Managing the Process

Different Strokes

Before they cross the threshold on any cross-border acquisition, CLOs need to advise their CEOs about pertinent differences between jurisdictions.

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> **[IN BRIEF]**
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> Even in an increasingly global economy, the intricacies of dealing with multiple jurisdictions make cross-border acquisitions complicated endeavors. Before moving ahead with any deal, CLOs must investigate a wide range of issues, including:
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> - Deal structure
> - Disclosure requirements
> - Regulatory constraints
> - Tax implications
> - Labor issues
> - Other special rules and regulations

Quick: What do you need to know to get moving on a cross-border acquisition? How soon can you investigate the target company, negotiate the deal, close it, and move on to the next?

From top management's position, those are the key questions. But for you it's more complicated. You can't begin to think about a timetable until you've wound your way through the myriad nuances that constitute a cross-border deal.

Still, you don't have much time. Your boss wants answers —and, chances are, you're not the only company vying for this conquest.

So here's a cross-border cheat sheet—14 key questions to start the ball rolling. The answers (and sometimes even the questions) are different from country to country, deal to deal. But you've got to start somewhere.

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1. How do you gather information on a target company? As you search for information about a cross-border target's financial condition, results, and prospects in a jurisdiction where the frequency and depth of public disclosure varies significantly from what is available in the United States, where do you look, and what will you find? The target's Web site, of course, is a first stop. If the target is listed in the United States, you'll find an annual disclosure that complies with U.S. generally acceptable accounting principles, or GAAP. Alternatively, the company will post local GAAP statements with U.S. GAAP reconciliations through the Securities and Exchange Commission. (The catch: Since these reconciliations can be made up to 180 days after year-end, what you find may be out-of-date.) The company will also publish semiannual financial statements, but they need not be in U.S. GAAP.

If the target is taking advantage of the "information-supplying" exemption from registration as a reporting company in the United States, shareholder reports will be available through the SEC, but generally only in local GAAP.

2. How should the transaction be structured? Don't assume you can acquire a foreign company the same way you'd acquire a domestic one. Mergers between companies in different countries are often impossible. In some countries, such as the United Kingdom, a U.S.-style merger is not an option. In others, such as Germany, France, and India, cash or freeze-out mergers are difficult or nonexistent. Other mechanisms, such as mandatory share exchanges to eliminate minority shareholders, may exist. The use of shares as consideration may be difficult or not yield the same tax-free treatment as in the U.S.

3. What are the threshold disclosure requirements? Laws differ as to when the recipient of a takeover proposal has to disclose it to the market. In the U.K., for example, the Takeover

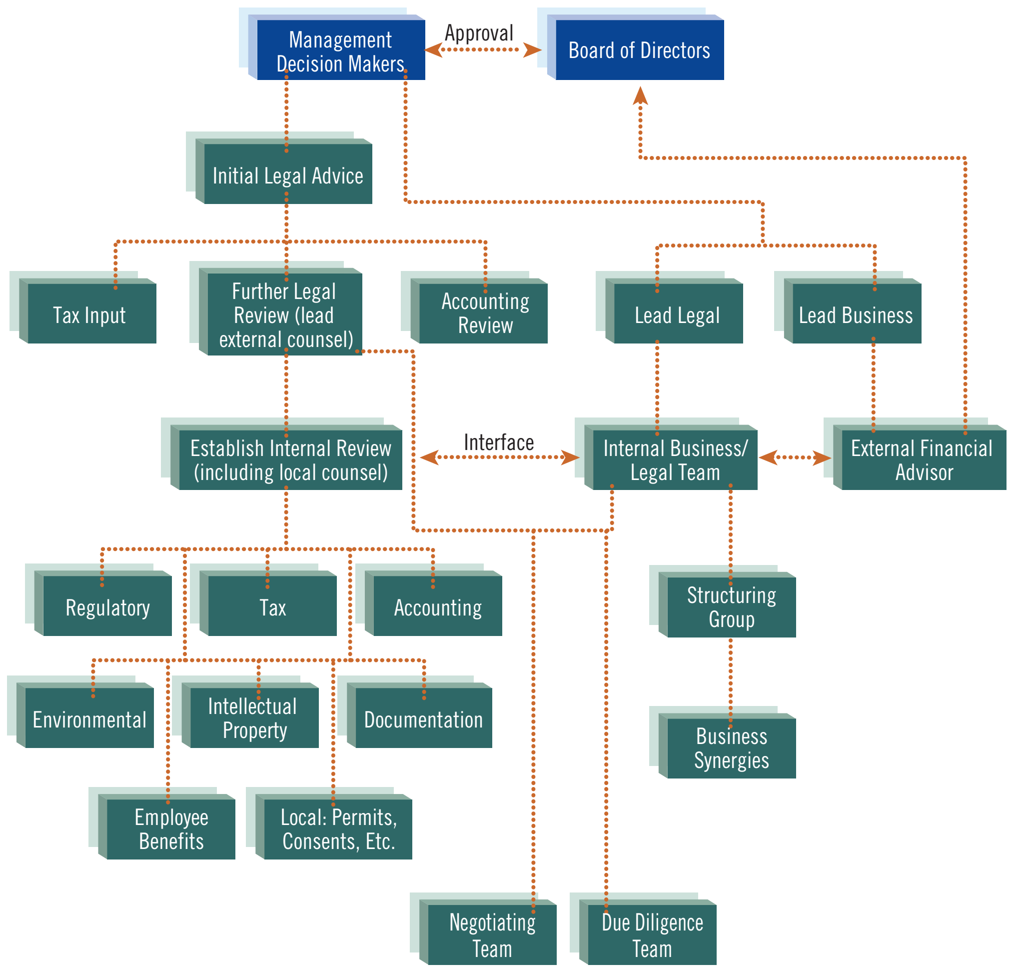
Panel may require a bidder or a target to announce that an offer is being contemplated if the target becomes the subject of market rumor or if there is unusual trading activity in the target's stock. A U.S. company might wait to make a disclosure.

4. Are there special rules for financing the deal? In many European countries, it's not possible to make a takeover offer except on a fully financed basis. Not only must the bid not be "subject to financing," but any third-party financing that is required for the offer must be fully arranged and committed to upon the launch of the offer. In the U.K., a company is generally prohibited from providing financial assistance to an acquirer, including granting security interests or guaranties to finance the acquisition of shares. This effectively prohibits asset-based leveraged acquisition techniques, unless "whitewash" procedures have been followed.

5. Can the acquirer take a toehold position in the target? If the proposed acquisition target is public, an acquirer may wish to acquire some shares before making a formal proposal. This may lower the overall cost and serve as a hedge against a rival bid. In the cross-border context, however, a toehold investment should *never* be made without checking with local counsel. Most countries have laws requiring disclosure of significant holdings. In some countries, the threshold is lower than in the United States. In many countries, a takeover bid must be made at a minimum price based upon any prior share purchases, so early efforts to acquire a block of stock at a premium may effectively set a price floor.

PURSUING A GLOBAL MERGER: THE PEOPLE BEHIND THE DECISION

Before the CLO can tell the CEO to move forward with a deal, before the CEO can give the board the good news, there's lots of work to be done—and lots of people to put to work. Here's a snapshot of the process.



SOURCE: PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP

6. What are the material regulatory constraints? The first question may be, Who are the relevant regulators? The answer may depend on the structure of the transaction. In the U.K., for example, the Takeover Code will apply to any acquisition of a public company whether or not its shares are listed on the London Stock Exchange. The Takeover Panel administers the code, and although its rulings have no force of law, ignoring them would be out of the question. Investment bankers, not lawyers, handle calls for guidance about the code.

Regulators in Europe may have an impact on substantive aspects of an offer. In the U.K., if a hostile bid is converted to a negotiated transaction, the panel can pass on whether the terms of the bid can be restructured and is likely to want to see the original terms maintained. In

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France, regulators play an active role in overseeing the substance of takeover bids, not just the adequacy of disclosure. In a regulated industry, it is critical to determine if there are any material barriers to foreign investment or preclearances.

7. How should due diligence be conducted? In some countries, market participants expect a process at least as thorough as in the United States. In others, the proposed arrival of a large due diligence team can threaten even the most compelling deal. Early intrusive questions may be viewed as signs of mistrust.

Target companies may have different expectations as to when due diligence is appropriate, such as after signing a "heads-of" agreement. Who conducts due diligence may also vary. Local counsel may not be used to performing the level of diligence required, or custom and practice may dictate that employees of the acquirer or the acquirer's accountants conduct the diligence exercise.

8. What are the threshold tax implications? In-house tax advisors may already be on the case, alone or with accountants. Different structures can present different outcomes for the acquirer and the seller.

9. Will labor issues present hurdles? In the current economic environment, where the idea of global operations after a deal often underpins at least part of the economic rationale for a cross-border acquisition, early consideration must be given to the interests of employees—and their unions—especially in jurisdictions where worker protections are prevalent.

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10. Does the target company have substantial U.S. ownership, which may implicate U.S. securities laws? Will U.S. filings be required in connection with the transaction? These could include filings on Schedule 13D if a greater than 5 percent toehold investment is made; if U.S. ownership exceeds 10 percent, a bidder will need to exclude U.S. shareholders from participating or comply with the U.S. tender offer rules and (if securities are issued) public offering rules. Don't assume the securities laws outside the United States are as comprehensive or that compliance will be as time consuming as in the U.S. If there is a review, it could be a merit review.

11. What if the target is insolvent or near insolvency? A purchaser should check the local jurisdiction's laws to determine if any fraudulent conveyance laws exist and apply. If the target has filed bankruptcy proceedings, what are the rules of the applicable bankruptcy regime and what options are available? For example, if the target has filed in the United States, the purchase could be undertaken as a discrete sale done on notice to all creditors with a hearing before a bankruptcy court or as part of the debtor's reorganization plan.

12. What kind of deal protection is possible? The level of "break-up" fees typical in the United States is high by international standards. In most European jurisdictions, 1 percent would be customary; in some, there is no clear legal basis for such fees. Rules and customs regarding the ability to get large shareholders to commit to supporting the deal also differ.

13. Can the target agree to deal exclusively? Privately held companies are generally free to decide with whom they will deal, and they may agree to negotiate only with a single party for a period of time. Publicly traded companies in many jurisdictions do not have this capacity and may be obliged to publicize the fact that they are considering a sale so as to invite all bidders to the auction. Where exclusivity agreements are possible, they will rarely be agreed to (or be meaningful) unless demanded at the outset. They may also offer less "exclusivity" than in the United States.

14. What legal advisors will be needed? Properly managing the acquisition process can have a tremendous impact on how smoothly—and how quickly—a deal can be consummated. Determine early on what resources will be needed where and when, and figure out how all the disparate elements can communicate effectively. For legal counsel, is the one-stop shop the right approach, or would the client be better served by firms with recognized expertise in the relevant jurisdictions? •

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