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Welcome to the first edition of McDermott International Legal Highlights. This publication includes a collection of articles written by McDermott lawyers in the US and Europe focusing on recent and future legal challenges that Japanese companies may face while expanding abroad. We are reporting on topics relevant for Japanese companies where McDermott has special skills and deep experience.

We hope that you enjoy these legal news updates. Please feel free to contact your McDermott attorney or me if you have further questions or require clarifications.

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Nationalism and Cross-Border M&A: Navigating Populist Politics in Deal Making

David Dai (Shanghai) and Jacob A. Kuipers (Boston)

More than half of the G20 countries voted-in campaigns that focused on harming foreign, outside interests as a means to strengthen domestic ones. Nationalism is in. Globalisation is out.

Nationalistic rhetoric is proliferating across the global political landscape. From India, and Prime Minister Narendra Modi's "India First," to the United States, and President Donald Trump's "Make America Great Again," politicians are scoring popularity points and galvanising voters who yearn for national glory.

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With increased nationalism, two elements of globalisation—the free flow of goods and services (trade) and people (immigration)—have come under attack across the world, where protectionist and anti-immigration policies are disrupting the globalised world order. The third element—the free movement of money or investment—also might not be immune to nationalism.

Several anecdotes signify that a rise in nationalism could jeopardize cross border investments and deals. Two of the most recent include Ant Financial's (China) takeover of MoneyGram (US), and the implosion of PPG Industries' (US) prolonged pursuit of Akzo Nobel (Netherlands). These examples do not necessarily mean that increased nationalism translates into a decline in international deal-making. Nevertheless, nationalism is a risk variable that further adds to the complexity and prickly nature of cross-border investment and M&A.

Ant Financial and Moneygram deal in limbo

Since January 2017, Ant Financial, which is headquartered in China and is the financial payments affiliate of Chinese e-commerce giant Alibaba, has been battling Euronet, a US-based financial payment provider, to acquire MoneyGram, a US-based cross-border payments service. After much negotiation among the three companies, Ant Financial prevailed over Euronet with a US$1.2 billion offer in April 2017.

Throughout the negotiations, and even since MoneyGram accepted Ant Financial's offer, Euronet stressed security and data privacy concerns over having a Chinese company control a US-based payments provider. Euronet has repeatedly pushed the idea that because Ant Financial is owned primarily by Chinese investors, it does not meet sufficient standards for being a US money transmitter.

Someone in the US Government may have been listening to Euronet. On 11 July 2017, Ant Financial was forced to resubmit the deal for review by the Committee on Foreign Investment in the United States (CFIUS) after failing to obtain clearance within the normally allotted 75 days. CFIUS performs a national security review of all acquisitions of US companies by foreign entities. The fact that Ant Financial could not obtain clearance within the normal review period reflects a heightened level of scrutiny by the US Government. US Senator Jerry Moran, who represents the state where Euronet is headquartered, has spoken publicly and advocated to CFIUS that the deal represents a significant security concern to US citizens.

Against the political backdrop of President Trump's America First foreign policy agenda, the commercial relationships between US and Chinese companies are complex and difficult to gauge. Nevertheless, Euronet's security concern claim places its and the Trump Administration's interests in alignment, as it plays well with the Administration's security concern over Chinese financial manipulation. The Ant Financial–MoneyGram deal remains in limbo, partly owing to nationalist rhetoric and policy, putting MoneyGram's shareholders at risk of taking Euronet's smaller (by US$200 million) bid if CFIUS rejects Ant Financial's deal.

PPG gives up on Akzo Nobel

In early March 2017, PPG Industries, a US-based paint and specialty coating manufacturer and supplier, made a US$28 billion offer to buy Dutch competitor Akzo Nobel. The timing for PPG was not good, as the Dutch national elections, which were largely dominated by anti-foreign, pro-national rhetoric, were to occur a few weeks later. The Dutch public had grown increasingly concerned over foreign acquisitions of Dutch companies. This concern was further stoked by nationalist leaning politicians who attempted to tie foreign acquisitions to a loss in Dutch identity.

Even after the elections, in which more moderate politicians prevailed, Dutch politicians continued to oppose the deal, culminating with multiple provinces, as well as the Dutch Economic Affairs Minister, openly criticizing the potential deal. They cited concerns over Dutch workers, labour standards, and the need to maintain Dutch-controlled entities.

Akzo Nobel, which refused to engage in negotiations with PPG, used the nationalist political landscape to continually rebuff PPG's advances, despite PPG making three additional offers that topped out at US$29.5 billion in May 2017. Although most Akzo Nobel shareholders approved of its defensive posture, Elliot Advisors, a hedge fund with significant holdings in Azko Nobel, attempted to get a Dutch court to remove Akzo Nobel's management for failing to engage with PPG.

The Dutch court rejected Elliot Advisors' arguments, finding that Akzo Nobel's actions aligned with most shareholders' wishes. The case, however, further strengthened the nationalist message and sent lawmakers scurrying to put in

place laws that would make it harder for a foreign entity to acquire a Dutch company. On 1 June, PPG formally withdrew its offers, realizing it did not have the legal or political capital to leverage the deal.

PPG's attempt to acquire Akzo Nobel provides an example for how nationalist winds can put further pressure and embolden defensive measures against an unsolicited, foreign takeover. Without the strong political pressure in favour of Akzo Nobel's independence, the company might have found it much harder to make its case to shareholders.

Nationalism adds further complexity to cross-border M&A

Like trade and immigration, international investment and cross-border M&A are not immune to the growing wave of nationalism. The Ant Financial–MoneyGram deal shows how nationalist tendencies have the possibility of shaving US$ hundreds of millions from a company's valuation. And PPG's efforts to acquire Akzo Nobel reflect how companies can use a country's nationalist fervour to strengthen their defensive position.

Although these examples suggest a negative outlook for cross-border M&A in a world of national interests, international deal making is not necessarily doomed.

First, nationalism remains strongest in large, developed economies, while cross-border M&A is growing fastest in emerging markets. Moreover, investment flows between developing countries continue to increase. For example, despite the recent setbacks in China's high-profit acquisition projects in the United States and Europe, which is mainly attributable to rising nationalism, China's investment in developing countries in the Middle East and South Asia under China's One Belt One Road initiative continues to grow. As a result, international deal-making no longer relies on the mature markets where nationalism poses the greatest risk.

Second, nationalist policies like trade protectionism and anti-immigration reform do not necessarily restrict cross-border deal flow. In fact, the opposite may be true as a World Bank study found that when trade protectionism increases, international M&A and investment also increase.

Third, outbound cross-border M&A might be a mechanism for advancing a nationalist agenda. For a country that wants to play a larger role on the global stage and increase its national stature, having its domestic companies become more prominent internationally through cross-border acquisitions could be complementary. This is clearly one of the reasons behind the recent boom in China's outbound investment.

Regardless of nationalism's impact on international deal flow, the growth in nationalist tendencies has become a significant variable that must be addressed by any entity engaging cross borders.

Beware of "Gun Jumping;" EU Court Confirms Fine on Norwegian Seafood Company

Daniel von Brevern (Düsseldorf) and Patryk Wcislo (Dusseldorf)

Between 2012 and 2013, **Marine Harvest** ASA ("Marine Harvest"), a Norwegian seafood company, acquired Morpol ASA ("**Morpol**"), a Norwegian producer and processor of salmon. Marine Harvest notified the transaction to the European Commission under the European Union's Merger Regulation ("**EUMR**"), but implemented it prior to the European Commission having granted clearance. The European Commission imposed in 2014 a EUR 20 million fine on Marine Harvest for "jumping the gun". On 26 October 2017, the **General Court** of the European Union ("General Court") confirmed the European Commission's decision ("**Decision**").

What Happened

On 14 December 2012, Marine Harvest entered into a share and purchase agreement ("**SPA**") with companies owned by Jerzy Malek, the founder and former CEO of Morpol. Under the SPA, Marine Harvest acquired 48.5% of the shares in Morpol ("**Initial Transaction**"). The Initial Transaction was closed on 18 December 2012. On 15 January 2013, Marine Harvest submitted a mandatory public offer for the remaining 51.5% of the shares in Morpol ("**Public Offer**"). Following settlement and completion of the Public Offer in March 2013, Marine Harvest owned a total of 87.1% of the shares in Morpol (together the "**Transaction**").

Marine Harvest established a first contact with the European Commission on 21 December 2012 by submitting a “Case Team Allocation Request”, which initiates the pre-notification process under the EUMR. After submitting various drafts and answers to requests for information, Marine Harvest formally notified the Transaction on 9 August 2013. On 30 September 2013, the European Commission cleared the Transaction subject to conditions.

On 31 March 2014, the European Commission formally launched a separate investigation into alleged “gun jumping” by Marine Harvest, and by decision of 23 July 2014, the European Commission imposed a fine of EUR 20 million on Marine Harvest (“**Fining Decision**”). The European Commission held that Marine Harvest, by implementing the Initial Transaction, had acquired de facto control over Morpol. By acquiring de facto control, Marine Harvest had infringed Art. 7(1) EUMR (“**Standstill Obligation**”). Under the Standstill Obligation, transactions requiring notification to and clearance by the European Commission may not be implemented prior to clearance.

The European Commission rejected Marine Harvest’s argument that the implementation of the Initial Transaction was covered by an exemption provided for in Art. 7(2) EUMR (“**Public Bid Exemption**”). Under the Public Bid Exemption, the acquisition of control from various sellers through a public bid or a series of transactions in securities can be implemented prior to clearance. However, this applies only if the transaction is notified without delay to the European Commission, and if the acquirer does not exercise the respective voting rights. According to the European Commission, the Public Bid Exemption is not intended to cover situations involving the acquisition, from a single seller, of a “significant block of shares” which in itself confers de facto control.

Marine Harvest appealed against the Fining Decision to the General Court. However, with the Decision, the General Court confirmed the European Commission findings, both on substance and with respect to the level of the fine.

What This Means

The Decision is an impressive reminder that gun jumping, i.e. the implementation of transactions prior to clearance by the competent antitrust authorities, can entail severe consequences. Under European merger control law, the European Commission can impose fines of up to 10% of the group’s total turnover on companies infringing the Standstill Obligation. Antitrust authorities in most other major antitrust jurisdictions have comparable sanctioning tools.

The Decision also confirms that the acquisition of a minority stake may well be considered as conferring de facto control. This applies in particular to situations where the minority shareholder is highly likely to achieve a majority at the shareholders’ meetings, taking account of the size of its shareholding and the level of attendance of other shareholders at shareholders’ meetings in preceding years. The General Court furthermore emphasizes that the mere possibility to exercise control is sufficient for a breach of the Standstill Obligation. Whether the acquirer actually makes use of that possibility (Marine Harvest argued it did not) is of no relevance.

Finally, the Decision clarifies that the European Commission is entitled to apply a narrow interpretation of the Public Bid Exemption. Parties who intend to rely on the Public Bid Exemption for (partly) implementing transactions prior to clearance should do so, if possible, only after consulting with the European Commission. Indeed, the European Commission, confirmed by the General Court, held that Marine Harvest acted negligently by not having consulted with the European Commission. Marine Harvest’s negligence was a main factor for the European Commission to conclude that a significant fine should be imposed – even though, as Marine Harvest argued throughout the proceedings, the European Commission did not impose a fine in a very similar, previous merger case.

Going Global – International Health Care Joint Ventures and Affiliations

Hamid Yunis (London)

Governments and their health care systems or operators are increasingly looking for improved, economically viable and more robust delivery of health care services. This has generated a real opportunity for entities that can provide these services to fulfil their needs.

Global health care entities, health care operators and governments are increasingly entering into cross-border joint ventures and affiliation models to gain access to best practice in an effort to better deliver health care services

- Major health care entities, such as a health care system, academic medical institution or leading hospital (referred to here for simplicity as the “international body”)
- A national government, local health authority or health care operator, (referred to here as the “delivery body”)

From both sides, there are a number of issues the parties should take into account when structuring a collaboration to ensure each party achieves its aims and objectives. Equally, there are a number of common pitfalls that should be avoided.

Initial Due Diligence

There is no substitute for being properly prepared and undertaking a thorough due diligence exercise to ascertain where the opportunities are and to mitigate any risks that may arise.

Actions that should be completed at this initial stage include the following:

- A full investigation by each party into the other’s capability, validity and ability to perform
- A thorough financial analysis that includes ensuring both parties understand, in particular, the local reimbursement policy and determining whether or not this creates a sustainable business model going forward.
- A detailed counterparty and competitor analysis to evaluate who else is active in the local jurisdiction and whether or not the joint venture or collaboration can realistically create a market leading or sustainable position
- A comprehensive review of both parties’ governance and compliance policies and an assessment of the local jurisdiction’s political, financial and cultural landscape. Issues that should be considered include determining whether or not both parties have a standard of compliance with local and international anticorruption and anti-bribery legislation.

Licensing of IP or Brand Names

There is another option: agreements for the use of brand names(s). This type of arrangement should, however, be avoided as it is extremely difficult to ensure real oversight and quality assurance. A failure to cover this properly could lead to substantial risks, including an adverse reputational impact and a danger of wider contamination.

Additional Issues to Consider

Before coming to a final agreement, both parties should give considerable thought to the following points

Identifying the Right Arrangement

From the point of view of the international entity, it may make sense to have a specific entity, or special purpose vehicle, within its organisational structure to hold its interest in the venture.

In addition to being preferable from a fiscal, regulatory and tax point of view, this also creates an easier and more transparent structure to provide oversight and deal with disputes if they do arise.

The international entity needs to be certain that the delivery body has the capacity and ability to enter into the chosen arrangement.

Scoping the Requirements

Each party needs to know, and be clear with the other party, what its aims and objectives are from the outset.

Marketing the Collaboration

The collaboration must be marketed properly to ensure both parties achieve their goals.

Determine Whether or not Financing is Required

Parties should determine the type of funding that is required and what, if any, future funding requirements might be needed as the arrangement progresses.

In particular, it is worth considering a time-based funding requirement and how this will impact on the economic or ownership rights of the entity that implements the arrangements.

Appointing Key Representatives and Forming a Committee

It is very helpful to have some form of management or liaison committee that includes representatives from both the international body and the delivery body.

This committee could deal with the management of the arrangements, any dispute resolution process, and what the next steps should be if the arrangement is a success or a failure.

Dispute Resolution Mechanism

It is vital to incorporate a dispute resolution procedure that allows for a sensible escalation for dispute resolution, depending on the seriousness of the dispute. For example, the local representative could report to a more senior representative, and ultimately to a CEO level person. If that fails, there could be recourse to arbitration or, ultimately, to court proceedings.

Human Resources

One of the main reasons for the failure of these types of collaboration is a scarcity of, or lack of agreement on, human resources. These may include transfers of staff or the parties' differing views on who is a "fit and proper" person for a management role.

The collaboration could include the adaption of the international entity's policies and procedures. Initial due diligence should take into account any local immigration, employment and visa issues.

Infrastructure Requirements

This covers equipment and operations and maintenance programmes.

It is important, for example, to ensure that obsolete or faulty equipment has not been provided by one of the parties and where equipment plays an important role, a survey of its condition has been conducted at the early stages.

IT

The legal arrangement should stipulate who pays for and implements upgrades and updates to IT.

Service Requirements and Standards/Performance Management

It is important to know what services are being delivered and by whom. This could be by reference to agreed service specifications and properly considered performance indicators that are capable of being monitored and measured.

Remuneration and Commercial Arrangements

It is vital that the remuneration and commercial arrangements between the parties are clearly described. Provisions could include a division of profits or a services related consultancy payment.

Changes and Variations Procedure

A procedure should be built into the collaboration to deal with any material changes and variations and the commercial consequences.

Termination and its Consequences

It is important to plan for the possibility the collaboration is not going to succeed, or that it is not successful.

Provisions should therefore be made for a clear set of events that could lead to termination and for dealing with the consequences.

These could include the return or re-engagement of staff, termination of the use of intellectual property or brand names, plus clearly stated financial consequences.

CNIL'S "Connected Cars" Compliance Pack

Romain Perray (Paris) and Lea Fertani (Paris)

Summary

In mid-October 2017, the French Data Protection Authority (CNIL) issued its "Connected Cars" Compliance Pack. Interestingly, this Pack has been designed as a toolkit, not only for France but with a more European GDPR perspective, on how connected cars (for personal, not professional, use) should be made to comply with data protection requirements. Although mainly intended for car manufacturers, it is being used notably by insurers and software editors can usefully refer to it.

This toolkit provides relevant guidance on data protection topics beyond connected cars. It highlights, in particular, that:

- information can be provided at various levels (contract, driver's manual, car computer, standardized icons, etc.) depending on whether it is essential information or not
- pseudonymisation, instead of anonymisation, can be used as a guarantee of confidentiality and therefore allow service providers to produce statistics on the basis of legitimate interest, but not necessarily with prior consent
- any data processed on legitimate interest is not subject to portability

In-Depth

Using an innovating approach, both practical and technical, the CNIL has elaborated 3 possible scenarios. The French Data protection authority takes a different stand with respect to the principle of informational self-determination in terms of which individuals shall have full and free control of their data, having thus in practice large consequences on technology use (e.g. geolocation) or user rights (e.g. data portability).

THE SCENARIOS

Scenario 1 (IN → IN)

This scenario covers the situation in which not only data is collected within the car, but also, when, if transmitted to any service providers, these latter cannot access it. As a result, this scenario is considered as entering into the scope of the household activity and falls outside the French Data Protection Act as well as, from 25 May 2018 onwards, the GDPR. The CNIL however provides some pre-requisites, all in congruence with the principle of informational self-determination:

- any driver or user retains full control over his/her data
- data shall only be processed in real time and without storage
- any driver or user shall be able to erase his/her data at all times
- full and comprehensive information shall be given to data subjects regarding the processed data, the purpose of the processing, and the possibilities to disable this processing and to erase data

Scenario 2 (IN →OUT) & Scenario 3 (IN→OUT→IN)

Scenario 2 and scenario 3 are quite similar: they both imply data transmitted outside connected cars, and therefore the application of the data regulation's high standards of protection (e.g. the processing of real time car speed is strictly interpreted). In those two scenarios, the purpose of processing activities requires a specific legal ground, data storage period, third recipients, a relevant type (e.g. infotainment, drivers guide, icons) and documents for information notices. Please see the table on the following page for more detail:

Scenario	Purpose	Legal ground	Storage period	Concerned party	Information
IN →OUT	Product optimization	Legitimate interest	3 years (pseudonymised)	– Data subject – Service provider – Processor – Business partner (pseudonymised)	Contract
	Accident data studies	Driver's consent	– Vehicle/driver data: study period – Vehicle technical data: 5 years	– Data subject – Service provider – Processor	Study's consent form
	Commercial use of vehicle data	Contract	– Commercial data: contract period, and beyond data may be archived to prevent legal litigation – Utilization data: limited period and then aggregated for the rest of the contract period	– Data subject – Service provider (only for performance data)	Contract
	eCall system	Compliance with a legal obligation (Regulation 2015/758)	As long as is required for the processing purpose	– Data subject – Service provider – Processor	Driver's manual
	Auto theft strategy	Driver's consent / performance of a contract	Geolocation data : investigation period	– Data subject – Service provider – Monitoring platform – Legal authorities	Contract
IN→OUT→IN	Remote maintenance	Contract	– Commercial data: contract period, and beyond that period data may be archived to prevent legal litigation – Utilization data: limited period and then aggregated for the rest of the contract period – Data relating to actions on the vehicle: vehicle lifetime	– Data subject – Service provider – Processor	Contract
	Enhancement of the driving experience	Contract	– Commercial data: contract period, and beyond that period data may be archived to prevent legal litigation – Utilization data: limited period and then must be aggregated for the rest of the contract period	– Data subject – Service provider – Processor	Contract

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