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Regulatory review of cross-border M&As

Safeguarding public interests or resorting to protectionism?

Introduction

Most governments are keen to attract and facilitate foreign investment as a means for productive capacity-building and sustainable development. At the same time, numerous countries reinforce the regulatory environment for foreign investment, make more use of industrial policies in strategic sectors, tighten screening and monitoring procedures, and closely scrutinize cross-border mergers and acquisitions (M&As).

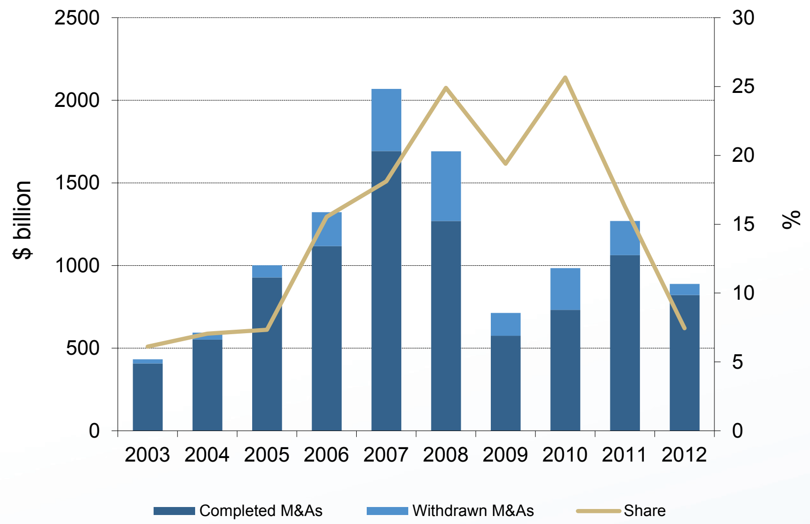
This special edition of the Investment Policy Monitor presents recent developments concerning the screening of cross-border M&As. An analysis by UNCTAD of large M&As withdrawn between 2008-2012 shows that a significant share was abandoned due to regulatory concerns, such as competition issues, economic benefit tests and national security screening, or political opposition.

Screening of cross-border M&As

A considerable share of cross-border M&As has been withdrawn for regulatory or political reasons.

Over the past 10 years, more than 2,000 announced cross-border M&As were withdrawn. These deals represent a total gross value of $1.8 trillion, or on average almost 15 per cent of the total value of cross-border M&As per year (figure 1).[1] The share of both the number and the value of the withdrawn deals peaked during the financial crisis.

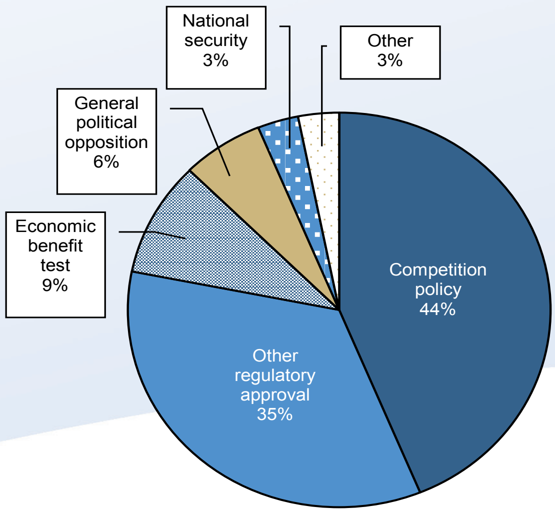
Figure 1. Gross value of completed and withdrawn cross-border M&As and share of withdrawn M&As, 2003–2012



Source: UNCTAD, based on information from Thomson Reuters database on M&As.

UNCTAD recently analysed 211 of the largest withdrawn cross-border M&As – those with a transaction value of $500 million or more – in the period between 2008 and 2012. Within this group, most announced M&As were withdrawn for business considerations (81 per cent); the bulk of the remaining M&As failed because of regulatory reasons or political opposition (figure 2).

Figure 2. Regulatory or political reasons for withdrawn cross-border M&As, 2008–2012

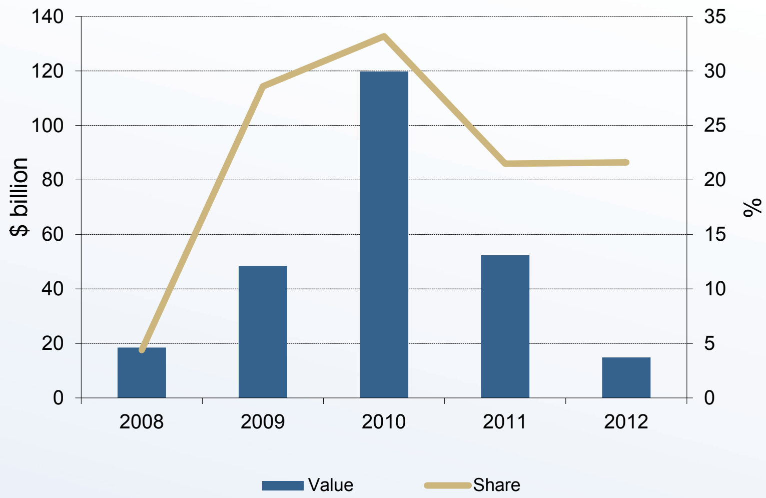


Source: UNCTAD, based on information from Thomson Reuters database on M&As and various news sources.
Note: Based on number of deals with a value of $500 million or more.

In some cases, companies did not wait for an official government decision but withdrew their bid upon receiving indications that it would not obtain approval, either for technical reasons or because of perceived general political opposition (e.g. the announced BHP Billiton–Potash Corporation M&A).[2] Sometimes, proposed deals have been revised and then resubmitted to eventually pass the approval procedures in a subsequent round. In other cases, government interventions may have been influenced by a combination of regulatory and political motivations, making it difficult to assess the true motivations for the withdrawal of a deal.[3]

Between 2008 and 2012, M&As withdrawn for regulatory reasons or political opposition had an approximate total gross value of $265 billion (figure 3).[4] Their share among all withdrawn cross-border M&As stood at about 22 per cent in 2012, with a peak of over 30 per cent in 2010, showing the impact of the financial crisis on governments' regulatory and political stance on cross-border takeovers. Even though the value of withdrawn deals dropped in 2012, their share of all withdrawn cross-border M&As remains relatively high.

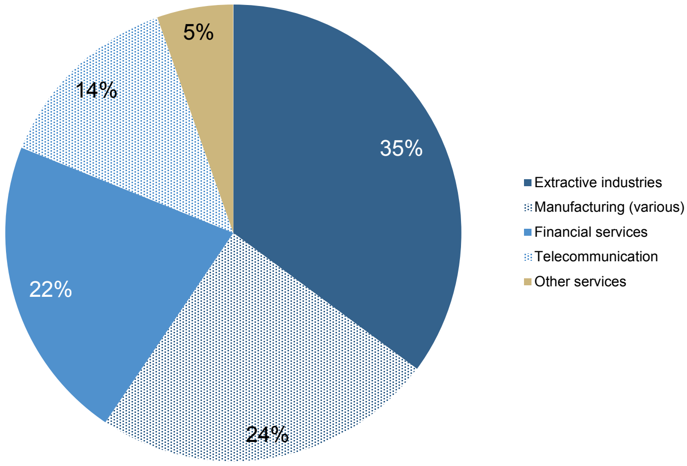
Figure 3. Gross value of cross-border M&As withdrawn for regulatory reasons or political opposition and their share in the total value of withdrawn cross-border M&As, 2008–2012



Source: UNCTAD, based on information from Thomson Reuters database on M&As.
Note: Based on deals with a value of $500 million or more.

The main industry from which M&As were withdrawn during this period was the extractive industry (figure 4) (e.g. the BHP Billiton–Potash Corporation M&A).[5] Other key industries targeted include manufacturing, financial services and telecommunications (e.g. the Deutsche Boerse–NYSE Euronext and the Singapore Exchange–ASX M&As).[6]

Figure 4. Sectoral distribution of withdrawn cross-border M&As for regulatory reasons or political opposition, 2008–2012



Source: UNCTAD, based on information from Thomson Reuters database on M&As.
Note: Based on number of deals with a value of $500 million or more.

Governments use numerous policy instruments for reviewing cross-border M&As.

With respect to the countries of the targeted companies, Australia, the United States and Canada constitute the top three – both in number of deals withdrawn and in the value of those deals (table 1). They are also the top three home countries of companies pursuing deals that were withdrawn because of regulatory reasons or political opposition.

Table 1. Top 10 target and home countries of cross-border M&As withdrawn for regulatory reasons or political opposition, by value, 2008–2012

	Target country			Home country		
Rank	Country/economy	Total value ($ billion)	Number of deals	Country/economy	Total value ($ billion)	Number of deals
1	Australia	87.8	8	Australia	112.9	5
2	United States	54.5	7	United States	47.1	7
3	Canada	43.8	4	China	23.6	5
4	Hungary	15.8	1	Austria	15.8	1
5	South Africa	11.4	1	India	11.4	1
6	India	8.8	1	Germany	10.2	1
7	United Kingdom	6.7	1	South Africa	8.8	1
8	Taiwan, Province of China	5.6	3	Singapore	8.3	1
9	Hong Kong, China	4.1	3	France	6.1	1
10	Switzerland	4.0	2	Hong Kong, China	2.2	1

Source: UNCTAD, based on information from Thomson Reuters database on M&As.
Note: Based on deals with a value of $500 million or more.

Policy instruments for reviewing M&As are manifold. Two basic categories can be distinguished – those applying to M&As irrespective of the nationality of the acquiring company and those applying only to foreign investors (table 2). The most important example of the first category is competition policy. Competition rules may not only apply to planned M&As in the host country, but extend to M&As in third countries that affect the domestic market (e.g. the Gavilon takeover by Marubeni).[7] The reason is the so-called "effects doctrine" in competition law, allowing for jurisdiction over foreign conduct, provided that the economic effects of the anticompetitive conduct are experienced on the domestic market. Other examples are rules that govern the transferability of shares or the issuance of "golden shares", giving the owner (often the State) voting powers disproportionate to the value of the shares, which can be used to block a hostile takeover, be it domestic or foreign.[8]

Table 2. Policy instruments affecting cross-border M&As

Applying only to foreign investors	Applying to both foreign and domestic investors
Formal 1. Ownership ceilings 2. FDI screening - National security - Economic benefit - Other screening (e.g. critical infrastructure)	**Formal** 1. Screening competition authority 2. Rules on transferability of shares (e.g. “poison pill”, mandatory takeover) 3. “Golden share” options
Informal 1. Delaying takeover procedures foreign acquisition 2. Financial support of domestic companies 3. Promotion of domestic mergers 4. Political pressure	

Source: UNCTAD.

Examples of the second category include, in particular, foreign ownership ceilings and domestic screening procedures related to national security considerations, industrial policy objectives or national benefit tests. Countries may also have special screening rules for individual types of foreign investors, such as State-owned enterprises, or for individual investment activities (e.g. in critical infrastructure). Screening procedures may require a positive contribution from the investor to the host economy in order to get the deal approved, or they may require merely that the proposed M&A not have a negative impact in the host country.

In addition to disapproving M&As, host countries may impose certain conditions before allowing them. This approach is often used in competition policies but may also play a role in other areas; for instance, in the framework of an economic benefits test.

There are also informal instruments with which a government can hinder unwelcome foreign takeovers. Governments may put political pressure on potential foreign acquirers to prevent an M&A, for instance by indicating that the company will face an unfavourable domestic environment if the deal goes through, or may block an unwelcome foreign takeover by finding a “friendly” domestic buyer (a “white knight”). Another tactic is delay, for instance by establishing new or tightening existing regulatory requirements for the tender or by providing financing only to domestic bidders. Governments may also choose to support the merger of two domestic companies into a new entity that is “too big to be taken over” by foreign firms.[9] By using these informal instruments, governments enter a grey zone where it is difficult to challenge government actions in the courts.

Finally, there are recent examples of “post M&A” government policies aimed at reversing a foreign acquisition. In some cases, host governments nationalized companies after their acquisition by foreign investors; in other cases, governments purchased the foreigners’ shares or introduced policies that negatively affected the operating conditions of foreign-owned companies.

As government regulation, screening and monitoring grow, so does the risk that such measures can hide protectionist aims.

As countries make more use of industrial policies, tighten screening and monitoring procedures, closely scrutinize cross-border M&As and become more restrictive with regard to the degree of FDI involvement in strategic industries, the risk that some of these measures are taken for protectionist purposes grows. The share of regulations and restrictions in newly adopted FDI-related policy measures has increased from 6 per cent in 2000 to 25 per cent in 2012. With the emergence and rapid expansion of international production networks, protectionist policies can backfire on all actors, domestic and foreign, in such value chains.

In the absence of a commonly recognized definition of "investment protectionism", it is difficult to clearly identify measures of a protectionist nature among investment regulations or restrictions.[10] Countries may have good reasons for restraining foreign investment. Restrictive or selective FDI policies have been recognized as potentially important elements of a development strategy and often are used for specific public policy purposes. National security considerations may also justify FDI restrictions. The problem is that what may be a legitimate reason to restrict investment for one country may not be justifiable in the view of others.

Efforts should be undertaken at the international level to clarify the meaning of "investment protectionism", with a view to establishing a set of criteria for identifying protectionist measures against foreign investment. Fact-finding endeavours could build upon UNCTAD's Investment Policy Monitor publications, which regularly report on developments in national and international investment policies, and the biannual UNCTAD-OECD reports on investment measures by G-20 countries.

For latest FDI trends and policies please see UNCTAD's forthcoming World Investment Report 2013 – Global value chains: investment and trade for development (to be launched on 26 June 2013) and the 9th UNCTAD-OECD Report on G20 Investment Measures (launched on 17 June 2013).

Notes

[1] Data do not include pending deals that may be withdrawn later or withdrawn deals for which no value is available. In some cases, a business or regulatory/political motivation to withdraw a cross-border M&A may affect more than one deal, as recorded in the Thomson Reuters database on M&As.

[2] The Economic Times, "BHP Billiton abandons bid for fertiliser-maker Potash", 15 November 2010. Available at http://articles. economictimes.indiatimes.com/2010-11-15/news/27607057_1_potash-corp-marius-kloppers-saskatchewan (accessed 30 April 2013).

[3] See S. Dinc and I. Erel (2012). "Economic Nationalism in Mergers and Acquisitions". Charles A. Dice Center Working Paper, No. 2009-24 and N. Harlé, K. Cool and P. Ombregt (2012). "Merger Control and Practice in the BRIC Countries vs. The EU and the US: Review Thresholds", INSEAD Working Paper, No. 2012/100/ST (Paris: INSEAD).

[4] Although in some cases regulatory or political motivations for withdrawn M&As have been recorded, in many other deals are aborted for these reasons before they can be recorded as an announced M&A. For this reason, it is safe to assume that in reality more deals would fall in this category and thus that the impact of regulatory reasons and political opposition is in fact bigger.

[5] The Economic Times, "BHP Billiton abandons bid for fertiliser-maker Potash", 15 November 2010. Available at http://articles. economictimes.indiatimes.com/2010-11-15/news/27607057_1_potash-corp-marius-kloppers-saskatchewan (accessed 30 April 2013).

[6] Bloomberg, "Deutsche Boerse-NYSE Takeover Vetoed by European Commission", 1 February 2012. Available at www. bloomberg.com/news/2012-02-01/european-commission-blocks-proposed-deutsche-boerse-nyse-euronext-merger.html (accessed 30 April 2013), and Reuters, "Singapore Exchange ends ASX bid after Australia rebuff", 8 April 2011. Available at www.reuters.com/article/2011/04/08/us-asx-sgx-idUSTRE7370LT20110408 (accessed 30 April 2013).

[7] Financial Times, "China clears Marubeni-Gavilon deal", 23 April 2013. Available at www.ft.com/cms/s/0/032f2e7c-ac33-11e2- 9e7f-00144feabdc0.html#axzz2Rw2yv1Ly (accessed 30 April 2013).

[8] See S. Dinc and I. Erel (2012). "Economic Nationalism in Mergers and Acquisitions". Charles A. Dice Center Working Paper, No. 2009-24 and A. Heinemann (2012). "Government Control of Cross-Border M&A: Legitimate Regulation or Protectionism?" Journal of International Economic Law, 15(3), pp. 843–870 (Oxford: Oxford University Press).

[9] See S. Dinc and I. Erel (2012). "Economic Nationalism in Mergers and Acquisitions". Charles A. Dice Center Working Paper, No. 2009-24.

[10] See UNCTAD World Investment Report 2012, p. 101.

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