims such as personal injury or libel.

Employment Integration Considerations

Differences in Labor Laws

The employment law aspects of cross-border corporate transactions are diverse and complex. Here are some key points, which are particularly relevant within Europe:

Transfer of undertaking

Within the EU a cross border corporate transaction often results in a transfer of undertaking (TUPE), in which employees are transferred by operation of law to the acquiring company while retaining all rights and obligations under their employment contracts. This is stipulated in EU Directive 2001/23/EC, which protects employees during a transfer of undertaking.

Similarly, a transfer of the shares of a company in Canada results in the buyer stepping into the role of the employer and employees maintaining all of their rights to employment, including the right to severance based on length of service (including while the seller was the owner of the business) if the buyer terminates the employment relationship. The same is true with respect to an asset sale in some Canadian jurisdictions (example, Quebec), while in other jurisdictions (example, Ontario), the sale of assets generally puts an end to the employment relationship and the seller is responsible for providing severance to the employees, unless the new owner agrees to continue the employment relationship.

Although generally similar, there are major differences between US and Canadian labor laws, the most significant of which is that there is no “employment at will” in Canada. Instead, employment relationships are terminated by the employer either for cause, or without cause. For cause terminations allow employers to put an end to the relationship without notice and without any indemnity payment. There are high thresholds for “for cause” terminations but they generally include matters such as theft, fraud, insubordination, incompetence, etc.

An employer may put an end to an employment relationship without any reason (without cause) in Canada, provided that adequate advance notice, or payment in lieu thereof, is provided to the employee. Employment

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standards acts across the country typically mandate the minimum notice period and provide a sliding scale of notice depending on the employee's seniority, which is typically a maximum of 8 weeks.

Additionally, in the case of termination without cause, an employee is also entitled to reasonable notice of termination (severance) under both common and civil law. There is no real formula for determining the amount of severance owed, but judicial awards have ranged in the one to two months per year of service up to a maximum of 24 months.

In the US, when a company is acquired, how employees are treated can differ based on the structure of the transaction. In a stock deal, the buyer purchases the target company's stock and essentially steps into the shoes of the existing employer, meaning employees generally remain employed by the same legal entity. Their titles, compensation, and benefits might not change substantially unless specifically renegotiated. In an asset deal, by contrast, the buyer selects which assets (and often which employees) to take on, and the employees typically end their employment with the seller. Whether the buyer rehires those employees is a separate decision governed by the asset purchase agreement and business considerations.

Severance obligations also hinge on the deal structure and any existing employment contracts or policies. In a stock purchase, since the employing entity remains the same, employees generally do not experience a termination event that would trigger severance—assuming there is no material change in the terms of employment. In an asset purchase, the employment relationship with the seller ends, and the buyer may or may not offer comparable positions or new employment. If the employees are terminated without being rehired, severance obligations may be owed under individual employment contracts, collective bargaining agreements, or the seller's internal policies, but severance is typically not required by US law.

Additionally, federal and state WARN (Worker Adjustment and Retraining Notification) Act requirements can come into play if the transaction leads to "mass layoffs" or plant closings. Under federal law, employers with 100 or more employees are generally required to provide at least 60 days' notice if a mass layoff or closing affects 50 or more full-time workers at a single site. There are nuances depending on whether the buyer is seen as a "continuing business" under the transaction, so the obligations to notify might shift between seller and buyer based on the specific deal structure and timing.

In Canada, mass layoffs are governed by both federal and provincial/territorial laws. The specific requirements can vary depending on the jurisdiction, but they generally include provisions for notice periods, severance pay, and other employee protections. Additionally, collective bargaining agreements may have provisions that must be followed, and individual employment contracts may also contain terms related to termination and severance. Employers must also ensure that layoffs do not violate human rights laws and do not discriminate.

Conditions of employment

Based on European law, if the employment contract contains a choice of law, the employment contract will be governed by the law chosen by the parties. However, the employment relationship cannot be removed from the mandatory law of the country whose law would have been applicable in the absence of a choice of law.

Employee participation

Employee participation in a company in the European Union (EU) refers to the involvement of employees in decision-making processes within a company. This can take many forms, ranging from providing feedback and input on day-to-day activities to participating in the company's strategic decisions, governance, and overall

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direction. Employee participation has been a significant concept in European labor law and is encouraged through various directives and national legislations. Key aspects of employee participation are the (mandatory) establishment of a works councils (which may have certain (advisory) rights in the event of any intended decision which may have a significant financial/economic or organizational impact on the company), board level employee representation and trade unions and (mandatory) collective bargaining on the terms and conditions of the employment relationship.

Conclusion and Key Takeaways

Preparation is key and knowledge is power. Getting ahead of the game and knowing what the judicial landscape looks like will be crucial to a successful transaction and transition. To do this, coordination with local counsel at an early enough stage is crucial to avoid unwanted and avoidable surprises.

No matter the law governing the agreement, know that local laws of the target entity will still apply in anti-trust, foreign investment and employment matters to name a few. Additionally, one must be aware of the nuances in commercial matters and ensure a good understanding of how relatively standard clauses may be interpreted in any given jurisdiction.

Consult with local counsel early in the game. Everybody wants to rule the world!

ⁱ Akorn, Inc. v. Fresenius Kabi AG, 198 A.3d 724 (Del. 2018).

ⁱⁱ Fairstone Financial Holdings Inc. v. Duo Bank of Canada, 2020 ONSC 7397 (CanLII) at para. 64 (emphasis added). See also Cineplex v. Cineworld, 2021 ONSC 8016 (CanLII) at paras. 105-106

ⁱⁱⁱ Id.

^{iv} Sattva Capital Corp. v. Creston Moly Corp.