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Expect the Unexpected – Foreign Antitakeover Regimes

The takeover defenses available, and sometimes unavailable, to foreign companies facing unsolicited or hostile offers occasionally come as a surprise and complicate the pursuit or defense of these bids.

The confluence of a number of overlapping factors – including an uptick in global and cross-border M&A activity, a resurgence in unsolicited takeover offers, the continued flow of tax inversion transactions, and the growth of activism in non-U.S. markets – means that U.S. companies and investors are more often facing unfamiliar takeover (and antitakeover) regimes as they evaluate and pursue offers for foreign targets. While experienced dealmakers are often well-versed in the nuances of friendly transactions with a foreign seller, the defenses available, and sometimes unavailable, to foreign companies facing unsolicited or hostile offers occasionally come as a surprise and complicate the pursuit or defense of these bids.

While a comprehensive survey of antitakeover regimes in various foreign jurisdictions is well beyond the scope of this Update, it is instructive to highlight a number of examples where the regime – mandatory or permissive – departs significantly from U.S. practices, even in countries with well-developed legal systems and capital markets.

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In a number of jurisdictions, the applicable takeover rules can be seen to facilitate, or even encourage, offerors in taking rejected overtures to the public shareholders:

Poison Pills

While the poison pill is a well-established mainstay of a defense by a U.S. target against a hostile bid, serving primarily to force the bidder to engage with the board of the target, such a defense is not permitted in many jurisdictions, including the United Kingdom and Ireland (two of the primary destinations for inverting U.S. companies). In Canada, regulators generally will order a target board to “cease trade” (or lift) a poison pill after just a few months, based on the principle that the defensive measure is intended only as a short-term respite to allow the target board to quickly assess the availability of alternatives to the hostile bid. As a result, a hostile acquirer in these jurisdictions generally has the opportunity to take its offer directly to shareholders without the board of directors of the target being able to intercede or unduly delay the offer.

Frustrating Actions

The effect of the inability to deploy a poison pill in these (and many other) European jurisdictions is extended by a corresponding ban on the target taking “frustrating” actions (i.e., acts that would interfere with, or impact, an outstanding or impending offer), such as buying or selling assets above certain size thresholds, issuing stock, amending contracts, etc., without shareholder approval. Again, the rules are designed to leave the ultimate decision about the bid in the hands of the public shareholders.

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Equally, many jurisdictions have rules that either facilitate an aggressive defense or otherwise make it harder for a hostile bidder to succeed:

Timelines

As compared to the U.S. where hostile bids can linger for many months while financing and regulatory approvals are obtained and stockholder sentiment is swayed, some countries, especially the United Kingdom and to a lesser degree Ireland, apply a variety of timeline requirements that force a hostile bidder to proceed, and attempt to succeed, on a very tight calendar. The so-called “put up or shut up” rules apply maximum time

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periods for both the launch and thereafter completion of a fully-financed (under a "funds certain" regime which requires unconditional access to the necessary cash) and largely unconditional offer following any leak or public announcement of a hostile offer.

Foundation Defenses

Companies incorporated in some European jurisdictions, including the Netherlands and Luxembourg, have sought to use an independent *Stichting* (or trust foundation) to defend against unsolicited offers. The foundation, controlled by independent trustees and with a broad statement of purposes including the preservation of the mission of the target company, may be issued "golden shares" that seek to enable it, at least temporarily, to control the voting outcome on any matter put to target shareholders. Alternatively, as was the case in the Arcelor/Mittal takeover battle, targets could try to drop "crown jewel" assets into the foundation, seeking to put those assets beyond the control of the bidder even if it succeeds, or outside its reach to facilitate required antitrust divestitures.

National Interest

While U.S. companies may be familiar with the CFIUS rules under which the President can block or put conditions on foreign acquisitions of U.S. targets if national security concerns are implicated, other countries have much broader national interest review regimes that empower government officials to block acquisitions of domestic companies based on their views on whether the acquisition is in the overall national interest. Political or corporate pressure may be exerted by targets to use these regimes to hamper a hostile takeover by a foreign buyer. For example, the Investment Canada Act allows an evaluation of a foreign investment based on an assessment of the overall "net benefit" to Canada, while Australia's Foreign Investment Review Board reviews certain acquisitions under a "national interest" standard that covers a broad range of issues including the impact on government policies, employees and creditors, as well as the identity and nationality of the buyer.

Voting Power

Some continental European countries, like Spain and France, have various mechanisms that address voting rights associated with a target's shares in a manner that can hamper a hostile takeover. For example, both Spain and France have regulations that permit a company's bylaws (on an opt-in basis) to cap the voting rights exercised by any single shareholder (or group) regardless of actual ownership percentage, thereby disincentivizing accumulation of a very large toe-hold position by a hostile bidder. Under France's controversial Florange Law (which is subject to opt-out by shareholder approval), long term (i.e., at least two years) shareholders are granted double voting rights, thereby mitigating the voting sway of both toehold positions and post-announcement purchases by merger arbs.

Reciprocity

A number of European countries have enacted defense principles predicated on reciprocity of regime with the country of the hostile bidder. Italy's "passivity" rule that limits defensive measures that may be taken by a target without shareholder approval is suspended if the hostile offer is made by an entity that is not itself subject to equivalent passivity rules. Similarly, a French company's articles may provide that similar "neutrality" rules do not apply if the takeover regime applicable to the bidder would not similarly constrain it if it were the target of an unsolicited offer. Given the U.S. rules that give a board substantial flexibility in defending against a hostile bid, these reciprocity provisions very well could be implicated if the bidder is a U.S. company.

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Both the principles and practices of antitakeover regimes in foreign countries often differ significantly from those applicable to a U.S. target. U.S. buyers pursuing unsolicited offers outside the domestic market are well-advised to understand the legal, cultural and political environment for hostile bids in the target's home country, as well as the company-specific provisions embedded in organizational documents. Similarly, boards and shareholders of companies reincorporating from the U.S. to foreign jurisdictions, including in inversion transactions, may be surprised at the vastly different balance of legal power between the board and shareholders, as well as unique tactics and vulnerabilities, which apply in their new home countries.

If you have any questions about the matters addressed in this *M&A Update*, please contact the following Kirkland author or your regular Kirkland contact.

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