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Cross-Border M&A Transactions: A Comparative Analysis of Legal Regimes

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Abstract

The article examines the key legal mechanisms affecting cross-border M&A transactions. It provides a comparative analysis to assess the "regulatory friction" investors encounter in planning and executing cross-border deals. The relevance of the study is determined by the growing share of cross-border transactions in the total M&A volume and the increasing complexity of the regulatory landscape: the expansion of foreign direct investment screening, the tightening of antitrust procedures, and the introduction of ESG disclosures create multilayered barriers that affect deal value and closing timelines. The work aims to conduct a systematic comparative analysis of corporate and public-law institutions and contractual instruments for ESG hedging and choice of dispute-resolution jurisdiction. The novelty of the research lies in integrating data from 7 authoritative sources. The study demonstrates how a combination of low notification thresholds, broad regulator powers, and various corporate defence mechanisms extends timelines and increases transaction costs, and how standard contractual ESG practices and arbitration selection can partially hedge this uncertainty. The main findings show that: in the USA, director-centric "poison pills" raise the negotiating price and timeline; in the UK, strict board neutrality reduces managerial friction but intensifies competition among bidders; in the EU, heterogeneity of national board neutrality options creates "legal arbitrage" and forces deal structures to be adapted to each jurisdiction. The article will be helpful to lawyers, financial advisers, and corporate strategists involved in planning and supporting cross-border M&A transactions.

Keywords: *Cross-Border M&A, Regulatory Friction, FDI Screening, Antitrust Control, Poison Pill, Board Neutrality, ESG Indemnities, Arbitration.*

INTRODUCTION

Cross-border transactions have long ceased to be a niche phenomenon: they are the principal means by which companies gain access to new markets, technologies, and human capital, compensating for the limitations of organic growth. According to [1], cross-border deals worth more than $2.1tn were agreed worldwide in 2021, up by 69% from a year earlier and comfortably above the previous record of $1.8tn set in 2007, according to figures from Refinitiv. The number of cross-border deals rose by 38% to an all-time high of 17,849 last year. The rising deal capitalization is accompanied by increasing transaction sizes. These figures confirm that cross-border transactions set the pace for global structural renewal and asset redistribution, especially in sectors with high technological convergence.

However, the growing economic weight of such deals exacerbates the challenge of regulatory fragmentation. Alongside the classic antitrust review process, foreign direct investment screening regimes and sector-specific national security filters have been strengthened almost universally.

"Regulatory friction" becomes evident already at the antitrust approval stage. Countries that apply FDI screening mechanisms together account for approximately 63% of global FDI flows and 63% of global FDI stock (as of the end of 2021) [2].

Collectively, such fragmentation generates additional advisory costs, extends the period between signing and closing, and—most importantly—creates uncertainty in risk assessment: what corporate practice calls "regulatory friction." While investors maintain their appetite for cross-border acquisitions, in the strategic horizon, the decisive factors become the quality of forecasting regulatory barriers and the ability to structure deals to synchronize requirements across multiple legal systems. A comparative analysis of these regimes, undertaken in the subsequent sections of the article, will identify which control models mitigate friction and which exacerbate it, thereby influencing the global redistribution of assets and capital.

MATERIALS AND METHODOLOGY

The study of comparative analysis of legal regimes governing cross-border mergers and acquisitions (M&A) relies on a combined approach, including a systematic review of normative acts, analysis of judicial and administrative practice, as well as a quantitative assessment of data regarding transaction reviews in various jurisdictions. As the primary source of statistical information, the reports of FDI

Intelligence [1] were utilized, along with the key indicators of UNCTAD regarding the share of countries implementing mechanisms for foreign direct investment (FDI) screening [2]. These data enabled the establishment of the scale and geographical coverage of regulatory barriers across various legal systems.

For the analysis of the corporate level of protection of transaction objectives, a review was conducted of national laws and codes regulating the safety of companies against hostile takeovers, based on the publications of Mayer Brown on Public M&A Spotlight [3] and the text of Directive 2004/25/EC on Takeover Bids, which describe variants of mandatory board neutrality and breakthrough provisions in EU countries [4]. The comparative method enabled the identification of key differences between the United States and the United Kingdom [3], as well as the assessment of the influence of options that more frequently protect insiders in Germany, the Netherlands, Belgium, and France on the strategy of a cross-border investor [4]. Corporate legal norms were examined through the lens of private cases, in which the features of national poison pills and shareholders' rights in different jurisdictions were compared, allowing for the determination of the degree of management flexibility and the uncertainty of transaction closing timelines.

The antitrust component of the study is based on an analysis of the practice of antimonopoly authorities in various regions. Data from SAMR were used regarding the number of reviewed mergers in China: in 2021, 824 filings were processed and 727 were approved — among them, four with restrictive conditions, and one transaction was prohibited, including approximately 200 cases of untimely notifications by large Internet companies (Alibaba, Tencent, ByteDance, Meituan, Baidu) [5]. The European experience is reflected in the Annual Activity Report 2021 of the European Commission, which presents the dynamics in the number of cases: from 272 in 2012 to 395–399 in 2018–2021, while the share of simplified procedures increased from 171 to 309 over the same period [7]. The methodology of comparison employed the criteria of formal notification thresholds (for example, the European dimension) and the applicable tests — classic SLC (significant lessening of competition) in the United Kingdom and SIEC in the EU — as well as the features of "stop-the-clock" in Brussels and "call-in" in the PRC for transactions below the threshold [5, 7].

The mechanisms of public information disclosure and dispute settlement complete the analysis of the legal environment. Birch's writings on the 2019 Hague Convention and Italian torpedo matters in post-Brexit England have been cited in comparing disclosures on ESG commitments, warranties, and arbitration clauses. The SPA has been subjected to a content analysis focusing on its representations and warranties, with consideration also given to its provisions relating to ESG criteria commitment, as well as arbitrable contractual risk-hedging methods. Consequently, a comparison is made regarding which provisions of the SPA become operative regulators of the transaction price in different jurisdictions and legal cultures.

It became possible to devise a single methodology from the approaches mentioned above: first, data on cross-border deals and regulatory obstacles were gathered (statistics from FDI Intelligence [1], UNCTAD [2], SAMR [5], EC [7]); next, a comparison of the corporate protection systems (US, UK, EU) was undertaken using normative acts [3, 4] and specific instances; then an evaluation of antitrust practices in major jurisdictions (US, European Union, China) was carried out considering notification thresholds and methodological differences [5, 7]; finally, disclosure mechanisms and dispute resolution (ESG commitments, arbitration, Italian torpedo) were examined based on Birch[6] and related legal norms. Such a comprehensive approach allowed not only to describe the legal regimes but also to identify the interrelationships between corporate, antitrust, and investment filters, as well as their impact on the structure, timelines, and cost of cross-border M&A transactions.

RESULTS AND DISCUSSION

The first barrier for a hostile bidder arises within the target company's corporate law: charter restrictions, board rights, and "poison pills" create a landscape where even a perfectly structured cross-border transaction can stall without regulator involvement. The divergence of national rules on defensive mechanisms adds a dimension of uncertainty, which investors must factor into the deal's pricing and timeline.

The American model remains the most director-centric. In a single day, a board can adopt a rights plan that blocks any unauthorized acquisition of shares. The pandemic shock demonstrates the flexibility of this logic. The US example illustrates how a low formal threshold for managerial intervention strengthens the board's negotiating position and sharply raises the cost of a hostile bid for a foreign acquirer.

At the opposite pole lies the United Kingdom. Rule 21 of the UK Takeover Code prohibits the board from taking "frustrating actions" without shareholder approval from the announcement of an offer [3]. Such board neutrality, reinforced by the "put up or shut up" rule, makes UK targets especially attractive to cross-border buyers. However, it forces them to factor in the risk of competitive bidding since management may not "shut the door" with pills.

Continental Europe balances between these extremes. Directive 2004/25/EC introduced optional board neutrality and breakthrough provisions; two-thirds of Member States deemed neutrality mandatory, whereas Germany, the Netherlands, Belgium, and later France opted for the "pro-insider" option, permitting defensive measures without additional shareholder sanction [4]. As a result, shareholder- and management-oriented regimes coexist within a single economic space, and a cross-border bidder must adapt strategy not only to Brussels' antitrust test but also to the risk map of local statutes: a two-year stand-still option in the Netherlands or the "Bons Bréton" mechanism in France fundamentally alters the entry price calculation.

A comparison shows corporate law can mitigate or amplify the above regulatory friction. In the USA, the ease of adopting a pill increases deal-timing uncertainty. Still, it grants management a flexible bargaining tool, whereas in the UK, the primary risk lies in the emergence of a competing bidder rather than management barricades. The European mosaic creates "legal arbitrage" within a single market for cross-border M&A, and it shows how institutional investors can gradually dismantle defenses, rendering targets more accessible. For cross-border transactions, all this means that assessment of integration synergies is inseparable from the probability of completing the deal under a given corporate regime; here, comparative legal analysis becomes not an academic exercise but a tool for quantifying risk in monetary terms.

The antitrust filter remains the principal public-law "friction point" in cross-border M&A, as it determines which deals will ever reach corporate closing and which will stall at the notification stage. The actual burden on supervisory authorities grows unevenly. From an enforcement perspective, in 2021, the SAMR processed 824 merger filings (an increase of 58.5 per cent from 2020) and cleared 727 cases (an increase of 52.9 per cent from 2020), among which four were approved with restrictive conditions. One was prohibited (the proposed merge of the top two Chinese live gaming platforms controlled by Tencent), and probed nearly 200 failure-to-notify cases, including those involving many household internet players such as Alibaba, Tencent, ByteDance, Meituan, and Baidu, as illustrated in Figure 1 [5].

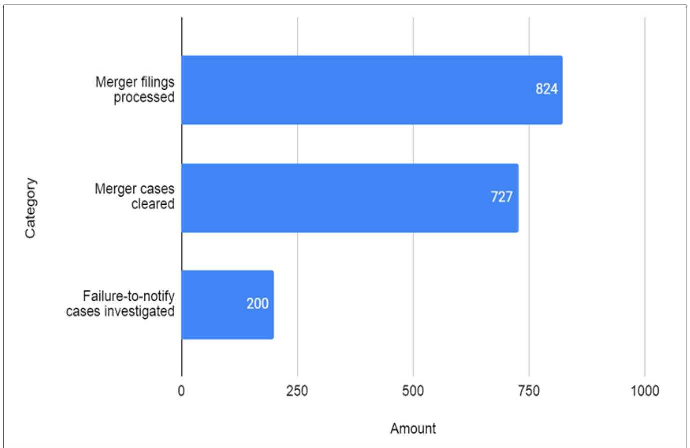

Fig. 1. SAMR Merger Enforcement Activities in 2021 [5]

The divergence between relatively low notification thresholds and lengthening review times imposes a direct temporal rent on the buyer: funds are already committed, yet synergies remain hypothetical.

Figure 2 shows a steady increase in the total number of merger cases heard in Europe, from 272 in 2012 to a peak of 395–399 in 2018–21, with the bulk of these cases coming from the simplified first stage, which rose from 171 in 2012 to 309 in 2021. The volume of cases dealt with in the technical first stage fluctuated between 81 and 86 from 2013 to 2016, before dropping to 56 in 2020; it then increased slightly to 75 in 2021. The unconditional second stage remains small and unstable (ranging from 0 to 4). Meanwhile, interventions involving injunctions and practice orders increased to 27 in 2016, then slowly decreased to only 15 by 2021. This means that, although there was an overall increase in merger reviews, new, complicated, and permissive review procedures and interventions have diminished since the middle of the decade.

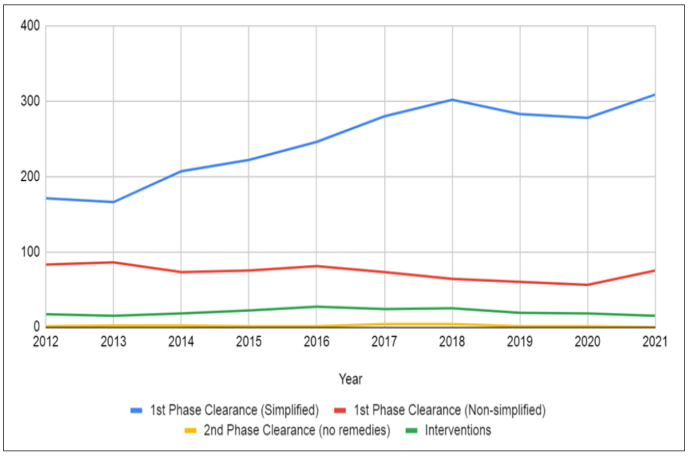

Fig. 2. Dynamics of Merger and Intervention Cases in Europe [7]

To offset the rigidity of formal thresholds, regulators create flexible "network" mechanisms. Articles 4(5) and 22 in the EU allow the re-referral of below-threshold deals from Brussels to national capitals or vice versa. SAMR's authority to review "below-threshold" concentrations fulfills a similar function in China, as seen in the conditional approval of Simcere/Tobishi.

Beneath external differences lie methodological divergences. These approaches differ not only in terminology: SLC drives the CMA toward early quantitative market-share assessments, whereas SIEC allows the Commission to construct complex multifactor scenarios and, accordingly, pause the clock for longer.

A shift of focus from price competition toward innovation amplifies differences further. Thus, antitrust regimes set the second coordinate of regulatory friction, complementing corporate pills and FDI screening. The lower the formal threshold and the broader the methodology (SIEC instead of SLC), the greater the regulator's discretion and the higher the deal-timing uncertainty. This translates into a mandatory dual check for a cross-border investor: first, whether the deal falls within the notification zone; second, which test will be applied to assess its effects. Consequently, comparing thresholds and methodologies has already become part of M&A financial modeling alongside synergy calculation and capital costs. Cross-border synergy risks remain purely theoretical without an adequate "discount" for antitrust inertia.

Political sensitivity grows non-linearly and concentrates around a narrow set of sectors. The result is a sector-specific "chessboard" in which the same transaction may be blocked in Washington, approved in Brussels, and conditionally cleared in Beijing, provided that parties agree to place sensitive assets in a nationally controlled trust.

Disclosure has become yet another regulatory layer directly affecting the structure of the SPA. The reps and warranties block becomes a "living" price regulator. Each covenant to upgrade a plant to low-carbon standards can alter an earn-out multiple times more than the classic working-capital adjustment. When disputes arise, forum choice shifts from national courts to arbitration. National courts, by contrast, face enforcement challenges: post-Brexit England saw a revival of the "Italian torpedo," in which a defendant initiates parallel proceedings in a slow jurisdiction. This risk prompted London to rapidly adopt the 2019 Hague Convention on the Recognition and Enforcement of Foreign Judgments. This is a simple principle for contracts: the more important the asset and the wider the ESG responsibilities, the higher the chance that the arbitration clause will serve as the ultimate backstop of business predictability in a complex legal environment. The comparison between the EU and China is illustrated in Figure 3.

Characteristic	EU	China
Threshold Flexibility	Re-referral of below-threshold deals	Review of below-threshold concentrations
Methodological Approach	SIEC: complex, multifactor scenarios	Early quantitative market-share assessments
Political Sensitivity	Sector-specific chessboard approach	Sector-specific chessboard approach
Disclosure Impact	SPA structure affected by disclosure	SPA structure affected by disclosure

Fig. 3. Comparison of characteristics EU and China (compiled by the author)

Theed—FDI screening, antitrust tests, corporate defense and minority-protection mechanisms, disclosure and sustainability, and dispute-resolution architecture—form an interdependent matrix. The stricter the state filter and the lower the notification thresholds, the more companies turn to contractual hedging: pills, ESG warranties, and arbitration choice. A comparative analysis of these regimes clarifies the deal speed and cost. It enables computation of the actual cost of capital when regulatory uncertainty becomes as tangible an element of the model as the discount rate or projected synergy.

CONCLUSION

The comparative analysis of legal regimes governing cross-border M&A confirms that in today's world, regulatory fragmentation is not an ancillary but a central factor shaping deal value and structure. Corporate defense mechanisms—from "poison pills" in the USA to the strict "put up or shut up" rule in the UK and the mosaic of options in Europe—create varying degrees of managerial flexibility and legal predictability at the target level.

Antitrust procedures remain the primary public-law "friction point," determining the formal notification requirement and the depth and duration of subsequent reviews. Differences in thresholds (HSR in the USA, "European dimension" in the EU) and methodological approaches (classical SLC versus broader SIEC) impose multilayered burdens on regulators in the second stage of deals and, consequently, timing uncertainty. Coupled with the European Commission's "stop-the-clock" practice and China's "call-in" mechanism, this necessitates building a temporal rent into M&A synergy models.

National-level investment screening adds yet another barrier: although the absolute risk of formal prohibition is low (blocks are rare), delays and multistage FDI screening procedures become a critical factor for financing planning and project timelines. Differences among CFIUS in the USA, national authorities in the EU, and SAMR in China—and their willingness to conduct below-threshold reviews—make political-risk and sector sensitivity assessments an obligatory part of pre-deal due diligence.

Simultaneously, rising ESG and sustainability requirements, enshrined in the CSRD and SEC rules, transform the SPA into a platform for contractual hedging of regulatory risk. Special ESG guarantees, indemnities, and earn-out mechanisms have become standard, and arbitration-clause choice is the final means of safeguarding predictability in dispute resolution. Growth in corporate and investor-state arbitrations reflects a shift of trust from national courts to international institutions.

Thus, regulatory friction in cross-border M&A is not a collection of isolated barriers but the anatomy of a unified, interdependent system—from corporate charter and FDI screening mechanisms to antitrust and ESG regulations, culminating in dispute resolution forum selection. A comprehensive comparative analysis of these regimes enables investors and advisers to account for regulatory risks and integrate them into financial models, adjusting capital cost and deal timelines—ultimately turning "regulatory friction" into a tangible, and therefore manageable, element of strategic planning.

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