market intelligence

Volume 1 • Issue 2

GETTING THE DEAL THROUGH

M&A

Alan M Klein leads the global interview panel covering 20 key economies

Is CEO confidence returning?

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market intelligence

Welcome to *GTDT: Market Intelligence*.

This second issue focuses on the global M&A markets.

Getting the Deal Through invites leading practitioners to reflect on evolving legal and regulatory landscapes. Through engaging and analytical interviews, featuring a uniform set of questions to aid in jurisdictional comparison, *Market Intelligence* offers readers a highly accessible take on the crucial issues of the day and an opportunity to discover more about the people behind the most interesting cases and deals.

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Getting the Deal Through
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In this issue

Alan M Klein is a partner of Simpson Thacher and Bartlett LLP and a member of the firm's corporate department with extensive experience in mergers and acquisitions, shareholder activism and corporate governance matters. He represented Microsoft on its US$7.2 billion acquisition of Nokia's phone business, its US$8.5 billion acquisition of Skype and its investment in Barnes & Noble's Nook business. Other clients have included Tyco International, Best Buy, Chinalco, Gas Natural SA, Portugal Telecom, Gerdau Ameristeel, Bavaria SA and Owens-Illinois. In 2012, The American Lawyer *named him a 'Dealmaker of the Year'. He is a frequent commentator on M&A issues. Klein serves as Simpson Thacher's co-administrative partner and is a member of the firm's executive committee.*

In this overview Klein takes a look at global M&A activity levels in the past year, key transactions and trends in significant sectors, and the future for M&A activity in the face of geopolitical and economic uncertainty.

GLOBAL TRENDS

ALAN M KLEIN OF SIMPSON THACHER & BARTLETT LLP

Global M&A activity levels have surged in the past year. In the first nine months of 2014, the volume of transactions worldwide has increased by approximately 60 per cent compared with the first nine months of 2013, representing US$2.66 trillion of transactions, according to data from Thomson Reuters. The aggregate value of transactions in the first three quarters of 2014 has exceeded the value of the full year's worth of transactions for each of the previous five years. 2014 now looks as if it will be exceeded only by 2007 in terms of deal activity, when the value of the year's transactions totalled US$4.7 trillion. There were a record number of transactions over US$5 billion in the first three quarters of 2014. The greatest increase in activity was in the United States, but there have been significant increases in deal activity in Europe and the Asia-Pacific region as well.

There had been a clear reluctance by CEOs during the past five years or so to engage in large-scale transformative transactions, except in rare circumstances. Uncertainty about the global economic climate following the financial crisis of 2008–2009 and the global recession that resulted, concerns about the stability of the eurozone and disputes over the United States' debt ceiling had all contributed to an unwillingness by companies to take risks during that period. The market began to shift during 2013 and mergers and acquisitions gained momentum as the year went on. That momentum picked up tremendously in 2014, as transactions became larger, more global and included a greater variety of business sectors.

The energy and power sector has had the most deal volume through the first nine months of 2014, with the deals totalling US$376.2 billion, a 56 per

cent increase over the same period in 2013. The health-care sector was not far behind, however, with US$368.6 billion of announced transactions in the first three quarters of 2014. The global consolidation of pharmaceutical companies, which has taken place in waves of activity over the past 30 years, resumed in 2014 at what seemed like a fevered pace. A sampling of these transactions include AbbeVie Inc, a US-based company, which agreed to buy Shire PLC, of Ireland, for US$54 billion. Actavis, an Irish company, agreed to buy Forest Labs, a US business, for US$25 billion. Bayer AG entered into an agreement to buy Merck & Co's consumer-health for approximately US$14 billion. Roche Holding AG agreed to buy two US companies for a total of US$10 billion. And GlaxoSmithKline and Novartis are swapping US$20 billion of assets with one another.

These agreed transactions do not include almost US$200 billion of unsuccessful offers in the pharmaceutical industry. Pfizer made a US$116 billion offer for AstroZeneca, which was spurned by AstroZeneca. Allergan has continued to fend off a US$53 billion unsolicited offer from Valeant Pharmaceuticals, which has teamed up with stockholder activist William Ackman, in one of the most high-profile hostile transactions in recent years. And Mylan Inc made an unsuccessful multibillion-dollar offer for Meda AB of Sweden.

Examining the geographic dispersion of M&A activity for the first nine months of 2014 shows that the United States has had the biggest share of the increase in M&A activity during that period. US deal volume is up 65 per cent for the first nine months of the year. Some commentators believe that 2014 may conclude with the most activity ever in the US. European M&A volume is up 27 per cent for the first three quarters of 2014 compared with 2013; the Asia-Pacific region is up 24 per cent in that same period.

One driver of activity involving US companies, which has had beneficial effects as well for non-US, particularly European, activity, has been the increase in what are popularly known as 'inversion' transactions. Transactions characterised as inversions generally involve a US-incorporated company acquiring a non-US-incorporated company, but structuring the transaction so that the non-US entity is the survivor of the combination. The result is typically the overall tax rate of the earnings of the US party to the transaction is reduced and cash held outside the US by the US company can be more readily used without subjecting that cash to US taxation. Although transactions structured in this manner have taken place regularly over the past decade, they greatly increased in number over the past year as the overall level of mergers and acquisitions picked up. Four of the ten largest transactions announced in the first nine months of 2014 were inversions. The string of inversion transactions in 2014 include AbbeVie's agreement to acquire Shire, referenced earlier, Medtronic's announced plan to acquire Covidien, Mylan's agreement to acquire Abbott Laboratories' non-US generic business and the pending combination of Chiquita Brands International and Fyffes.

A public backlash arose in the US over the perceived stream of US companies managing to move their incorporation outside the US in connection with these cross-border transactions. Pressure began to build for action to be taken to limit the ability of US companies to move their country of incorporation in connection with a business combination. Finally, at the end of September 2014, the US Department of the Treasury issued a set of rule modifications intended to limit the ability of companies to take advantage of the benefits of these inversions. These rules took immediate effect and applied to any transactions still pending and not yet completed. These rule changes did not ban these transactions, since that requires action by the US Congress, which was not forthcoming. However, the amended rules did greatly limit certain of the intended benefits of inversions. It remains to be seen what effect the limitations on inversions will have on cross-border deal activity in the near term.

The outlook for global M&A activity should remain bright for the remainder of 2014. The M&A market has been resilient despite recent areas of geopolitical instability and significant economies such as the eurozone and China showing signs of weakness. A growing economy in the US and a lack of volatility in global equity markets, together with a general availability of debt, have combined to provide a favourable climate for significant M&A transactions. However, should any of these negative factors begin to adversely affect investing behaviour, or the positive factors begin to shift, global M&A activity may begin to slow down. One sign of caution may be that although the value of worldwide M&A transactions is up significantly, the number of transactions is up only very slightly. A record number of large transactions may be taking place, but the number of smaller and mid-market transactions through the first nine months of 2014 are only marginally greater than those in 2013. So euphoria has not swept through every level of the M&A market. We will have to see whether this means there is another area where there will be an increase in activity or whether this is a sign that the spike in volume will be relatively short-lived.

Gavin Davies

M&A IN AFRICA
A REGIONAL OVERVIEW

Gavin Davies and Hubert Segain are partners at Herbert Smith Freehills, a firm which has acted on numerous matters throughout the African continent over the past three decades.

Based at Herbert Smith Freehills' London office, with over 20 years' experience of a wide range of cross-border deals and advisory work, Gavin acts for corporates and financial buyers in Europe and Asia, as well as in Africa, where as part of the firm's Africa team he has worked on agribusiness, consumer, energy, industrial and telecoms deals across the continent.

Gavin also advises the government of Sierra Leone on a pro bono basis. He is recommended in *Legal 500, Chambers* and *Who's Who Legal* for his international M&A work.

Hubert heads the firm's Paris office. He has extensive experience in public and private M&A, joint ventures and capital markets transactions. Hubert has advised a large number of international corporates and banks on their M&A transactions in France and abroad (and in particular in Africa). *Chambers Global, Legal 500* and *Who's Who Legal* list him as a leading corporate lawyer.

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"The message that conflict and commerce do not mix well has hit home with many political regimes in Africa."

GTDT: What trends are you seeing in overall activity levels for mergers and acquisitions during the last year or so?

Gavin Davies & Hubert Segain: M&A activity in Africa has demonstrated year-on-year growth since 2012 and we expect this growth to continue and for M&A activity in Africa to intensify, at least in the short to medium term. There are several key factors that suggest a buoyant future for M&A in Africa.

The message that conflict and commerce do not mix well has hit home with many political regimes in Africa, which have taken active steps to reduce political instability and the damaging consequences of such instability on foreign investment and commerce generally. The desire to deliver peaceful governance and procure peaceful transitions of power is especially important at a time when the global spotlight shines on Africa. Largely peaceful recent elections in Kenya, Ghana and Senegal are testament to such change in attitude and willingness to ensure a peaceful transition.

In many African countries, prudent macroeconomic policies have also provided a sound foundation for investment and have increasingly freed people from the impoverishing effects of inflation. Privatisation programmes (such as the privatisation of the Nigerian power sector), lower corporate taxes (through provision of corporate income tax holidays and reductions from the standard rate for taxes such as import duties and VAT for large infrastructure projects), reductions in trade barriers and improving judicial systems all combine to present an increasingly appealing picture for M&A investment opportunity across Africa, especially in sub-Saharan Africa.

The growth of consumer-driven markets has also played a key role in the Africa success story. According to the African Development Bank, Africa now has the fastest-growing middle class in the world and by 2060 it is envisaged that the number of middle-class Africans will grow to 1.1 billion. The growth of these consumer-driven markets, which seems likely to continue as the middle class expands, is expected to open up new frontiers for regional and foreign investment in these sectors, in turn giving rise to increased levels of joint venture and M&A activity.

M&A activity in Africa will no doubt continue to be influenced by the relation of Africa's developing economies with the BRICS countries (Brazil, Russia, India, China, and of course South Africa itself), which are driven to continue to invest in Africa as a result of their appetite for the continent's natural resources, Africa's large and untapped agricultural sector as well as the opportunity to tap into Africa's ever-increasing consumer base (its growing middle class). On the other side of the trade divide, African countries are mindful of the importance of trade and investment with BRICS as a channel to economic growth, poverty alleviation and development, and most African countries are making efforts to create an enabling bilateral trading environment in order to make their exports more attractive. As a result, we expect to see continued growth in trade relations between

Africa and the BRICS countries and consequently increased inward M&A activity.

We also expect to see continued interest in Africa from traditional European investors (including the UK, Germany and France) as European multinationals seek to counter limited European growth potential with African expansion.

Africa's current position as poster-child for emerging market investment has also put the continent on the investor map for North American investors seeking opportunities outside the crowded markets of North America and Europe.

In addition to inward M&A activity from investors outside Africa, we also expect to see an increase in regional M&A activity. In East and Central Africa, the mining sector has been the main sector for regional M&A activity in recent years, but sectors including financial services, energy, and telecommunications have also seen increased pan-African deal activity. Primarily in regulated sectors such as financial services, insurance and telecommunications, we expect to see further consolidation among various industry players across key sectors as they bid to meet their respective regulatory requirements (for example, in relation to minimum capital requirements) or otherwise look at pan-African consolidation as a means for entry into new markets or competing with more dominant players in the market.

GTDT: Which sectors have been particularly active or stagnant? What are the underlying reasons for these activity levels?

GD & HS: Africa's huge mineral and hydrocarbon deposits have historically attracted international oil and gas, and mining, groups. Persistently high commodity prices in recent years have also resulted in renewed demand for Africa's abundant natural resources.

Power and infrastructure have also become a key investment sector and are both an opportunity for foreign investors and an essential ingredient in the continued development of many African countries. In 2012, there were over 800 infrastructure projects under way in Africa, amounting to over $700 billion in investment, according to Ernst & Young. Interest in infrastructure investments seems only likely to grow, with recent figures from the Commonwealth Business Council showing an average 15 to 20 per cent return on investments in African infrastructure projects across all sectors. Investor commitment and appetite in the African power sector is demonstrated by two recent developments. In 2013, President Obama launched the Power Africa initiative, which intends to facilitate the development of 30,000 megawatts of cleaner, more efficient electricity generation capacity in sub-Saharan Africa. Additionally, Blackstone and Dangote Industries recently announced a commitment to jointly invest up to $5 billion over the next five years in energy infrastructure projects across sub-Saharan Africa with a particular emphasis on power, transmission and pipeline projects.

Agriculture is another well-established cornerstone of foreign investment in Africa. For example, in early 2013 the Carlyle Group made its maiden foray into the African market (through its new sub-Saharan Africa fund) in one of the bigger private equity investments in recent years, as part of a consortium that injected $210 million into the Export Trading Group, a Tanzania-based agricultural company that sources commodities from Africa's small farmers and sells those goods to China, India and elsewhere. Following the Carlyle Group's entry into the African market, New York-based KKR Group recently sealed its first deal in the African market through its $200 million investment in Afriflora, a company that grows about 730 million flowers a year in Ethiopia for export to Europe.

In addition to investment in natural resources, power and infrastructure, increased economic activity has been demonstrated in telecommunications, banking and, most recently of all (and for reasons already discussed), consumer goods.

According to a recent report by consultant Analysys Mason, the telecoms market will be one of sub-Saharan Africa's key growth sectors in the next five years thanks to an increase in 3G coverage and capacity and the wide penetration of low-cost smartphones. Additionally, the launch of a handful of key submarine cables around the African contour has triggered a rapid price drop and improved availability of data services to the end-user. Furthermore, the absence of traditional banking solutions for the unbanked rural population in much of Africa has been capitalised upon by several telecommunication service providers, which seek to add mobile money transfer services to the bundle of voice and data services provided to end-users. Growth in the telecoms towers industry also continues to be robust, underpinned by telecoms operators looking to reduce exposure to costly infrastructure in the region as well as the growing demand for 3G and 4G data, which is driving the need for significant additional infrastructure capacity across the African continent.

With respect to the banking and financial services sector, industry opinion remains that sub-Saharan African financial and banking systems remain underdeveloped and that the relatively stable macroeconomic and financial environment of sub-Saharan Africa, together with the current reform momentum and expected strong growth, only bodes well for the growth of the banking industry in Africa. Industry experts envisage that with the recovery of eurozone banks the next 12 to 18 months will bring increased investment activity

in the banking and financial services sector, with insurance and banking appearing to be the most likely areas for big deals, especially in South Africa. Interest in the African banking and financial services sector has especially spiked since the entry into the market of Bob Diamond's nascent African banking venture, Atlas Mara, which recently invested $270 million for a 20 per cent stake in Union Bank of Nigeria.

GTDT: What were the recent keynote deals? What made them so significant?

GD & HS: In addition to the deals we have already mentioned, there have been several other keynote deals in Africa in the past 12 to 18 months.

Three of the biggest M&A deals have been through acquisitions by Chinese companies in the African energy, mining and utilities sector.

China National Petroleum Corporation (CNPC) recently acquired a 28.57 per cent stake in Eni East Africa SpA for $4.2 billion, providing it with an indirect 20 per cent stake in Mozambique's Area 4 gas field. This transaction marked the largest investment from a Chinese company in an overseas natural gas field to date, and is one of the largest investments by a Chinese company into Africa.

The past year has also seen a US$150 million investment in Seven Energy, an oil and gas group based in Nigeria. The transaction marked a growing trend towards sovereign wealth fund investment in sectors in Africa that were historically dominated by more traditional private equity houses.

In February 2013, Nigeria officially handed over legal control of 15 state-owned electricity companies to their new owners, capping a $2.5 billion privatisation process. The privatisation is regarded by many as the largest development in the power sector of Nigeria to date and establishes a framework that will allow for substantial investments to be made into the Nigerian power sector to increase generation capacity, and expand the capacity of transmission and distribution networks.

As we have mentioned, the consumer goods market continues to attract interest from foreign investors: Godrej Consumer Products recently acquired a stake in the Darling Group's artificial hair production and distribution businesses in a number of African countries, and Danone, in partnership with the Abraaj Group, recently acquired Fan Milk International, a leading manufacturer and distributor of frozen dairy products and juices operating in West Africa.

Investor interest in the telecoms sector in Africa is demonstrated by Etisalat's recent $5.7 billion acquisition of Vivendi SA's controlling stake in Maroc Telecom and a number of telecom tower portfolio acquisitions across the continent.

The banking sector in Africa has also seen increased interest from the Middle East, with banks


Hubert Segain

"In addition to investment in natural resources, power and infrastructure, increased economic activity has been demonstrated in telecommunications, banking and, most recently of all, consumer goods."

in the region looking to establish or broaden their footprint in Africa. Most recently, Qatar National Bank bought a 12.5 per cent stake in Ecobank for a reported $200 million. This was the Qatari lender's second African purchase in the past two years. In March 2013, it bought Société Générale's Egyptian business for $2 billion and the bank is also present in Libya, Mauritania, South Sudan, Sudan and Tunisia.

GTDT: How has the legal and regulatory landscape for mergers and acquisitions changed during the past few years?

GD & HS: A challenge that many foreign investors may face with Africa, and one they may not have encountered elsewhere, is that of local content and indigenisation requirements. These requirements (the most well-known of which are perhaps the economic empowerment rules in South Africa and Zimbabwe) are many and varied, but are intended to assure a degree of local exposure to foreign-owned or operated ventures, and to assuage concerns that foreign activity is not bringing benefits to the local area. Local content rules can pose challenges in sourcing partners and personnel with suitable qualifications and experience, and material and service providers with sufficiently high standards. Local content requirements may also affect the structure of an M&A deal, with transactions more likely to be executed as joint ventures or staged investments rather than 100 per cent acquisitions.

Difficulty in taking effective security in many African jurisdictions presents a challenge for financing M&A transactions. It is often legally impossible to take a comprehensive security package and therefore it is important to assess what is possible to secure and compare this with market practice for international financings. In a number of jurisdictions, the growing trend for the harmonisation of commercial law in the region, such as the Organisation for the Harmonisation of Business Law in Africa (OHADA), has assisted in establishing market norms for local security issues, however there remain blanket prohibitions on the giving of 'financial assistance' by a target or any of its subsidiaries for the acquisition of its shares in many jurisdictions in Africa. Therefore, the granting of security over the assets of the target in support of acquisition financing is unlawful in many jurisdictions.

Merger control analysis is fast becoming a key aspect of transaction planning for acquisitions and joint ventures in emerging markets, and this is no different in sub-Saharan Africa especially following the introduction of the supranational COMESA competition regime in January 2013. Under the COMESA regime any merger or acquisition (very broadly defined under the relevant regulations) requires a notification to the COMESA Competition Commission (CCC) to be made. The merger notification requirements for the COMESA regime are unusually broad and very easily triggered and when entering into a notifiable transaction the filing costs will potentially be significant. Following the first round of applications made to the CCC pursuant to the COMESA regime, in August 2013 the CCC announced (through the publication of terms of reference and a request for proposal from a team of experts) its intention to conduct a full review of the existing CCC regulations on merger control and it is hoped that such a review will result in the adoption of revised regulations that strike a fair balance between protection of regional economies from economic concentrations and anti-competitive behaviour and the need to ensure the existence of a conducive and non-inhibitive environment for facilitating foreign investment.

GTDT: Are there factors that may temper the envisaged growth in M&A activity levels across Africa?

GD & HS: For all the optimism surrounding the economic growth recorded and potential for further growth that has been discussed so far, there is an inverse cautionary tale to be told. Africa may be on the right track, but this is the proverbial marathon and continuous efforts are required to tackle poverty, epidemics, corruption, inadequate infrastructure and political instability to ensure that Africa does indeed fulfil its limitless potential.

Africa is often referred to as a whole, but each of its 54 nations has a different legal system, and there are more than 2,000 native languages as well as Arabic, English, French, Portuguese and Spanish. This rich diversity is a barrier to foreign investment in sectors requiring scale for bankable returns achievable only on a cross-border, regional basis. Legal systems in Africa are rooted either in civil law or common law and in certain countries these systems operate alongside shariah law and tribal or customary laws. Lack of certainty is a feature affecting many local legal systems, driven by inconsistent court interpretations, a shortage of precedents and unreliable public registers. Local market practice may also differ significantly from international market practice. Local law remains an essential part of every M&A deal in Africa. Certain elements of local law, such as tax, employment, company and insolvency law, cannot be avoided. These factors combine to make for a legal landscape that may be unfamiliar and complex to navigate for foreign investors.

African governments are increasingly alive to the drag on investment caused by the diversity of national rules affecting foreign investment, and a gradual trend towards regionalisation has been emerging for some years. The work of supranational bodies such as OHADA and COMESA is beginning to harmonise some of the rules affecting foreign

investment in the hope that the negative effects of national divergence can be eliminated over time; however, as we have discussed, such attempts at harmonisation are not without their own difficulties.

The recent Ebola outbreak in West Africa and the challenges for the relevant governments to contain it has visibly had an impact on the economies of Sierra Leone, Guinea and Liberia. The crisis has had an adverse effect on labour availability and capacity, which in turn, for economies that are largely dependent on the agriculture sector for economic growth, has resulted in a downturn in economic growth since the outbreak. The world's largest steelmaker ArcelorMittal has seen work disrupted on its iron ore mine expansion project in Yekepa in Liberia after contractors declared 'force majeure' and moved people out of the country. Similar disruptions have also been experienced by Vale and Rio Tinto in their iron ore mines in Simandou in the forests of eastern Guinea.

The sustained growth of many economies in Africa is also dependent on the continued willingness of governments in Africa to strike a fair balance between a regulatory and economic framework that is conducive to foreign investment but at the same time protects local interests. For example, although Ethiopia should be commended for the steps taken in adopting and implementing its Growth and Transformation Plan (2010), commentators have expressed concern about the level of protectionism that remains in areas such as banking, retail, telecommunications and transportation.

GTDT: What does the future hold? What activity levels do you expect for the next year? Which sectors will be the most active?

GD & HS: As investors deal with economic slowdown in developed economies, they continue to look to more significant growth opportunities in new emerging and frontier markets, and are prepared to address the associated higher investment risk. The 'Africa rising' story of rapidly expanding consumer goods markets, and similar attractive opportunities in related sectors such as financial services and telecommunications, is a growing area of focus for many such investors. As a result, we expect big opportunities for business to continue to emanate from Africa and result in increased inbound and regional M&A activity, with significant interest in the ever-expanding consumer goods market as well as keen interest from investors in sectors such as financial services and telecommunications.

The ongoing exploration and development of natural resources should see increased interest in the development of infrastructure as both governments and private-sector participants seek to develop infrastructure to allow for the exploitation of natural resources and transportation of upstream products to market.

Increased investor activity is also expected in the power sector as governments seek to implement large-scale power generation, distribution and transmission projects to provide a stable backbone of power for domestic and commercial consumption.

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Roberto Horacio Crouzel

M&A IN ARGENTINA

Roberto Horacio Crouzel and Ramón Ignacio Moyano are partners at Estudio Beccar Varela and are members of its executive committee.

Roberto's practice is focused on M&A, providing general advice to companies, banks and financial institutions, debt restructuring and project financing. He has also been heavily involved in promoting pro bono services related to micro-finances in Argentina.

Ramón specialises in giving general advice to companies, M&A and private clients. He recently advised Finlays (Swire Group) on the acquisition of Casa Fuentes, an Argentine company dedicated to the growing, processing and exportation of tea and yerba mate.

María Shakespear is a senior associate who specialises in M&A and corporate law. She recently advised sellers on the sale of FN Semillas (a seed company) to Bayer.

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GTDT: What trends are you seeing in overall activity levels for mergers and acquisitions in your country during the last year or so?

Roberto Horacio Crouzel, Ramón Moyano & María Shakespear: If mergers and acquisitions come in waves, we can say that we are getting ready to ride them. We are lawyers, not surfers, but taking the analogy presented by Schumpeter (in 'Riding the wave' in the 5 October 2013 edition of *The Economist*) and according to our experience, the Argentine economy has cycles and so do M&A transactions even if there are no scientific explanations for that.

The last major crisis faced by Argentina was in 2001. Though the 2008 financial crisis had a negative effect, the most relevant signs of stagnation affecting M&A transactions are from 2011. Indeed, many investors mention that nowadays there is a constant feeling of crisis in Argentina, not only for the number of governmental regulations and restrictions in place but also for the macroeconomic situation and the high rate of inflation that provides for an uncertain scenario for M&A transactions.

During the past year we have noticed an increase in the number of prospective deals in areas such as natural resources. The number of deals in the pipeline has started to increase thanks to certain decisions by the government which have fostered a more 'foreign investor friendly' environment. Among those decisions were the settlement of the claim with the Spanish oil company Repsol SA as a result of the nationalisation of YPF, ending a two-year dispute with the issuance of US$5 billion in compensation bonds, and the decision made in May 2014 to settle payments of nearly US$10 billion with the Paris Club. Nonetheless, a number of M&A transactions that were in the pipeline failed or were dropped after the Argentine government's recent default on its foreign debt in the bondholders' claim that is being decided under US law by US District Judge Thomas Griesa.

Investors in Argentina are used to economic cycles by now and they are expectant as times of crisis can create opportunities. In that regard the most tangible effect is that assets are already cheaper in Argentina than in many other Latin American countries, and that may be in part the reason why we have recently received a number of enquiries from foreign and local investors about the legal environment during the last year.

GTDT: Which sectors have been particularly active or stagnant? What are the underlying reasons for these activity levels? What size are typical transactions?

RHC, RM & MS: The energy and natural resources sectors have been particularly active. The reasons for this can be attributed to the fact that Argentina needs to foster investments in this sector to substitute the import of natural resources (eg, gas) to achieve energy self-sufficiency and improve exports. Also, the discovery of Vaca

Muerta shale oil and gas field in Neuquén, which has been estimated to be one of the largest shale oil reserves in the world, required YPF to partner with private parties to explore and develop these unconventional oil and gas resources. In addition, most investors in energy and natural resources are sophisticated, long-term investors that are experienced in making deals in countries where legal and economic certainty cannot be taken for granted.

For instance, we have just closed a transaction involving Medanito oil and gas areas. We have also advised Medanito SA (an Argentine company with over 20 years in the field of energy, especially in upstream hydrocarbons and mid-stream gas) on the acquisition of the oil and gas exploration business Chañares Herrados Empresa de Trabajos Petroleros (CHASA) in June 2014. This acquisition will enable the company to increase its reserves and the production of hydrocarbons, as well as being at the helm of Cuenca Cuyana, through the hydrocarbon concessions of CHASA.


Ramón Ignacio Moyano

Another relevant case we participated in is the investment of local company Ciminas in Minera IRL Patagonia (the local subsidiary of Peru's Minera IRL) in 2013, in order to develop its gold mining project Don Nicolás, located in the Argentine province of Santa Cruz (gold production in Don Nicolás is estimated at 50,000 ounces per annum). The fact that Argentine funds provide financial facilities to large-scale mining projects is a significant aspect of this transaction. Ciminas is a company formed by a group of Argentine private capital investors with a mission to invest in projects in Argentina with high medium and long-term growth potential, and with a main focus on generating export revenue and import substitution. In July 2014, Ciminas finally acquired all shares of Minera IRL Patagonia, and changed its name to Don Nicolás.

The financial services sector has also been active. Beccar Varela acted as deal adviser for the merger between Visa Argentina (a credit card company that in Argentina is owned by the banks) with Banelco (ATM business) and two other companies. Also, agribusiness (despite the enactment of the Rural Land Law, which restricts the acquisition of rural land by foreign parties) represented a relevant sector in M&A as will be mentioned afterwards. In that field Beccar Varela advised the sellers on the sale of FN Semillas, a seed company, to Bayer, and also Finlays in the acquisition of Casa Fuentes, which required approvals from two Argentine federal authorities, the Rural Lands Registry and the Border Security Zone Authorities.

On the other hand, and mainly due to import and foreign exchange restrictions in force in Argentina, most of the businesses related to import of goods or supplies have been particularly stagnant. As an example, the automotive parts and components industry – which needs to import products on a regular basis – has suffered import restrictions. In addition, the Central Bank of Argentina (BCRA) has established an informal procedure, not written in any regulation, known as 'scheduling' of transactions (in Spanish, *calendarización*) that has particularly affected this sector. This scheduling procedure implies that all transfers of funds exceeding a certain amount need to have the BCRA's informal authorisation. On these matters we have worked closely with clients such as Chrysler, Mercedez Benz, Affinia and Delphi, among others.

A typical transaction in Argentina is done for less than US$100 million. In most of the cases the numbers are kept confidential so the amounts involved are not published or disclosed.

GTDT: What were the recent keynote deals? What made them so significant?

RHC, RM & MS: The most significant and recent deals that put Argentina on the Latin American map of M&A transactions are in the oil and gas field. First there was the YPF SA/Repsol SA case, which started in 2012 with the Argentine government's decision to expropriate Repsol's shareholding in YPF. Then came the intervention of YPF SA and the appointment of the Minister of Planning as administrator of the company (the same measure was taken with regard to Repsol YPF Gas SA). This year the Argentine government and Repsol have signed an amicable agreement and expropriation settlement that recognised Repsol's right to receive approximately US$5 billion as compensation for the expropriation of the shares of YPF.

Another relevant case is *YPF SA/Apache*, by means of which YPF acquired Apache's local assets for US$800 million. Consequently, YPF became Argentina's main operator of gas (being already Argentina's main operator of oil). The main assets involved in the transaction were located in the provinces of Neuquén, Tierra del Fuego and Río Negro.

There is also the case of the Brazilian Energy Company Petrobras, which has decided to leave Argentina. This transaction is still under way and will probably be one of the most significant M&A transactions of this cycle.

GTDT: In your experience, what consideration do shareholders in a target tend to prefer? Are mergers and acquisitions in your country primarily cash or share transactions? Are shareholders generally willing to accept shares issued by a foreign acquirer?

RHC, RM & MS: Mergers and acquisitions in Argentina are primarily cash transactions. Nevertheless, shares do sometimes play a part in trasnactions. One example would be the case of CSAV, the Chilean shipping company (the largest in Latin America) that merged with Hapag-Lloyd (German company), exchanging its container shipping business for a stake of 34 per cent in the latter company. CSAV is now expected to make an additional capital injection in Hapag-Lloyd, through a capital increase worth US$509 million, in order to finance refurbishment and maintenance works on the merged company's fleet. Our firm advised CSAV's subsidiary in Argentina on the due diligence process and other Argentine law related matters.

A local example would be the restructuring of Tarjetas Regionales, in which shares were accepted as consideration in view of a future IPO of the company.


María Shakespear

"A typical transaction in Argentina is done for less than US$100 million. In most of the cases the numbers are kept confidential so the amounts involved are not disclosed."

THE INSIDE TRACK

What factors make mergers and acquisitions practice in your jurisdiction unique?

Transactions are over-regulated because of the vast amount of regulation in different areas involved in most mergers and acquisitions. For instance, foreign exchange, trade and commerce, antitrust, rural land law, anti-money laundering, among other regulations. This particular situation and the existence of complex legislation that may be applicable, or at least has to be considered, makes it necessary to consult with experienced lawyers and sometimes a vast team of lawyers with expertise in such areas.

What three things should a client consider when choosing counsel for a complex transaction in your jurisdiction?

First, counsel should inspire clients' confidence and trust, making them feel supported. Second, in Argentina clients have to make sure that the lawyer has a high standard of ethics in addition to a high level of professionalism. Third, the lawyer should consult with a fully integrated team with the ability to cover different legal areas required in such a complex transaction.

What is the most interesting or unusual matter you have recently worked on, and why?

The most interesting or unusual matter we have recently worked on was a merger between Visa (the credit card company) and Banelco (the ATM company) and two other companies (Monedero and Prisma), where Estudio Beccar Varela acted as deal counsel of the transaction. It was a very interesting transaction because it involved a stock purchase agreement and a merger apart from the fact that Beccar Varela acted as a deal counsel for all of the different parties involved, including 15 shareholders for Visa that happen to be the major financial institutions of Argentina.

Roberto Horacio Crouzel, Ramón Ignacio Moyano & María Shakespear
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GTDT: How has the legal and regulatory landscape for mergers and acquisitions changed during the past few years in your country?

RHC, RM & MS: During the past few years the Argentine government has enacted profuse and complex regulatory frameworks that have had a profound impact on mergers and acquisitions. These have shaped M&A transactions to make them compatible with regulations on foreign exchange control, commerce and trade, rural land law, price control and supply law, tax on dividends and transfer of shares, among other things.

As an example, regarding the foreign exchange regime, the BCRA has established strict foreign exchange control, and has limited the acquisition of foreign currency. Funds transferred to Argentina must be registered with the BCRA through a local bank, and liquidated (converted into Argentine pesos) through the local foreign exchange market. Said funds, unless permitted by the regulations or previously authorised by the BCRA, must remain in the country for at least 365 days as from their registration and if no exception applies, during such period 30 per cent of the funds must be retained in a US dollar denominated, non-transferable, non-withdrawable and non-interest-bearing time deposit that cannot be used as collateral for any kind of debt (known locally as the 'Encaje'). In many transactions loans were substituted by capital contributions that had a chance to be completed without Encaje. In addition to this, in order to transfer funds abroad from Argentina, it is necessary to convert local currency into foreign currency. That means that foreign currency deposited in Argentine bank accounts cannot be transferred directly abroad. Furthermore, several limitations on the payment of dividends and royalties or services payable abroad have been established, limiting the chances of foreign investors recovering their investments. It is important to highlight that the original reason behind the foreign exchange regulations was to avoid an outflow of US dollars, but it turned out to be a disincentive to foreign investments.

Regarding trade and commerce regulations, limitations on import of goods are very restrictive and bureaucratic and there are some informal requirements and measures in place that end up delaying or even frustrating the deal and import of goods. These regulations were issued allegedly to protect national industry but ended up being detrimental for industries that depended on the import of goods.

Regarding tax matters, new legislation imposed taxes on the transfer of shares and the payment of dividends. As a result of the enactment of Law No.

26,893 in September 2013, taxes are imposed on the transfer of shares (including physical persons and foreign shareholders).

In the case of non-resident and Argentine-resident individual sellers, income tax is imposed on the sale of shares and equity interests (at a rate of around 15 per cent – depending on whether the seller is resident or not – on the transfer price or on the net income obtained). If the buyer is an Argentine resident, the buyer must assess, withhold and pay the income tax to the Argentine tax authorities. If the seller is an Argentine legal entity or an enterprise, the applicable income tax rate is 35 per cent on its net income.

As to the distribution of dividends in corporations and limited partnerships (SLRs), those are subject to income tax at a 10 per cent if the stockholder is a local individual or a foreign resident.

Furthermore, as regards merger control, Law 25,156 has been in place since 1999 but the process has slowed down in the recent years and it can take more than a year to obtain a formal decision from the authorities, which gives uncertainty to the parties, who will not be able to definitively close the deal until a final decision is issued.

It is worth noting that the increase in regulation is an international trend. Nonetheless, in Argentina it is exacerbated and is perceived by investors as very unwelcoming.

GTDT: Describe recent developments in the commercial landscape. Are buyers from outside your country common?

RHC, RM & MS: Foreign buyers are very common in Argentina. As mentioned before, the regulatory constraints and the macroeconomic situation of Argentina have been perceived as unfriendly mainly by foreign investors. Consequently, some of them have left the country. We have lately seen many cases of local players acquiring businesses or companies that were once owned by foreign investors. As an example we can mention the recent acquisition of AECSA (concessionaire of the motorway Ricchieri-Ezeiza-Cañuelas), the acquisition by Pampa of EDF assets in Argentina and the already-mentioned *Ciminas* case.

GTDT: Are shareholder activists part of the corporate scene? How have they influenced M&A?

RHC, RM & MS: In general terms, shareholder activists are not relevant in the M&A scene as in Argentina it is typical to have only a few shareholders per company (usually the majority of shareholdings are concentrated in one or two groups). In addition, there are few listed companies in Argentina. Nonetheless, the active participation of the government as shareholder of listed companies after the expropriation of the pension funds has been considered a kind of activism.

By the end of 2012 the current Capital Markets Law 26,831 (the CNV Law) was enacted, and with respect to the minority shareholders several changes in corporate governance were introduced in order to achieve a greater recognition of minority shareholders' rights as well as to provide them the possibility to actively participate in the companies they have a stake in.

Many of the new provisions of the CNV Law are not convenient for major shareholders and in that sense such law may discourage companies from going public. For example, minority shareholders now have the opportunity to challenge the purchase price of its shares, guidelines for determining an equitable purchase price have been settled, and the control of the company cannot be acquired without giving notice to minority shareholders. The control of the Argentine Stock Exchange Commission (CNV) in listed companies has increased under the CNC Law as well, and small investors can request the CNV to intervene on their behalf, under certain circumstances.

GTDT: Take us through the typical stages of a transaction in your jurisdiction.

RHC, RM & MS: A transaction in Argentina can start in different ways according to the needs and characteristics of the particular case. There is no mandatory proceeding to be followed albeit the path is more regulated when the target company is a listed company.

It is standard for the selling party to prepare the target company for the sale. The seller may hire an adviser to prepare a valuation of the company, define the strategy of the transaction and assist the seller throughout the deal.

Once the valuation of the company is completed, depending on the structure of the deal prospect buyers are contacted – a one-to-one approach should be made so as not to be considered as a public offering of the shares – usually through the advisers hired.

The first step is usually to execute a confidentiality agreement to protect the target and any of the information to be provided as well as to keep the deal itself under confidentiality conditions. Then a teaser or 'book' of the target company is sent to prospective buyers including its history, chart with shareholders, products and services, brands, projections, etc.

After the seller has decided to engage with a buyer or a shortlist of determined prospective buyers it may execute a memorandum of understanding, a letter of intent or a term sheet.

Sometimes prior to the execution of any of the mentioned documents the purchaser is allowed to make a preliminary or limited due diligence or sometimes seller provides sell-side due diligence.

Once the preliminary agreement is executed, the parties agree on the extension and scope of a due diligence (if such was not agreed under the memorandum of understanding). It is usually carried out through virtual data rooms or by putting at the prospective buyer's disposal the requested information in a defined location. It involves teams of lawyers, accountants, finance experts, operational, technical and human resources teams from the buyer side. The due diligence stage is critical for the success of the transaction, mainly in the determination of the price (including the possibility of retaining a portion of the price in an escrow) and in determining the existence of deal breaker contingencies (which in Argentina are usually related to labour, foreign exchange and environmental matters). The due diligence ends within the time frame agreed upon and with the delivery to the buyer of a report prepared by the buyer's lawyers and accounts team.

Conducting management meetings has proven to have a relevant added value to transactions, providing buyers and sellers not only the chance to meet face-to-face but to gain guidance on aspects of the target company that do not appear clear from the documentation provided in the data room.

If the due diligence outcome is positive, meaning that no deal breakers were found, a negotiation process of the key findings may be started along with the negotiation of the transaction documents.

The closing of the transaction is reached with the execution of the sale and purchase agreement, which may also involve the execution of an escrow agreement (to cover contingencies) and a shareholders' agreement (if the sale does not involve 100 per cent of the shareholding).

Subject to the characteristics of the transaction a filing requesting antitrust authorities' approval (or other regulatory approvals as applicable) may be mandatory. In addition, post-closing tasks contemplated in the transaction documents are carried out.

GTDT: Are there any legal or commercial changes anticipated in the near future that will materially affect practice or activity in your country?

RHC, RM & MS: One very relevant legal change worth noting is that a law approving the Commercial and Civil Code has been recently enacted and the new Code will be valid from 2016. Even though this law has been enacted very recently and is too new (and long) to be commented on, a relevant provision to bear in mind because it may impact on M&A transactions is the provision stating that any payment obligations stated in US dollars might be validly cancelled in Argentine pesos. It is yet to be determined whether this provision will be kept or whether a clarification will be provided and how it will be construed (eg, if private agreements between the parties stating that the obligations shall be paid in the agreed currency will be valid and prevail over the Code's provision).

In addition, the new Civil and Commercial Code introduced some changes in the Companies Law, the most relevant being the provision stating that companies of a single member or shareholder can be validly incorporated, which was not previously permitted. This will allow single entrepreneurs to limit their liability regarding a given business.

GTDT: What does the future hold? What activity levels do you expect for the next year? Which sectors will be the most active?

RHC, RM & MS: Beyond the macroeconomic context there have been new opportunities and changes are expected in the near future after the 2015 presidential election. There are businesses that have grown in Argentina and are seen as very attractive, such as those in the agribusiness, mining and energy sectors. These kinds of businesses require capital and investment to continue to grow in the future and compared with similar business in the rest of Latin America, prices in Argentina are six to seven times cheaper. As long as the context becomes friendlier for investors, M&A transactions will undoubtedly take a leading role.

"As long as the context becomes friendlier for investors, M&A transactions will undoubtedly take a leading role."

Roberto Salles

M&A IN BRAZIL

Roberto Salles began his career working with PwC and then Andersen. He is now co-founder of Campos, Fialho, Canabrava, Borja, Andrade, Salles. He is responsible for the firm's tax planning and consulting practices and specialises in tax planning and corporate structuring of M&A, private equity and venture capital deals.

Mariana Loyola is a senior associate of the team coordinated by partner Roberto Salles, working with M&A, corporate restructuring and private equity. Mariana recently completed a master's degree in corporate law and is experienced in conducting corporate restructuring and M&A work.

Roberto and Mariana recently advised Mota-Engil Group in all Brazilian tax and corporate matters related to the reorganisation of the structure control for Brazil (also involving investments in Portugal and Peru) and designed the conceptual structure for Fashion City Brasil, a large project in the fashion segment, comprising a shopping centre, hotel and other facilities in Belo Horizonte, Minas Gerais area, also negotiating all relevant contracts regarding corporate matters.

GTDT: What trends are you seeing in overall activity levels for mergers and acquisitions in your country during the last year or so?

Roberto Salles & Mariana Loyola: Brazil was not among the countries that were most affected by the financial crisis of 2008 at first. Because of that, and also because Brazil has been seen as having a lot of potential to grow, the market for M&A, despite suffering an inevitable blow in 2008 and 2009, bounced back quickly after that. In 2010 and the following years, the market has recovered to the levels it reached before the crisis. On the other hand, Brazil has experienced low economic growth in 2012 and 2013 (2014 is expected to be the worst of the three years) and there has been an intense debate about the causes of this, especially because of the presidential elections that took place in October 2014. The low growth and the possibility of change in government increased uncertainty, therefore many investors and entrepreneurs were waiting for the next presidency to be determined and for changes in the macroeconomic scenario before resuming transactions involving mergers and acquisitions. The percentage of prospective transactions that do not evolve into effective transactions is also noticeably higher than normal.

The extended period of low growth combined with the uncertainty derived from the proximity of the presidential elections has certainly contributed to slow down the recovery of the market. Besides that, especially in 2014, it is also fair to say that the FIFA World Cup played a role in this scenario. During the games period, in June and July, many cities in Brazil were completely focused on them, with many governmental agencies closing on game days, investment decisions being postponed, business travel being avoided and a lot of people going on holiday. Due to all the factors described, one can say that, despite activity levels recovering, Brazil has not been able to show a significant increase compared to the pre-crisis period.

On the other hand, Brazil still has great potential to grow as well as to develop new economic activities. The Brazilian government has invested in infrastructure, established new rules to encourage capital market transactions and created an environment to receive more investments from abroad. Therefore, we expect the market to receive good news after the period of uncertainty surrounding the elections has passed, and especially after (and if) the federal government is able to act in boosting economic growth once again. There have been some positive signs. After the World Cup, activities in the M&A market have increased (August was the best month so far in 2014, with an increase of more than 30 per cent in comparison to August 2013 and more than 40 per cent in comparison to the same month of 2012), but it is yet too soon to know if it is just a delayed effect of operations that were postponed during previous months or if this marks a consistent recovery.

GTDT: Which sectors have been particularly active or stagnant? What are the underlying reasons for these activity levels? What size are typical transactions?

RS & ML: The sectors that have been consistently among the most active are information technology and internet companies, company services, and food and beverages. Retail, energy, telecoms and financial institutions are also active sectors. This could be explained by some economic and social changes that Brazil has been undergoing throughout the past decade. For instance, the average income has increased, especially of the lower and middle classes, and there has been a significant increase in consumer credit. Around 40 million people considered to be in the lower class have become middle-class over the past decade, and 22 million have risen above the poverty line. Such changes obviously favour all sectors directly related to consumption of goods and services in general and consequently increase the attractiveness of transactions involving them. Moreover, the development of new technologies has been an incentive to the creation of new start-up projects, which is a sector where many transactions have taken place, although most of them involve lower values compared with other sectors.

Recent investments by the Brazilian government in oil and gas, especially because of the pre-salt exploration and production, have boosted the market for oil and gas companies. On the other hand, there has been stagnation in some parts of the energy sector because of strong intervention from the government in the rules, prices and activities related to it. For instance, the indirect control of gas prices has adversely affected biofuel companies. Another example is the recent renewal of the contracts of electricity providers which, in some cases, resulted in major losses for these companies.

GTDT: What were the recent keynote deals? What made them so significant?

RS & ML: One of the major transactions that took place recently was the merger involving Oi and Portugal Telecom, both prominent groups in the telecommunications sector, where many legal aspects raised polemic decisions related to cross-border transactions, tender offers, minority shareholder protection, regulatory issues and antitrust analysis.

The merger of ALL into Rumo Logistica, which belongs to the Cosan group, was the most significant of 2014 in terms of the money involved (13.5 billion reais). It stands as the largest transaction of the country in the first half 2014.

Another relevant transaction closed recently (in 2013) was the acquisition by Itaú Unibanco of the shares of Banco Citicard SA and Citifinancial Promotora de Negócios e Cobrança Ltda held by Citibank for 2.767 billion reais. The transaction included the Credicard brand, which is a well-known brand of credit card in Brazil, with a base of 4.8 million cards, and assets of around 8 billion reais (as of December 2012).

GTDT: In your experience, what consideration do shareholders in a target tend to prefer? Are mergers and acquisitions in your country primarily cash or share transactions? Are shareholders generally willing to accept shares issued by a foreign acquirer?

RS & ML: Brazilian shareholders tend to prefer cash rather than any other kind of payment. It is not yet usual to see Brazilian shareholders receiving shares, especially if issued by foreign companies or investors, although we have seen it happening a few times (in all cases we have handled, only for part of the price and no more than half of it). There appear to be three main reasons that keep the Brazlian sellers away from accepting shares. First, Brazilian tax regulation is complex and many times may impose a taxation on the seller even without cash being received therefore requiring sophisticated structures to reduce tax inefficiency. Second, lower liquidity in some cases (especially if the shares are abroad) and the costs of hiring foreign lawyers. And third, corporate culture shock, especially because the seller becomes a minority shareholder in a completely new and different structure (a significant number of Brazilian companies are still family-owned and family-managed with low dispersion of shares).

Nevertheless, deals including part of the payment in shares are happening more often, especially when the sellers become partners with the buyer or investor (at least for a certain period of time).

This kind of deal is often wanted by foreign investors seeking local knowledge of the market, experience and expertise.

When the seller accepts to receive shares and stay as a shareholder of the company or a new

> *"After a few years of growth of the internal market and the announcement of the 2014 World Cup and the 2016 Olympic Games there was a significant increase in buyers from outside the country."*


Mariana Loyola

investment vehicle, a lock-up period is usually arranged and often there are some sort of preferred rights attached to the shares. Roll-up transactions are good examples of this type of situation.

GTDT: How has the legal and regulatory landscape for mergers and acquisitions changed during the past few years in your country?

RS & ML: There have been some important changes to the regulatory framework in Brazil related to M&A transactions. Some of them deserve to be highlighted.

In the middle of 2012, the new Antitrust Law, Law No. 12,529, entered into force, establishing important changes to the process of submitting the transaction to the analysis of the governmental antitrust agency, the Administrative Counsel of Economic Defense (CADE). From that moment on, the transaction cannot have any legal or economic effects until it is approved by this agency. There are rules to expedite the procedure and filter complex cases from straightforward ones, but this remains a big change in Brazil's approach to antitrust as applicable to M&A transactions.

The taxation landscape has also had some relevant changes. First, IFRS accounting is currently being adopted as the starting point for the purpose of calculating corporate taxes in 2014 to 2015, after six to seven years of a transitional regime that kept all accounting as it was in 31 December 2007 for tax purposes. The new rules heavily affected the calculation of goodwill in M&A transactions, thus affecting (usually against taxpayers' interests) the tax consequences that may derive from the deduction of such goodwill. While the goodwill calculation rules worsened, the legality of its deduction, on the other hand, was reinforced. Considering that tax authorities have disputed that deduction in many cases, this certainly reduces the risk for M&A deals. The deduction of the goodwill generated by a transaction involving related parties, which was a source of strong debate in the past few years, is now clearly prohibited. Another important tax change that may affect M&A deals (although the scope of the rule is yet to be detailed) regards the possible taxation of sales of shares or quotas by the PIS and COFINS social contributions, at a joint rate that may be as high as 4.65 per cent of the revenue generated. This taxation would apply whenever the quotas or shares are considered as an asset available for sale and not as a permanent investment. Another tax issue that deserves to be highlighted is the taxation of foreign investment when a FIP (a private equity fund) is used as the investment vehicle. Non-resident investors are not subject to Brazilian taxation upon the redemption, liquidation or sale of FIP quotas. There are certain requisites for the exemption, such as, for example, the investor neither being located nor domiciled in a tax haven nor being entitled to 40 per cent or more of the FIP's interests or profits, or both. However, once these requisites are met, using the FIP as the investment vehicle for the foreign investor can be advantageous from a tax perspective.

Finally, the recent Brazilian Bribery Act, Law No. 12,846, has created several penalties and responsibilities for companies involved in any kind of illegal relationship with public agents, such as bribery. Therefore, potential acquirers will need to approach this issue more thoroughly in their due diligence process in order to reduce the risk that the target company, its group or its officers have carried out any kind of bribery acts to prevent any succession and liability for the penalties applied to the company.

GTDT: Describe recent developments in the commercial landscape. Are buyers from outside your country common?

RS & ML: After the privatisation process in the 1990s, foreign parties have been relatively active as participants in M&A transactions in Brazil. Over the past decade, foreign investors have become more and more relevant in this scenario; especially after a few years of growth of the internal market and the announcement of the 2014 World Cup and the 2016 Olympic Games there was a significant increase in buyers from outside the country. They were attracted by the government initiatives of investment in

THE INSIDE TRACK

What factors make mergers and acquisitions practice in your jurisdiction unique?

The bureaucracy and the complexity of the legal system make Brazil a very challenging jurisdiction. Clients rely heavily on their lawyers to help deliver legally robust and commercial outcomes. Brazil is a jurisdiction in which it is essential to have a strong legal adviser in order to understand the environment in which the company operates, the tax and labour matters and to address risks accordingly. The deep analysis of the target and the acquaintance of the business environment is very important to achieve a successful transaction. Brazil can be very challenging even to Brazilians as target companies (mostly family-owned) often lack qualified management professionals and need support to implement better levels of corporate governance.

What three things should a client consider when choosing counsel for a complex transaction in your jurisdiction?

1 Highly qualified personnel with a lot of experience in order to manage the complexities of doing business in Brazil.
2 A firm with broad and adequate scope: corporate, tax, contracts, regulatory in order to deeply analyse all legal aspects of the transaction, make an efficient and effective due diligence and design the best structure to make the deal happen regarding corporate, tax and contractual issues.
3 Direct involvement of partners and senior staff.

What is the most interesting or unusual matter you have recently worked on, and why?

A transaction involving a foreign investment in a construction company. We were the target's and the seller's advisers. The target company had an investment in a highway concession that was not included in the deal, so we had to plan withdrawal of the investment (and the effects that such withdrawal would generate in the target's numbers and activities) along with the price and contract negotiation. We experienced several regulatory limitations to make the deal happen. Tax planning was also relevant and difficult to execute as the deal already had a lot of limitations due to the target's sector and its investment's characteristics.

Another project that we have worked on is related to a specific type of shopping mall which is located very near to an international airport and is focused only on wholesale stores. The mall is being funded using equity from investors from several sectors such as construction, fashion, real estate as well as being financed by banks, including BNDES – the Brazilian Bank of National Economic and Social Development, a federal public bank.

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infrastructure sector as well as by the characteristics of the Brazilian market. Considering that family-owned companies are still very representative in the market (with its characteristics, problems and limitations), there are a lot of opportunities for foreign investors who may gain prominence with strategic arrangements, new forms of governance and well-organised corporate structures. Private equity and venture capital have played a very important role in this context. A significant part of the foreign investment came to Brazil through PE and VC funds.

Even in a context of persistent economic crisis in the international scenario (reduction in global investment flows and recession), Brazil has remained attractive and competitive when compared to traditional M&A markets and foreign investment has continued to grow, although at a reduced pace.

GTDT: Are shareholder activists part of the corporate scene? How have they influenced M&A?

RS & ML: There have been only a few examples of shareholder activism, and only in public listed companies (Oi Telecom). Even in the public environment, the profile is of low free floats and well-defined controlling shareholders. Additionally, as the Brazilian market is mostly formed by small and medium-sized companies, it does not experience high levels of shareholder activism.

GTDT: Take us through the typical stages of a transaction in your jurisdiction.

RS & ML: There are often banks and financial advisers involved and the contact is frequently initiated by them. Normally the first step is the

execution of a non-disclosure agreement, where the parties agree to present relevant information about each other and the target. After that there is usually some price discussion and the presentation of the first proposal by the buyer or investor, along with the execution of a memorandum of understanding (MOU) (usually non-binding), which is the document to regulate the next steps of the transaction, the due diligence procedures and to establish an exclusivity period. There are two kinds of due diligence process: compliance and legal due diligence. Law firms are responsible for legal due diligence, which involves the legal aspects of the company's operations and structure (relevant contracts, real estate, corporate aspects, lawsuits, labour and tax matters). If the due diligence results are satisfactory, the parties begin the negotiation of the investment agreement or the share purchase agreement and also shareholder agreements when applicable (transaction agreements). Guarantees and indemnification clauses are often the most sensitive ones, because of the complexity of the Brazilian legislation and uncertainty of the judicial system. Tax planning is also a neuralgic issue within the deal, and normally parties begin the study about the best way to structure the transaction immediately after the signature of the MOU and it continues during the whole deal until the structure is agreed and can be portrayed in the transaction agreements. The transaction agreements normally foresee certain conditions to closing, including corporate restructuring (also to execute tax planning), notice to antitrust and other regulatory authorities (ie, CADE, the Brazilian Central Bank) and banks and suppliers whose contacts provide for previous approval, if necessary.

GTDT: Are there any legal or commercial changes anticipated in the near future that will materially affect practice or activity in your country?

RS & ML: Yes, the rules of the new Commercial Code (Bill No. 1,572/2011) are under discussion among specialists and at the National Congress. The new Commercial Code is designed to compile and update all rules regarding the relationship between companies and shareholders, officers and directors; all kinds of business contracts (with banks, insurance companies, suppliers); rights and obligations of companies, partners and officers; and measures relating to bankruptcy of a company. All of these issues could be affected.

Other legal changes that will affect practice and activity are those regarding tax, especially corporate income tax, the social contribution on profits and PIS and COFINS (social contributions levied on the gross revenues). As explained before, taxation rules are currently being adjusted to accommodate the adoption of IFRS in Brazil and the most important part of the necessary legislation has already been enacted. However, when it comes to tax matters, often the application of the law to practical situations is just as relevant as the theory behind it, since tax authorities and taxpayers often express different views on the same point. As tax matters are highly relevant in M&A transactions, it will be crucial to follow up on the development of the interpretation of the recent modifications by tax authorities, tax courts and taxpayers.

GTDT: What does the future hold? What activity levels do you expect for the next year? Which sectors will be the most active?

RS & ML: The level of activity should continue to increase because Brazilian companies are still growing (the majority of transactions still only involve small amounts – up to US$100 million) and therefore present a great number of opportunities. Brazil needs heavy investment in infrastructure and companies that can better cover the consumption needs (health, insurance, transportation, consumer goods, etc) of the new internal market created by the social movements among classes that has occurred over the past decade. However, the rate and speed of such increase will depend on the ability of the president to muster confidence from the productive sectors and from the financial markets in order to promote investment and therefore recover a steady growth pace for the country's economy.

The most active sectors will likely be infrastructure-related and consumption-related. Therefore, public services and utilities, real estate and internet/IT with an emphasis on infrastructure are certainly among the top sectors, since Brazil has a huge need for investment in the railways, roads, ports and airports, electrical transmission, etc. Brazil needs to improve its infrastructure to continue to grow (infrastructure year after year has been known to be a bottleneck for many industries) and to accommodate production necessities. At the same time, every person that has emerged from poverty into the lower or middle classes is eager to consume.

There will be many opportunities.

"The level of activity should continue to increase because Brazilian companies are still growing and therefore present a great number of opportunities."

Vincent Mercier

Peter Hong

M&A IN CANADA

Vincent Mercier is a senior partner at Davies Ward Phillips & Vineberg LLP whose practice focuses principally on mergers and acquisitions across all industries, and Peter Hong is a partner in the M&A and capital markets groups at the firm.

Vincent is a member of the firm's management committee and has experience advising on complex transactions, including cross-border transactions, hostile takeover bids, private equity acquisitions, negotiated merger transactions and special committee processes. He has been involved in a number of restructurings of insolvent companies, including acting for Shaw Communications in its C$2 billion acquisition through insolvency proceedings of the conventional and specialty television businesses of Canwest Global Communications Corp, now known as Shaw Media.

Peter has extenstive experience in public and private M&A transactions. He represented Augusta Resource on the hostile takeover bid for Augusta by HudBay Minerals, which resulted in a supported C$555 million acquisition of Augusta by HudBay. He also advised Brookfield Office Properties on the US$5 billion offer for Brookfield Office Properties by Brookfield Property Partners.

Vincent and Peter also advised the Maple Group, a consortium comprising 13 of Canada's largest financial institutions, in its C$3.8 billion acquisition of TMX Group, the operator of the Toronto Stock Exchange, and Ontario Teachers' Pension Plan Board in its equity investment in Hudson's Bay Company to finance the US$2.9 billion acquisition of Saks Incorporated.

Photo: yelo34/iStock/Thinkstock

GTDT: What trends are you seeing in overall activity levels for mergers and acquisitions in your country during the last year or so?

Vincent Mercier & Peter Hong: While there continue to be large and interesting M&A transactions in the Canadian market, overall activity levels have not yet returned to pre-crisis levels. To illustrate this point, Canadian M&A deal value in 2013 was approximately one-third of what it was in 2007, principally as a result of fewer mega deals, and 2013 M&A deal value was at its lowest since 2004. However, activity in the small-cap market resulted in a robust number of deals in 2013.

2014 started off slowly with first quarter deal value on par with the fourth quarter of 2013, but with a lower number of deals. Significant improvements in activity were seen in the second quarter of 2014, with deal value up 51 per cent from the first quarter of 2014 (up 48 per cent from the second quarter of 2013) and a solid performance based on the number of deals. As a result, there is cautious optimism for increased M&A activity in 2014 and beyond, with deal activity recently picking up in Canada, including in sectors that were very slow in 2013, particularly oil and gas.

A large portion of the Canadian economy is commodity price driven, so Canadian M&A activity tends to follow commodity price cycles. If commodity prices start to recover – and this is by no means certain given the state of the global economy, particularly China and Europe – Canadian M&A activity should continue to pick up.

GTDT: Which sectors have been particularly active or stagnant? What are the underlying reasons for these activity levels? What size are typical transactions?

VAM & PH: 2013 saw a significant decline in activity in the mining and oil and gas sectors, traditional stalwarts of Canada's resource-based economy. The decrease in activity can be explained in part by volatile commodity prices. Pulling the trigger on acquisitions proved difficult in 2013 when commodity price uncertainty made pricing transactions very difficult. The dearth of activity in the mining and oil and gas sectors was somewhat offset by relatively strong activity in the real estate and retail sectors in 2013, including Loblaw's C$12.4 billion acquisition of Shoppers Drug Mart.

An increase in levels of activity in the mining and oil and gas sectors has been one of the driving forces in the return of healthier M&A activity in 2014, with four of the top five deals in the first half of 2014 being in these sectors. Canada's M&A market is generally characterised by mid-market deals, with average transaction size in 2014 being approximately C$115 million, and the largest transaction being Burger King's proposed acquisition of Tim Hortons for C$12.5 billion.

GTDT: What were the recent keynote deals? What made them so significant?

VAM & PH: One of the keynote deals for 2014 is Burger King's acquisition of Tim Hortons for

approximately C$12.5 billion and a related C$3 billion preferred equity investment from Berkshire Hathaway. Tim Hortons is an iconic Canadian coffee and doughnut brand, and its merger with Burger King, an iconic US brand, will create the world's third-largest fast-food company. The merged company will be headquartered in Canada, with the brand headquarters of Burger King and Tim Hortons remaining in the US and Canada.

Another keynote deal for 2014 was the recently completed C$3.9 billion acquisition of Osisko Mining by Agnico Eagle Mines and Yamana Gold. Osisko was initially put into play by a hostile takeover bid by Goldcorp. Osisko commenced litigation against Goldcorp alleging misuse of confidential information. This litigation was settled, with Goldcorp agreeing to keep its takeover bid open for approximately 90 days (the statutorily mandated minimum bid period in Canada being 35 days). Osisko conducted an auction, resulting in a unique white knight transaction in the form of a joint bid from Agnico Eagle and Yamana. The transaction involved the formation of a fifty-fifty partnership between Agnico Eagle and Yamana to operate Osisko's primary mine, and the spin out of a new company holding a royalty interest in the mine, as well as exploration assets. Many market observers point to the *Osisko* situation as a catalyst for renewed interest in the mining sector, with several other deals being subsequently announced.

Barrick Gold and Newmont Mining, two of the world's largest gold companies, held extensive merger discussions earlier this year. Had this C$35 billion merger been completed, it would have created by far the largest gold company in the world, and been the largest Canadian M&A transaction in 2014 and one of the largest Canadian transactions ever.

GTDT: In your experience, what consideration do shareholders in a target tend to prefer? Are mergers and acquisitions in your country primarily cash or share transactions? Are shareholders generally willing to accept shares issued by a foreign acquirer?

VAM & PH: In our experience, shareholders generally prefer cash consideration for the obvious benefit of price certainty. However, in scenarios where there may be significant upside in the business or very significant synergies, shareholders may prefer share consideration in order to participate in the upside. The majority of transactions in the mining space in Canada usually involve share consideration.

In addition, where the receipt of cash consideration would trigger a significant tax gain, shareholders may prefer share consideration if a tax-deferred 'rollover' is available. One of the requirements for a tax-deferred rollover is for the share consideration to be issued by a Canadian company. This requirement has led to the use of 'exchangeable share' structures, where shares are issued by a special-purpose Canadian company listed on a Canadian stock exchange that are exchangeable into shares of the foreign acquirer. The exchangeable shares provide Canadian shareholders with the tax-deferred rollover treatment, while being economically equivalent to shares of the foreign acquirer. However, this transaction structure does limit a foreign acquirer's ability to maximise the tax attributes of the target's assets, and so it is now only used where achieving a rollover for Canadian shareholders is critical to the deal's success. A recent example of the use of this structure was the US$5 billion acquisition by Brookfield Property Partners of the shares of Brookfield Office Properties it did not already own. It was also used in the *Molson/Coors* merger.

Canadian shareholders are generally willing to accept shares issued by a foreign acquirer, provided they trade on recognised and established stock exchanges. Foreign acquirers should note that if shares are to be issued as consideration for the acquisition of a Canadian public company, the foreign acquirer will become subject to the continuous disclosure obligations under Canadian securities laws.

GTDT: How has the legal and regulatory landscape for mergers and acquisitions changed during the past few years in your country?

VAM & PH: There has been an increased focus on foreign investment review in recent years. Acquisitions of control of Canadian businesses above specified dollar thresholds are subject to review under the Investment Canada Act to determine whether they are likely to be of 'net benefit' to Canada.

The increased focus started with BHP Billiton's proposed acquisition of Potash Corporation of Saskatchewan in 2010. BHP Billiton's offer was withdrawn following the Canadian government's announcement that it would be unlikely to be approved. In December 2012, when the Canadian government approved the acquisition of Nexen by CNOOC, a Chinese state-owned enterprise (SOE), and the acquisition of Progress Energy by Petronas, a Malaysian SOE, it announced restrictions on further SOE investments in the Canadian oil sands sector and possibly other concentrated sectors. Also, while the government previously proposed to progressively increase the dollar thresholds that trigger 'net benefit' review under the Investment Canada Act, investments by SOEs will not benefit from the escalation of the thresholds.

In October 2013, the Canadian government rejected the proposed acquisition by Accelero of Allstream on the basis of national security

concerns. Pursuant to the Investment Canada Act's national security review process, which is separate from the 'net benefit' review, the Canadian government can reject a foreign investment if it would be injurious to national security. Although we are aware of a small number of other transactions that have been abandoned as a result of national security concerns, this appears to be the first time since the national security review provisions were added to the Investment Canada Act in March 2009 that the Canadian government has rejected a proposed investment on national security grounds. The Canadian government's announcement noted that Allstream operates a national fibre optic network that provides critical services, including to the government, but did not otherwise provide any explanation of the grounds for its decision. Navigating the opaque national security review provisions can be very challenging and frustrating for acquirers.

As a result of these developments, successfully navigating the foreign investment review process has become one of the most important issues for a foreign entity considering an acquisition in Canada. While the vast majority of foreign acquisitions of Canadian businesses are unlikely to raise Investment Canada Act concerns, it is important that non-Canadian investors carefully consider any potential issues at the early stages of their transaction planning. In many cases, a plan to address potential concerns should be formulated in concert with the larger transaction strategy and executed concurrently with, or prior to, announcement of the deal.

"Historically, Canadian M&A activity has been characterised by strong inbound deal flows from foreign buyers outweighing outbound acquisitions of foreign businesses by Canadian companies, pension funds and private equity firms."

The merger control and antitrust approval process in Canada is very similar to the process in the United States. As with any transaction these days, obtaining clearance from the Canadian Competition Bureau can be an important component of any transaction involving a horizontal or vertical merger.

GTDT: Describe recent developments in the commercial landscape. Are buyers from outside your country common?

VAM & PH: Historically, Canadian M&A activity has been characterised by strong inbound deal flows from foreign buyers (with US buyers typically leading the way) outweighing outbound acquisitions of foreign businesses by Canadian companies, pension funds and private equity firms. In part due to the performance of the Canadian economy during the financial crisis and the strength of Canadian financial institutions, Canadian outbound M&A has been higher than Canadian inbound M&A in the past few years, with C$79.6 billion of Canadian outbound M&A in 2013 (the highest level since 2008), including the high-profile US$2.9 billion acquisition of Saks by Hudson's Bay Company, compared to inbound M&A of just C$44.3 billion. The first nine months of 2014 were also noteworthy for the strength of outbound deal flow from Canada, with Valeant Pharmaceuticals' US$42.5 billion hostile bid for Allergan, the US-based maker of Botox, comprising a large portion of outbound deal value, and Encana's US$7.1 billion acquisition of Athlon Energy. This has led to increased Canadian equity capital market activity to finance the outbound deal flow.

GTDT: Are shareholder activists part of the corporate scene? How have they influenced M&A?

VAM & PH: Shareholder activists have been, and we expect will continue to be, a very important part of the corporate landscape in Canada, with the number of proxy contests rising significantly over the past decade.

Historically, shareholder activism in Canada was associated with smaller companies and remained out of the spotlight. However, New York-based Pershing Square's successful proxy contest for Canadian Pacific Railway in 2012 was a watershed moment for shareholder activism in Canada. It signalled that even the largest blue-chip companies with respected and well-connected boards were not immune from successful attacks by activists. It also signalled that Canadian fund and pension managers, who were traditionally conservative and hold significant positions in many Canadian public companies, were willing to support activist shareholders.

While there are significant differences between Canadian and US rules relating to proxy contests and share accumulations, the regulatory landscape in Canada is conducive to shareholder activism. US activist investors have been increasingly active in Canada. They have been targeting underperforming companies to push for management or strategy changes, including in some cases pushing for the sale or break-up of companies, acting as a catalyst for M&A activity.

GTDT: Take us through the typical stages of a transaction in your jurisdiction.

VAM & PH: The nature of the initial contact between a target company and an acquirer depends on the circumstances. The initial contact may take the form of the financial advisers to the target company contacting potential buyers as part of an auction process, or discussions between management, directors or advisers of the parties. In the case of hostile bids, there may be an unsolicited proposal letter, or no contact at all, prior to the announcement of the bid.

In negotiated transactions, there may be a non-binding letter of intent setting out the parties' understanding of the price and other key deal terms. There may also be a binding exclusivity agreement, providing the acquirer with a period of exclusivity to conduct due diligence and negotiate the transaction. In addition, as a precondition to the target company providing access to confidential due diligence information, it is typical for an acquirer to enter into a confidentiality and standstill agreement. The standstill provisions would preclude an acquirer from making an unsolicited offer for an agreed period of time.

Following the completion of due diligence and the negotiation of the transaction, the parties would enter into a definitive agreement and announce the transaction. Prior to its approval of the definitive agreement, the board of directors of the target company would typically want to receive a fairness opinion from its financial adviser that the consideration to be received by the target shareholders is fair from a financial point of view.

Public company transactions may take the form of a one-step statutory merger transaction in the form of a plan of arrangement or an amalgamation, or a two-step transaction involving a takeover bid in the form of an offer made to the target shareholders for the target shares followed by a second-step acquisition transaction to acquire shares not tendered to the bid. The one-step merger transaction would be subject to approval by the target shareholders at a shareholders' meeting. A takeover bid would also be subject to shareholder approval, as it would be subject to a minimum tender condition in order to ensure that a second-step acquisition transaction can be completed to acquire shares not tendered to the bid. Prior to the approval of a one-step merger by the target shareholders or the expiry of a takeover bid, the board of directors of the target company would typically have a 'fiduciary out' permitting it to terminate the definitive agreement in order to support an unsolicited superior proposal from a third party. This termination right is typically subject to the right of the acquirer to match the superior proposal. The target company would be required to pay a termination or 'break' fee to the acquirer in order to terminate the definitive agreement to pursue the superior proposal.

Following the receipt of the applicable shareholder approvals and any applicable regulatory approvals, the transaction would be consummated.

Hostile transactions would not involve the due diligence and agreements mentioned earlier and can only proceed by way of takeover bid made directly to the target shareholders.

GTDT: Are there any legal or commercial changes anticipated in the near future that will materially affect practice or activity in your country?

VAM & PH: In September 2014, the Canadian Securities Administrators proposed amendments to the takeover bid rules that, if adopted, will significantly change the way in which hostile takeover bids are conducted in Canada.

Currently, a shareholder rights plan or 'poison pill' is the principal defensive mechanism used by target companies to provide more time than the statutorily mandated minimum 35-day bid period to pursue alternatives to the hostile bid. A bidder facing a shareholder rights plan would apply to the Canadian securities regulators for a cease trade order to nullify the target's rights plan, allowing the acquirer to complete its hostile acquisition if a sufficient number of shares are tendered to its hostile bid. With a few exceptions, the securities regulators have nullified rights plans within 45 to 70 days after the hostile bid date based on the principle that shareholders, not boards of directors, should have the right to decide whether to accept or reject a hostile bid and must be given the opportunity to choose between the hostile bid and any alternatives proposed by management.

The proposed amendments are aimed at rebalancing the current dynamics between hostile bidders and target boards. It is also hoped that the amendments will make the conduct of hostile bids more predictable and result in the adoption of fewer rights plans, and therefore fewer rights plan hearings before Canadian securities commissions. The amendments will give target boards more time to respond and seek alternatives to a hostile bid. In addition, the amendments are intended to

THE INSIDE TRACK

What factors make mergers and acquisitions practice in your jurisdiction unique?

As all M&A practitioners know, every deal is unique, particularly hostile bids and proxy contests, with its own dynamics, drivers and personalities. Canadian M&A deals are no different in this respect. In addition, because of the relatively small size of the Canadian economy, Canadian M&A expertise is concentrated in a relatively small number of firms and investment banks. The current rules for conducting, and defending against, hostile takeovers in Canada are also quite different from those in the US. In Canada, there is no 'just say no' defence due to the unavailability of certain structural defences otherwise available in the US, and the Canadian regulatory position that there comes a time when a shareholders rights plan must go to permit shareholders to decide whether to accept or reject a hostile bid. This prevents target companies from standing behind a shareholder rights plan indefinitely. In addition, the foreign investment review provisions of the Investment Canada Act are unique and require guidance from experienced regulatory counsel and other advisers in order to successfully navigate them. Lastly, tax implications resulting from the application of unique Canadian tax laws always need to be considered in cross-border transactions, so advice from experienced Canadian tax counsel is always critical to a successful transaction.

What three things should a client consider when choosing counsel for a complex transaction in your jurisdiction?

Experience, experience and experience. We say this only half-jokingly, because there is no substitute for experience in running and successfully completing complex transactions. For example, on one transaction we worked on, we came up with a first-of-its-kind transaction structure to address a specific regulatory issue that came up at the last minute by combining a variety of concepts and structures from prior transactions.

Judgement and ability to think creatively and solve problems is also very important, but experience contributes to creative problem solving by allowing one to draw on his or her 'deal toolkit' and also contributes to good judgement by helping to differentiate between that which seems possible and that which is. Advising clients that they are overreaching can sometimes be as valuable as coming up with a creative structure to complete a transaction.

Depth of the team is also very important. Complex M&A transactions require expertise in many different fields, including tax, Investment Canada, antitrust, and litigation. On complex transactions, it is critical to hire a law firm that works as a team to deliver excellence across multiple practice areas.

What is the most interesting or unusual matter you have recently worked on, and why?

We have had the good fortune to have worked on many interesting matters, including one of the most complex M&A deals in Canada in the past five years. We represented Maple Group, a consortium comprising five of Canada's largest pension funds, four Canadian bank-owned investment dealers, a leading independent broker dealer, Canada's largest financial cooperative group and a leading Canadian-based financial services group, in its C$3.8 billion acquisition of TMX Group, the operator of the Toronto Stock Exchange. The transaction was of critical importance to the future of Canada's capital markets, with the Maple Group proposal being made in response to TMX Group's proposal to merge with the London Stock Exchange. Maple Group's acquisition of TMX Group followed a successful proxy contest to convince TMX Group's shareholders to reject the merger with the London Stock Exchange.

We are used to complex and novel deals, but this one set a new bar for complexity and novelty, receiving numerous 'Deal of the Year' awards. There was incredible complexity in bringing together and managing the consortium of 13 financial institutions to work together on the deal. The transaction also involved the acquisitions of CDS, the clearing house for securities trades, and Alpha Trading, a competing stock market, and there was incredible complexity in negotiating and simultaneously closing the acquisitions of three highly regulated enterprises. The transaction also required the development of a novel two-step integrated transaction structure to address US securities law issues. The structure involved a partial takeover bid offering cash consideration in the first step, and a second step offering share consideration, and we obtained unprecedented exemptive relief from the Canadian securities regulators to utilise the structure.

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encourage hostile bidders to negotiate with target boards by allowing transactions with target board support to be completed more quickly – that is, in a minimum of 35 days, rather than the 120 days required if no target board support is obtained. The proposed amendments will not, however, alter the fundamental principle that shareholders ultimately must decide the fate of a hostile bid.

The proposed rules would require takeover bids to have the following features: the bid must remain open for a minimum of 120 days, subject to the ability of the target board to waive, in a non-discriminatory manner when there are multiple bids, the minimum period to not less than 35 days; the bid must be subject to a mandatory minimum tender condition that more than 50 per cent of all outstanding target securities owned or held by persons other than the bidder and its joint actors be tendered before the bidder can acquire any securities under the bid; and the bidder must extend the bid for an additional 10 days after the bidder achieves the mandatory minimum tender condition and the bidder announces its intention to acquire and pay for the securities deposited under the bid.

The proposed amendments do not prohibit the use of rights plans. Rights plans will continue to be relevant to regulate the accumulation of large 'toe-hold' positions in a company through transactions that are exempt from the takeover bid rules. Rights plans may also continue to be relevant where there are unique circumstances that require a bid to remain open for more than 120 days, or where shareholders continue to be vehemently opposed to a hostile bid. At a minimum, we expect that there will be a heavy burden on issuers to demonstrate that a rights plan should be allowed to remain in place where a bidder has complied with the proposed rules.

The proposed amendments are the culmination of 18 months of consultation by the Canadian Securities Administrators following the publication in March 2013 of two different defensive tactics policy proposals, which are now no longer being pursued. The Canadian Securities Administrators intend to publish the proposed amendments to the takeover bid rules in the first quarter of 2015. Given the long period of consultation, we believe there is a good chance that the proposed amendments will become effective.

GTDT: What does the future hold? What activity levels do you expect for the next year? Which sectors will be the most active?

VAM & PH: Canadian M&A activity will largely be dictated by global economic factors, particularly commodity prices given our resource-driven economy. The US economic recovery, although fragile, bodes well for Canadian M&A activity, even though China's economic 'slowdown', together with changes to Canada's foreign investment rules, have negatively affected Canadian M&A activity, particularly in the oil sands sector. Strong capital markets activity, particularly in the oil and gas sector, together with continued availability of cheap debt financing, also bodes well for Canadian M&A. Increased interest from private equity firms, including the acquisition of Wind Mobile by a consortium of Canadian and other investors, the recent openings of Canadian offices by Blackstone and KKR, and Bain's acquisition of Canada Goose, also give cause for optimism that we are on the road to an M&A recovery in Canada. However, as always, any macro level shocks to the global or Canadian economy will have a significant impact on future activity levels.

Caroline Berube

M&A IN CHINA

Caroline Berube is the managing partner of HJM Asia Law. She is admitted to the New York Bar, the Singapore Bar and holds a BCL (civil law) and an LLB (common law) from McGill University in Montreal, Canada. Caroline also studied for a year at the National University of Singapore in 1998, where she focused on Chinese law. Caroline has been working in Asia for more than 15 years with SMEs, MNCs and foreign banks, advising them in the field of commercial law, intellectual property, human resources and M&A in the Asia-Pacific region. She spent the majority of this time in China, Bangkok and Singapore when she initially worked in a British law firm.

Caroline has experience in setting up legal,tax and corporate structures, and navigating the challenges and options faced by potential and existing investors in Asia.

Caroline is an arbitrator approved by the Chinese European Arbitration Centre and the China International Economic and Trade Arbitration Commission. She is also a regular speaker at various international conferences and has taught courses at the Université Laval in Quebec, Canada and Sorbonne ASSAS International School of Law, Asia campus.

Photo:Charrie/iStock/Thinkstock

GTDT: What trends are you seeing in overall activity levels for mergers and acquisitions in your country during the last year or so?

Caroline Berube: The M&A market is growing in China. I would say that the 2008 financial crisis did not have an impact in China as it was a developing market. It would be more appropriate therefore to analyse whether the crisis has slowed down M&A deals or whether it has changed the type and scope of M&A in China. Some would say that the crisis reinforced the need for Western investors to invest in newer markets. I would agree that investors in the West since 2008 are becoming more open-minded about emerging markets or countries where the legal framework is not as secure as it is in the West.

One new trend is Chinese companies buying companies in the West. This has intensified since 2008 as Western companies need fresh capital and China has that capital. China is also facing challenges in its economy and development that need to be addressed.

We are also seeing foreign companies established in China making alliances with domestic companies to grow their market share and increase profits. Foreign investment is surging. Chinese companies know the market better and these foreign companies do not fear being robbed of their ideas by their local business partners. This is a good sign that the market in China is becoming mature.

GTDT: Which sectors have been particularly active or stagnant? What are the underlying reasons for these activity levels? What size are typical transactions?

CB: All sectors are active where they have been opened up to foreign investment. China continues to maintain quite tight control on the sectors in which foreign investors can enter. The Catalogue for Foreign Direct Investment classifies the economy into three sector types: encouraged, open but restricted, and forbidden. Activities that are not listed should be considered as open to foreign investment without restrictions or specific treatment.

The Catalogue for Foreign Direct Investment was recently amended to open up new sectors to foreign investment, for instance the green energy and new technologies sectors. As such, there is competition, which is generally a good stimulus for the sector concerned, and at same time it allows importing of technologies that are not yet available in China.

Recently, we have seen more foreign investment in the education sector and the health industry. China is definitely turning into a services market and the needs are huge, in particular in the elderly care sector. Transactions are of all shapes and sizes: now even small investors are not afraid of the cultural differences in business. China is a huge market which is worth the effort of investing in.

There are plenty of examples such as the acquisition of the Canadian company, Nexen. The takeover by Chinese state-owned entity CNOOC Ltd in February 2013 took more than seven months to close and Nexen, based in Calgary, Alberta, said in a statement that its shareholders would receive US$27.50 in cash for each Nexen share. The closing came just as Nexen reported a net loss in its final quarter.

Another example is Club Med. A Chinese investor and a French private equity firm won over Club Med with an improved €557 million takeover bid in June 2013 , seeking to accelerate a shift as the holiday resorts pioneer to fast-growing emerging markets. China's Fosun International and AXA Private Equity, who have teamed up with Club Med management and are already the firm's biggest shareholders, paid €17.5 a share for the stock they did not already own.

Four Chinese businessmen (Sun Xiaofei, Chen Xiaofei, Pan Changhai and Hong Jianqiao) also bought an unspecified stake in the French fashion company, Pierre Cardin, to take over its brand and all business in China as reported by the China Business News. All four Chinese businessmen are all from Wenzhou in east China's Zhejing province, which is China's manufacturing base of light industrial products.

GTDT: What were the recent keynote deals? What made them so significant?

CB: There was one potentially large deal involving a Chinese-owned company, Ralls Corp, which acquired four wind farm projects in the United States. The deal was blocked, however, due to national security issues, forcing Ralls Corp to divest its stake in the projects. A court has now overruled the decision, but too late to save the deal.

On the other hand, the *Coca-Cola/Huiyuan* deal in 2009 was blocked for antitrust reasons in China.

One of the keynote deals is the acquisition of Club Méditerranée by Fosun. The Chinese investor had already held a minority stake in the French group for a while but now it has made a full takeover offer, which the Club Med board has backed. It illustrates how well the economy in China is developing. Chinese people have seen their social benefits growing since the 1990s and they are now consumers and going on holidays outside China more frequently and not necessarily returning to their hometown for holidays. If the takeover is successful, Club Méditerranée will surely begin to target Chinese clients and tap into the increasing Chinese demand for this kind of leisure.

GTDT: In your experience, what consideration do shareholders in a target tend to prefer? Are mergers and acquisitions in your country primarily cash or share transactions? Are shareholders generally willing to accept shares issued by a foreign acquirer?

CB: I don't think Chinese companies prefer cash particularly over shares. It really depends on the case. If the transaction is about forming a joint venture and marrying two companies, then the share transaction does make sense. This is a type of deal we have already seen some years ago. To really shore up their relationship, a French company and its Chinese counterpart decided to do a cross-investment. One part of the consideration was cash and the other part was a share transaction.

However, it must be emphasised that the financial markets are not really an option in China due to the complex process of getting listed and delisted. Financial markets do not really offer financial leverages, hence M&A deals occur between companies that are not listed and foreign investors must bear in mind that they may not be able to list after the M&A deal is done.

GTDT: How has the legal and regulatory landscape for mergers and acquisitions changed during the past few years in your country?

CB: There are several legal pitfalls in the M&A market. First the sector might not be open to foreign investment, as already mentioned. Some sectors are totally off limits (such as national security, for example). Other sectors are restricted in the sense that the foreign investor may be obliged to be a minor shareholder. This must be checked beforehand.There are some ways of dealing with this issue, such as dividing the target into several entities if only some of the activities are interesting for our foreign client and these activities are not restricted. In that case, we could separate the restricted activities into another entity. However, the process can take a long time.

There is also the antitrust and national security review. This pitfall was highlighted in the 2009 *Coca-Cola* deal. The review may take three or four months, and this is not the last step of the process.

The last step is to amend the type and structure of the company. In China, as foreign investment is restricted, we must apply for an investment approval and then go through the incorporation amendment process. This can also take approximately three to four months.

The Companies Law was reformed this year to make the management and maintenance of companies easier. However, the reform's implementation depends on local regulations and administrative practice. To date, there have been no major developments.

GTDT: Describe recent developments in the commercial landscape. Are buyers from outside your country common?

CB: Although China is not 100 per cent open to foreign investments, the economy relies largely on foreign investments including new sectors and technologies. Although the authorities are accustomed to foreign investors, they are not necessarily making it easy for foreign investors to enter the market. Cities such as Shenzhen or Shanghai are really dependent on foreign investment. However, the documentation for foreign investment is not in English, which makes it even harder for foreign investors to enter the market. There are some cases where the authorities' officers have drafted articles of association for foreign investment companies and the investors cannot amend them. This obviously differs from the standard practice in other countries.

China also has a preferred approach for some activities to target specific knowledge from a particular country to develop a sector where it is in demand in China. For example, for infant's milk, China targets specifically France and New Zealand

"Although China is not 100 per cent open to foreign investments, the economy relies largely on foreign investments including new sectors and technologies."

THE INSIDE TRACK

What factors make mergers and acquisitions practice in your jurisdiction unique?

China is still a developing economy and the legal environment is challenging.

What three things should a client consider when choosing counsel for a complex transaction in your jurisdiction?

1 If the information is difficult to find then it is better to rely on a resourceful service provider to check.
2 The law is evolving so rapidly that what is found on the internet may be already outdated.
3 There are some business codes that the client should be aware of in order to avoid diving straight into an interesting deal without understanding the culture.

What is the most interesting or unusual matter you have recently worked on, and why?

A client appointed our firm to conduct several projects which require a local partner due to foreign investment regulations but none of the projects went through, but it is hard to understand why as the sector is growing and our client has some advantages on the competition.

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for imports, especially as after the scandal for infant milk in China consumers have lost the trust they had in domestic companies.

GTDT: Are shareholder activists part of the corporate scene? How have they influenced M&A?

CB: There has been very little shareholder activism in China thus far. There is a logical explanation for this. In many companies in China, the shareholders are the company's managers. In addition, people negotiating the deal are in charge of the business too. Hence, the shareholders do not need specific protection as they are the ones running the business and closing the deal with investors. It is often a win-win situation as foreign investors usually want to do business in China rather than merely hold the shares.

GTDT: Take us through the typical stages of a transaction in your jurisdiction.

CB: There are a number of informal intermediaries that introduce companies and investors for a living. Then, the process takes place between the management bodies of the two companies.

Depending on the target company, the due diligence process can be very different. It may require a lot of work to explain due diligence requirements, such as disclosing financial data or the lists of clients and suppliers, to some Chinese counterparties.

But with the opening up of China's markets, we see more experienced Chinese business people becoming very accustomed to the process of due diligence. However, discovering the history of the company can be a complicated process. Private background checks can help at an early stage to find certain information on a target to save time.

GTDT: Are there any legal or commercial changes anticipated in the near future that will materially affect practice or activity in your country?

CB: I do not think that the business sectors will open up significantly in the next couple of years. My guess is that the sectors open to foreign investors today will remain so for some years.

What is interesting is that more Chinese companies are getting themselves listed in the US (as Alibaba did recently) or other foreign markets. I expect that Chinese companies will become more prevalent in the foreign markets and their foreign subsidiaries may be involved in M&A transactions instead of the Chinese entities themselves.

The question now is how the government will react to the fact that companies need to go abroad to grow and close their deals. It is hard to see how the financial markets will open further unless the Chinese currency becomes internationally traded and foreign exchange control is loosened.

GTDT: What does the future hold? What activity levels do you expect for the next year? Which sectors will be the most active?

CB: The energy industry and the services industries will continue to grow. There is a growing consumerism trend in China and more foreign companies will want to be part of this market as the domestic markets are quite depressed. Inbound deals have maintained the same pace in the past two years and the situation should remain the same. I believe that outbound deals will continue to increase but the sectors will diversify.

Rudolf Rentsch

M&A IN THE CZECH REPUBLIC

Rudolf Rentsch is the founding partner of Rentsch Legal, an independent boutique law firm in Prague with an international scope. He specialises in cross-border and domestic M&A transactions, venture capital and private equity, and corporate and commercial law. He has provided advice to multinationals as well as direct private investors in connection with their investments or divestments, in the Czech Republic and other countries in the region.

Recent projects include advising the now former owners of Impact-Corti, a leading Czech property manager, in connection with the sale of their business to CBRE, the support of the sponsor in a management buyout of a leading Czech IT company, and the support of the owner of a leading marketing/IT company in connection with the sale of his business to a foreign investor.

Rudolf co-owns Sauter Rentsch Investment Services, a Prague-based corporate finance/M&A boutique. Prior to establishing Rentsch Legal, he was a local partner of the Prague office of Gleiss Lutz/Schönherr. Before moving to Prague, Rudolf worked with leading Swiss firm Homburger. Rudolf is admitted to the Czech and Swiss bars. He graduated from the Swiss universities in Lausanne (lic iur) and Basel (Dr iur) as well as from the University of Chicago (LLM).

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GTDT: What trends are you seeing in overall activity levels for mergers and acquisitions in your country during the last year or so?

Rudolf Rentsch: In the Czech Republic, as in all neighbouring developed economies, the overall activity level for mergers and acquisitions has increased over the past year. According to most studies, the number of transactions increased 30–70 per cent in 2013 compared with 2012. Thus, 2013 was the busiest year in terms of M&A in seven years. This general trend seems to be continuing in 2014.

The activity level has therefore reached the pre-crisis level in terms of the number of transactions, but not yet in terms of their average size. There have been a number of large-scale transactions lately, such as the acquisition of the Czech subsidiary of Telefónica O2 by PPF Group or the purchase of Net4Gas by a consortium of Allianz Capital Partners and Borealis Infrastructure Management from RWE.

Five recent trends are particularly interesting. Western European energy and utility companies are selling off their Czech assets. RWE disinvested and German E.ON exited from Prague's gas company Pražská plynárenská. Among the drivers of this trend are the aim to improve the balance sheet and a focus on other regions, such as Asia and South America.

Business owners are increasingly dealing with succession issues. Founders who established their businesses in the early years after the Velvet Revolution are now approaching retirement age and are searching for new owners.

A growing number of large-scale deals feature Czech buyers. In 2013, half of the buyers of the top 10 deals were Czech entities.

The Czech Republic has become a strong regional investor, given that it has competed in more outbound transactions than any other country in central and southern Europe. This signals that the Czech economy and its players are highly developed. This trend will persist as well, not least due to the fact that the number of suitable targets in the domestic market, given its limited size, is finite.

Chinese investors are increasingly seeking investment opportunities in the CEE in general and thus also in the Czech Republic. Several initiatives both on government and industry levels have recently been launched to strengthen mutual ties. This will automatically also lead to increased M&A activity involving Chinese investors.

GTDT: Which sectors have been particularly active or stagnant? What are the underlying reasons for these activity levels? What size are typical transactions?

RR: Lately the busiest sectors in terms both of deal size and volume have been the energy and utilities sector, the real estate sector, followed by retail and consumer goods, and the industry and services sectors.

The increased activity level in the energy and utilities sector is due in particular to the trend of

western European investors shifting their interest away from the Czech Republic to either their home markets or other economies. As regards real estate, foreign investors are returning after having somewhat neglected the Czech market over the past years. This may have been due to more promising yields in markets further east. Following the latest turmoil in Russia and Ukraine, and the unstable economic climate in these countries, investors seem to appreciate the safer environment in the Czech Republic coupled with its interesting return on investment compared to most western European countries.

In the retail sector, we are seeing further ongoing consolidation, while the increased demand for high-quality products is motivating new players to enter the markets, thus putting additional pressure on the incumbents. This is more than welcome, not only from the consumer's perspective, but also from an M&A practitioner's view. Either tendency triggers additional M&A activity.

In terms of size, most deals range between €5 million and €100 million. In exceptional cases, the size exceeds €2 billion. One such deal was PPF Group's acquisition of a 65.9 per cent stake in the Czech subsidiary of Telefónica O2 for a total consideration of €2.5 billion. Most other deals are significantly smaller, thus reflecting the smaller size of the Czech economy compared to Germany, France or the UK, not to mention the US or China.

GTDT: What were the recent keynote deals? What made them so significant?

RR: Apart from the deals mentioned earlier, I would highlight the acquisition by Ahold of Austrian Spar AG's supermarket business in the Czech Republic for €265 million. Ahold thus becomes the second-largest player in the Czech supermarket sector. After Carrefour quit the market several years ago, just like Belgium's Delhaize Group, Spar is the next significant retailer to back out of the Czech Republic. Tesco, Lidl/Kaufland and Metro Group, to name the most important international players, remain active here.

GTDT: In your experience, what consideration do shareholders in a target tend to prefer? Are mergers and acquisitions in your country primarily cash or share transactions? Are shareholders generally willing to accept shares issued by a foreign acquirer?

RR: Czech sellers typically prefer cash considerations. This is true across the board, regardless of size. PPF paid cash, RWE sold for cash, and Ahold paid cash. This is in line with our practice as well. We only exceptionally see share transactions. This does not mean, however, that Czech sellers refuse share considerations as a matter of principle. I would expect that a Czech seller would be as willing to accept shares of the buyer as any other seller in the world, if the shares offered are interesting.

GTDT: How has the legal and regulatory landscape for mergers and acquisitions changed during the past few years in your country?

RR: The legal framework changed dramatically on 1 January 2014. Czech private law and corporate law underwent a fundamental overhaul. In terms of M&A, this concerns especially the new Act on Business Corporations and the new Civil Code. Among the most important amendments, which are relevant from an M&A perspective, are increased liability of the statutory bodies, new options in terms of creation of various classes of shares in

limited liability companies, and new structural and organisational options in joint-stock companies.

The courts have yet to answer numerous legal questions, and this does not appear likely to change soon. As a result there is a rather high level of legal uncertainty, which is fuelled by attempts on a government level to re-amend numerous provisions. Over time, however, practice will gradually overcome this uncertainty, and in the long run the advantages of the new law will no doubt outweigh its present disadvantages.

This being said, the higher level of legal uncertainty at present should not generally have a negative impact on M&A deals. Rules pertaining to transfer of shares have not changed. The same is true for mergers and demergers under the Transformation Act. Therefore, the new law should not prevent a given transaction from materialising.

In terms of merger control, the principles have been valid for many years. The regulation is, of course, modelled upon EU law. Therefore, there are no surprises in this respect.

Last but not least, the tax regime has also been quite stable lately. Overall, the regime is favourable compared with the tax regimes of surrounding countries. Hence, taxes are not a reason to steer clear of the Czech Republic.

GTDT: Describe recent developments in the commercial landscape. Are buyers from outside your country common?

RR: Yes, over the past 25 years buyers from outside the Czech Republic have been very common. Investors from Western countries took advantage of the favourable conditions for transferring manufacturing plants to the Czech Republic. The automotive industry is particularly well represented, with manufacturers such as Volkswagen Group, Hyundai, Toyota and PSA Group maintaining production facilities around the Czech Republic. Suppliers on all levels have followed in their wake.

Other notable foreign investors across various industries include Nestlé, Kraft/Mondelez, Danone, Bayer, Lonza, KBC, Société Générale, Unicredit Group and Saint-Gobain, to name only a few. Basically, all of the big players had already entered the country in the 1990s.

Over time, however, labour costs naturally increased, and mass production moved further east. Instead of closing their Czech plants, however, most investors established more sophisticated production or R&D centres. We also increasingly see multinationals setting up their regional headquarters in the Czech Republic – mostly in Prague. It does not always have to be Vienna!

In terms of cross-border activities, more and more Czech investors are acquiring businesses abroad, not only in other countries in the CEE but also in western Europe and Asia. Notable Czech investors abroad include PPF Group, Agrofert (which is owned by the current Czech Minister of Finance) and EPH.

GTDT: Are shareholder activists part of the corporate scene? How have they influenced M&A?

RR: No, shareholder activists are not really part of the corporate scene. This is a logical consequence of the small number of companies listed on the Prague Stock Exchange and thus the low market liquidity. Unlike regional competitor Warsaw, Prague is not really significant in terms of being a capital market. Consequently, they do not influence M&A. The last important public M&A deal was PPF's investment in O2. This whole process went smoothly.

GTDT: Take us through the typical stages of a transaction in your jurisdiction.

RR: As probably anywhere else, there is no typical way in the Czech Republic for an M&A transaction to be managed. The process largely depends on the size, kind and (financial) shape of the business to be sold. In large deals with a transaction value of €40 million or more, the buyer or the seller will typically hire a financial adviser who will be in charge of managing the entire process. As there are not many deals of this size in the Czech Republic and as there are many financial advisers – big and small – we see an increasing involvement by financial advisers in smaller and medium-sized deals.

That being said, it is no exception for a financial adviser to trigger the entrepreneur's willingness to sell his or her business. As I already explained, we are facing the first generation of entrepreneurs post-revolution who have to deal with the succession issue. They do not have any experience

"The higher level of legal uncertainty at present should not generally have a negative impact on M&A deals."

THE INSIDE TRACK

What factors make mergers and acquisitions practice in your jurisdiction unique?

The most exciting thing in our M&A practice consists in coping with often strongly diverging characters on the sell and buy sides, in particular in private M&A cases. In those instances, the typical seller is a self-made entrepreneur who has built up his business over 20 years and is used to making decisions on his own without having to consult a board. If the business is sound and has reached a critical size, the buyer is often a multinational group, where the decision-making process is somewhat more complex. Our job then is not in the first place to handle purely legal issues, but to bridge the gap due to differing mindsets, backgrounds and languages.

What three things should a client consider when choosing counsel for a complex transaction in your jurisdiction?

Apart from being an excellent and experienced lawyer, the counsel should fulfil two main connected criteria:

1 He should be a proven dealmaker. In our market, unfortunately, many lawyers still don't have much business sense. They only pinpoint problems without aiming to find solutions. I have seen many promising deals killed by lawyers.
2 He should speak the languages of all the parties involved, and not only in a purely linguistic sense. The manager of a multinational, who has been educated at a leading global university and has spent years in sophisticated corporate structures, speaks a different language from the entrepreneur who has built up his business from scratch. A counsel who understands both languages can translate, if need be, and thus facilitate the deal.

What is the most interesting or unusual matter you have recently worked on, and why?

The most interesting matter I have recently worked on was an attempted management buyout of a promising Czech IT business. Unfortunately, the speed of the sponsor, a US–German investor, was too fast for the management. It turned out that the gap was too big even for a dealmaker.

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with this kind of project and are thus open to cooperate with a qualified adviser. Typically the process is as follows:

The adviser analyses and valuates the target business. Together with the entrepreneur, he or she prepares the business for the sale. If the adviser is adept, he or she manages to convince the entrepreneur that a sell-side due diligence is a good investment, which eventually pays back in the form of a higher price.

The adviser prepares the materials to be distributed to the potential buyers later on (ie, a teaser as well as an information memorandum). More importantly, the adviser identifies suitable potential investors. At this stage, lawyers start to become involved. They prepare the contractual transaction documentation.

The adviser approaches potential investors by providing them with the teaser and inviting them to request detailed information on the investment opportunity. In case of a positive reply, the potential investor receives the information memorandum.

Based on the information memorandum, the potential investors are invited to submit an indicative bid.

The adviser and the entrepreneur evaluate the indicative bids and select those potential investors that they will invite to the next round. At this point, they also have to decide whether to grant exclusivity to one particular bidder.

Once the advancing bidder or bidders are determined, they are invited to conduct due diligence. As anywhere else, virtual data rooms are most common. At the same time, the bidders receive the draft transactional documentation. After having evaluated the results of the due diligence, the bidders submit a binding offer, often in the form of an amended draft sale and purchase agreement.

Finally, the adviser and the entrepreneur evaluate the binding bids and determine the winner, with whom they then negotiate the final terms of the deal. Once signed, they then only need to close.

Realistically, this process takes six to 12 months. Quicker deals are usually only made when, for example, the CEOs know each other and negotiate the deal directly, or when the target is in a critical situation and time is of the essence. In either case, deals are usually realised without the involvement of any financial advisers.

The same is true when sophisticated private equity houses strive for and realise deals. They would usually not participate in tenders but rather identify opportunities and, where they can, directly negotiate with the owner of the target.

In terms of legal requirements, Czech corporate law and contract law do not provide for any insurmountable obstacles. Nevertheless, parties in cross-border deals usually choose some foreign law with regard to the framework agreements (ie, the SPA), while the transfer instruments are to be governed by local law. The same is, of course, true whenever it comes to the requirement to obtain any public authorisations prior to the consummation of a deal, which is the case particularly in regulated markets such as energy, telecoms, infrastructure and banking. As regards merger control, larger deals are typically subject to clearance by the European Commission. Only medium-sized deals, which are not subject to EU merger control, may require prior clearance by the Czech antitrust agency. The merger control rules both in terms of substance and procedure are fairly similar to European regulations.

GTDT: Are there any legal or commercial changes anticipated in the near future that will materially affect practice or activity in your country?

RR: I do not expect any fundamental changes in legislation in the coming years. As I already explained, we have recently gone through the most substantial changes in private law in more than 20 years, so that we will now 'only' face relatively minor changes where the flaws of the new law will be repaired. It now will be important to follow how case law based on the new law will develop. It will definitely be a number of years before most of the important open issues are resolved. Until then there will be some legal uncertainty, but nothing that we cannot cope with. Overall, I am positive that the fundamental amendment of Czech private law will soon pay off.

GTDT: What does the future hold? What activity levels do you expect for the next year? Which sectors will be the most active?

RR: I expect that the market will remain lively. While there may not be many blockbuster deals, I see a significant number of interesting medium-sized private transactions. Real estate will continue to be busy, like the energy and utilities and industry. Increasingly we will see activity in the IT sector, not least thanks to a dynamic start-up scene, and green-tech.

Another phenomenon that we will see is the increased activity of Chinese investors in central Europe. China lately has been focusing on outbound investments, not only with respect to the US, Africa and Australia, but also Europe. The Czech government has recently strengthened its endeavours vis-à-vis the competent Chinese bodies and thus has managed to attract some interest here. It's a safe bet that Huawei's investment in the Czech Republic will not be the last one. Our work will remain thrilling in the future, too!

Marielle Garrigó

M&A IN THE DOMINICAN REPUBLIC

Marielle Garrigó is a partner at Medina Garrigó, where she is the chairperson of the financial and corporate practice. She has participated in the most relevant M&A transactions in the Dominican Republic acting as local counsel to the buyer. Among those are the first LBO in the country for the acquisition of the holding of the concession of five international airports by a private investment fund, which received the *IFLR500* 'Deal of the Year' award; and the acquisition of the largest brewery in the Dominican Republic by Anheuser-Busch InBev. Marielle has extensive experience in dealing with the acquisition of family businesses and in multi-jurisdictional transactions. She is recognised as a leading lawyer by the the main international legal directories.

GTDT: What trends are you seeing in overall activity levels for mergers and acquisitions in your country during the last year or so?

Marielle Garrigó: M&A activity levels are starting to return to the levels prior to the financial crisis. However, they have varied from quarter to quarter and focused on diverse sectors of the economy. Likewise, as both sellers and buyers are constantly seeking tax-efficient alternatives, we can no longer refer to a typical structure in the context of an acquisition.

GTDT: Which sectors have been particularly active or stagnant? What are the underlying reasons for these activity levels? What size are typical transactions?

MG: The industrial and financial sector have been active, as consolidation in both remains a trend. The largest transaction involved the telecommunications industry and it was in excess of US$900 million. However, the average transaction for other industries has not exceeded US$500 million.

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GTDT: What were the recent keynote deals? What made them so significant?

MG: The acquisition of Orange Dominicana and Tricom by Altice was relevant not only because of the amount involved, but also because it represented a major change in the local industry, which now has, among other companies, two large telecoms service providers of foreign origin. In the financial sector, the consolidation of Centro Financiero BHD Leon, which resulted from the merger of Grupo BHD and Banco Leon, resulted in a repositioning of the key players in the financial sector.

GTDT: In your experience, what consideration do shareholders in a target tend to prefer? Are mergers and acquisitions in your country primarily cash or share transactions? Are shareholders generally willing to accept shares issued by a foreign acquirer?

MG: In the Dominican Republic acquisitions are primarily cash transactions. However, in certain cases the seller remains on board for a limited period of time as a preferred shareholder with a fixed dividend with a put option or call by the company. Although very rare, cashless deals are possible. Thus, in the end the consideration will vary depending on the specifics of the transaction.

GTDT: How has the legal and regulatory landscape for mergers and acquisitions changed during the past few years in your country?

MG: Merger control remains limited to specific sectors, such as energy, telecommunications, insurance and banking. Foreign investment is allowed in most industries of the economy with limitations only related to national security and the repatriation of capitals is not subject to restrictions. From a fiscal standpoint, while the tax regime remains the same, the authorities are now becoming involved in M&A processes at early stages, as the parties often seek tax-efficient structures for the implementation of the transaction that require validation by the tax administration.

GTDT: Describe recent developments in the commercial landscape. Are buyers from outside your country common?

MG: Foreign buyers are very common and it is also common for foreign buyers to enter into partnerships with local investors to acquire a business. Mergers between local groups are less frequent and sometimes are the preamble to an international bidding process.

GTDT: Are shareholder activists part of the corporate scene? How have they influenced M&A?

MG: Yes. There are a considerable number of family businesses with a heavy presence of shareholders at board level. Recently, several groups have successfully adopted a business model combining a family council with independent

THE INSIDE TRACK

What factors make mergers and acquisitions practice in your jurisdiction unique?

As often the buyers are from other jurisdictions it is important to be aware of how cultural differences may have a major role in the transaction. Frequently, the lawyer will have to explain not only what the law provides but also what is customary and reasonable from the seller's perspective; that means that a good practitioner will have to constantly place him or herself in the other party's shoes to gain a clear perspective of their expectations to explain them to the client along with the risks and potential alternatives related to those expectations. Also, the fact that the number of family businesses is high means that the due diligence process frequently must reach beyond the target and the seller as sometimes key assets may the held by related individuals or entities that may not be operative or in good standing and while none of these issues are deal-breakers they may delay the completion of the transaction or entail post-closing measures that may not be desirable by either party.

What three things should a client consider when choosing counsel for a complex transaction in your jurisdiction?

Experience and knowledge of the client's business are key; as well as the ability to assist the client in the process of assessing commercial risks based on the business reality of the jurisdiction. Availability and the capacity to work as part of a multidisciplinary team are essential and finally, in my experience, the successful completion of a transaction requires the ability to be able to combine local requirements and standard practice with international standards and sometimes also the requirements of foreign public or heavily regulated entities.

What is the most interesting or unusual matter you have recently worked on, and why?

Each transaction is special in its own way, and they teach us that the learning process is never-ending. However, for me the first LBO in the DR was particularly interesting as it involved private parties that included corporations, investment funds, financial institutions, individuals, governmental entities and a team of advisers in multiple fields and in several jurisdictions that managed to work in sync to close a deal for an amount in excess of US$700 million right before the 2008 financial crisis hit the international markets. What at times seemed to be the perfect storm ended as a success story thanks to the hard work of a diverse team that was totally aligned with the client's objective.

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directors; which has facilitated high-profile acquisitions in recent years.

GTDT: Take us through the typical stages of a transaction in your jurisdiction.

MG: In the most transactions the initial contact is from one CEO to another. However, intermediaries are frequently used either by the potential buyer, or by the seller, that may decide to open a restricted bid. As for the legal requirements, assuming that there are no restrictions under the target's by-laws or any shareholders' agreement, then the seller will enter into the corresponding non-disclosure agreement with the potential buyer and the due diligence process will begin. How the due diligence process is handled will vary and at some point will involve contacting the authorities to confirm the accuracy of certain information made available by the seller in the data room. The use of virtual data rooms is common; however, in certain cases the information is made available in hard copy, at the premises of the seller, for a limited period of time. The due diligence process usually involves experts in different fields and having a comprehensive consolidated reported frequently depends on the efficiency of their interaction.

GTDT: Are there any legal or commercial changes anticipated in the near future that will materially affect practice or activity in your country?

MG: Not to the best of our knowledge.

GTDT: What does the future hold? What activity levels do you expect for the next year? Which sectors will be the most active?

MG: We expect the activity levels to increase. The industrial sector, energy and tourism are likely to be more active and the consolidation trend in the financial sector is likely to continue.

Ulf-Henrik Kull

M&A IN FINLAND

Ulf-Henrik Kull's experience covers over 20 years in complex cross-border transactions, including both public and private mergers and acquisitions, with a special focus on private equity. He is recognised as one of the leading experts in corporate, mergers and acquisitions and private equity transactions in Finland and is regularly involved in some of the largest cross-border transactions in the Nordic region. One of the largest recent deals headed by Ulf-Henrik was the €2.55 billion divestment of Fortum Corporation's (listed on the NASDAQ OMX Helsinki) electricity distribution business in Finland to a consortium led by Borealis and First State.

Ilkka Perheentupa represents fund and industrial clients in mergers and acquisitions, investment and capital markets transactions, as well as shareholder, contractual and corporate matters. He has spent the majority of his over 16-year career in a corporate, capital markets and private equity practice in New York and London. In addition to his practice under Finnish law, Ilkka regularly advises clients with respect to their investments in the United States and US law implications of their operations. Industries that Ilkka has recently served include energy and infrastructure, gaming and entertainment, technology, private equity and venture capital.

Ilkka recently represented Elenia Group, a leading Finnish distribution system operator, and its main shareholders in the issuance of over €900 million in secured bonds and senior notes. He has also represented Next Games, a leading Finnish mobile gaming company, in its recent Round A financing and licensing arrangement with AMC regarding *The Walking Dead* franchise.

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GTDT: What trends are you seeing in overall activity levels for mergers and acquisitions in your country during the last year or so?

Ulf-Henrik Kull & Ilkka Perheentupa: Finland and the Nordic countries generally provide a very stable and predictable regulatory and cultural environment for M&A activity. For non-Finnish operators it is noteworthy that the Nordic custom and process for private M&A deals is broadly similar to, for example, in the UK or in the US, with relevant transaction documentation being (almost without exception) in English.

During the recent downturn, M&A levels in Finland (and the Nordics) have been quite volatile but especially during the past year or two we have seen significant activity. For certain quarters, M&A activity in Finland has been higher than in Sweden, a clearly larger market. Activity is driven by a number of factors, including challenges within various industry sectors and the resulting need to reorganise and seek synergies. The Nordic private equity funds (small to mid-cap being most active) have also been active in divesting assets from their more seasoned funds, as well as making acquisitions into new funds which many have recently been successful in raising.

Most of the activity has been related to private transactions, whereas we have seen only a limited number of public tender offers actually materialise. Recent examples include the over €1 billion all-cash public tender offer by the Danish Dannfoss Group for all the shares in Vacon Plc and the €1.1 billion public share exchange offer by Swedish SSAB for all the shares in Rautaruukki Corporation.

There have been highly publicised approaches around some of the Finnish crown-jewel public companies, including most notably Wärtsila Corporation and Metso Corporation, but so far no formal tender offers have been made.

The Nordic banks have weathered through the downturn relatively unscathed and access to bank financing has not been a significant bottleneck for M&A. Parallel to bank financing, we are also seeing the development of an increasingly active Nordic high-yield bond market with many companies turning to a bond solution in both refinancing and M&A contexts.

In line with the trend that has been prevalent in the Swedish market and supported by the healthy stock market valuations, we are seeing a number of PE-led exit processes move to a dual-track mode with priority on an IPO exit structure. There is a decent number of new IPOs in process – both for the main list of the NASDAQ OMX (Helsinki) as well as the smaller-cap First North list of the NASDAQ OMX (Helsinki).

GTDT: Which sectors have been particularly active or stagnant? What are the underlying reasons for these activity levels? What size are typical transactions?

U-HK & IP: Sectors that have been very active during the past two to three years are energy and infrastructure, health care and real estate.

Representative recent transactions include the €2.55 billion sale of Fortum Corporation's electricity network assets in Finland to a consortium led by Borealis and First State and the €1.54 billion sale by Vattenfall AB of its electricity network assets in Finland to a consortium led by GS Infrastructure Partners and 3i Infrastructure Partners. These regulated assets in a stable triple-A rated (until just recently) jurisdiction have proved highly attractive to international pension and infrastructure funds as they look for stable returns and geographic diversification in their portfolios. There has also been other activity on the infrastructure side, including around planned new nuclear power plants, PPP highway projects and transactions involving electricity networks of specific industrial sites.

Effectively all of the leading Finnish private health, elderly and social care providers are held by private equity, with KKR and Triton owning Mehiläinen, IK owning Attendo and EQT having recently acquired Terveystalo from Bridgepoint. Investment in these sectors is driven by attractive demographics, as well as public budgetary pressures and the pending reorganisation of the public health-care sector which some believe creates new opportunities for increased outsourcing. In general, the private social and health-care market is changing rapidly, which may create new opportunities for investors.

Other sectors that have seen particular activity include the media and entertainment sectors. The traditional media sector is, of course, undergoing fundamental transformation. Adapting to changing consumer behaviour and the new commercial realities require swift action both within published media and advertising. The Finnish media house Alma Media, for example, has recently been successful in seeking opportunities to invest in potential new growth businesses.

On the entertainment side, a clear bright spot is the booming mobile gaming sector. In the wake of the huge success of the likes of Supercell there are several very promising new gaming companies, including Next Games, Small Giant Games and Ministry of Games. Many of these companies are successfully raising capital from some of the leading venture capital funds in the US, Asia and Europe. Many international investors active in this space view Finland as having a strong concentration of know-how for mobile game development.

An important recent real estate transaction was the sale of Sanoma House, the Helsinki headquarters of Sanoma Corporation, to German Deka Immobilien for €176 million.

Ilkka Perheentupa

GTDT: What were the recent keynote deals? What made them so significant?

U-HK & IP: Fortum Corporation sold its Finnish electricity network assets to a consortium led by Borealis and First State in 2014 for €2.55 billion. The sheer size and the amount of foreign interest made this a landmark deal. From the Finnish society's perspective it is also important to obtain significant new investment into our core electricity infrastructure.

The Elenia Group also recently established a new bond programme that is listed on the London Stock Exchange. This refinancing structure reflects a UK style whole business securitisation and is the first of its kind involving a Finnish issuer entity. Based on the attractive rating granted to the structure, we are pleased to note that the Finnish regulatory environment supports this novel structure.

Clearly also the sale of Nokia Corporation's mobile handset business to Microsoft Corporation is one of the key recent deals in our market. The historical success of this business and the tremendous implications of the Nokia saga on the Finnish economy make this a landmark deal and represent a closing of one important chapter for the country.

GTDT: In your experience, what consideration do shareholders in a target tend to prefer? Are mergers and acquisitions in your country primarily cash or share transactions? Are shareholders generally willing to accept shares issued by a foreign acquirer?

U-HK & IP: In private deals cash is clearly the most common form of consideration. Share consideration is seen as an alternative in public tender offer structures but even there it is often difficult to structure transactions to allow for tax-free share exchanges given that typically even a limited cash component prevents such favourable tax treatment. Combining cash and shares may also create challenges with respect to equal treatment of shareholders. The recent €1.1 billion public share exchange offer by SSAB for all outstanding shares in Rautaruukki was an example of an all-share transaction.

GTDT: How has the legal and regulatory landscape for mergers and acquisitions changed during the past few years in your country?

U-HK & IP: The regulatory environment for M&A has remained quite stable, with certain notable developments on the tax and industry-specific regulation. Finland has recently imposed restrictions on the deduction of certain interest payments to affiliated entities for tax purposes. This has particular relevance to both new and existing cross-border financing structures (often implemented in an M&A context).

Driven by the prevailing political climate, the tax authorities are expected to increasingly scrutinise certain types of tax structures, including ones that involve shareholder loans between Finnish operating companies and offshore holding structures. The tax authorities are also very focused on transfer pricing and there is some high-profile tax litigation pending in this regard. Taxation will likely be one of the key topics of the next general election to be held in the spring of 2015.

There are also noteworthy sector-specific regulatory developments. Perhaps the most important one is the proposal to broadly reorganise the Finnish health and social care system by way of the formation of five distinct geographic areas that are responsible for social and health care in their region. This proposal is making its way through the political system but is likely to have profound implications on private health and social care providers.

Even though there have not been specific regulatory reforms in this regard, the recent shift in the geopolitical environment is likely to increase government scrutiny of foreign acquisitions of certain assets that may be deemed critical for the functioning of the society (pursuant to the relevant statutes on the control of foreign acquisitions), including on the energy and infrastructure side.

Photo: JacekSopotnicki/iStock/Thinkstock

GTDT: Describe recent developments in the commercial landscape. Are buyers from outside your country common?

U-HK & IP: Many of the traditional Finnish export-driven industries, including pulp and paper, metal and engineering, are being challenged by the current macroeconomic cycle and a range of adverse trends in the global and domestic fronts (eg, reduction in global demand including from China, high domestic cost base, etc). The recent sanctions against Russia are also affecting the food

THE INSIDE TRACK

What factors make mergers and acquisitions practice in your jurisdiction unique?

Finland provides a very stable and predictable legal and cultural environment for successful dealmaking, offering significant deal security and traditionally a low risk of post-closing disputes. Transactions are negotiated and documented in a manner that closely reflects UK and US traditions and practices.

In terms of what is unique, one thing that is noteworthy is the level of trust and transparency that parties will expect from one another in the context of doing deals in Finland. Finns have a strong tradition of being worthy of their word. This culture is also reflected on the adviser side which is known for high ethical standards and sophistication.

The Finnish language is clearly one unique feature of dealmaking in Finland given that few people outside the country speak Finnish. This is mitigated by the fact that, without really any exceptions, all significant deals are negotiated and documented in English. Another feature of the listed environment is the fact that the Finnish state continues to hold substantial stakes in many Finnish industries with certain non-strategic assets being administered by Solidium Oy, the investment vehicle of the Finnish state.

What three things should a client consider when choosing counsel for a complex transaction in your jurisdiction?

First, we believe clients need to make sure that the adviser has a relatively fresh and actual track record in successfully completing the relevant type of transaction – ideally in the same sector given that certain industries (including health care and energy) can be highly regulated. Second, clients should ensure that their adviser of choice will make the appropriate team available for the transaction, including the requisite senior attention and experience, and that the core members of team are genuinely hungry to get the mandate. Third, clients should not over-emphasise the scope of services offered by the large firms. In many cases, a more specialised and highly experienced firm may be the appropriate choice.

What is the most interesting or unusual matter you have recently worked on, and why?

Since the founding of our firm in 2011, we have been fortunate to have had the opportunity to work on many of the key corporate transactions involving our market.

To point to particularly exciting matters, we would mention our representations of some truly promising Finnish mobile gaming companies in their recent financing rounds involving leading US, Asian and European technology-focused venture capital funds and other prominent investors. Some of these companies are already expanding through M&A and some are attracting approaches from established film and TV studios that are looking to license their intellectual property for mobile game development. A prime example is the licensing arrangement between our client Next Games and AMC Networks regarding the production of a mobile game based on the hugely popular *The Walking Dead* television franchise.

It has been fascinating to observe how these newly formed companies with dynamic and international management and development teams seek to boldly take their companies global. The fact that many leading investors from around the world are zoning in on a cluster of companies from Finland in this manner is truly unique. With the broad international experience of many of our attorneys, including in the fields of M&A, venture capital, intellectual property and financing, we feel that assisting this cluster of Finnish companies to go global hits a sweet spot in our service offering.

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and retail sectors, as well as other businesses with substantial investment in Russia. Some of these challenges are reflected as increased consolidation and reorganisation activity.

Given the relative size of our economy, it is very common in our M&A landscape that buyers are from outside Finland. There are numerous recent examples of this, ranging from Microsoft's acquisition of Nokia's handset division to Borealis and First State's acquisition of Fortum's electricity network assets and Facebook's acquisition of fitness and activity tracking app Moves.

GTDT: Are shareholder activists part of the corporate scene? How have they influenced M&A?

U-HK & IP: The influence of shareholder activists has so far been quite limited. There are instances where a hedge fund holds significant positions in a public company and through their board representation such funds have managed to effect material reorganisations (including split-up) of the relevant entities, thus potentially releasing shareholder value. But such instances remain rare.

GTDT: Take us through the typical stages of a transaction in your jurisdiction.

U-HK & IP: We would emphasise that the Nordic custom and process for private M&A deals is broadly similar to that, for example, in the UK or the US with relevant transaction documentation being structured in a very similar manner and being (almost without exception) in English. In terms of process, foreign operators will not encounter any adverse surprises in doing deals in Finland or the Nordic region.

Although there is, of course, variation from deal to deal, with bankers in some cases having a more active role in serving as intermediary, contacts are generally established at senior management level and discussions can go on for quite a while before advisers are brought in. Once the deal gets sufficient traction, NDAs are executed and legal and other advisers are engaged. With few exceptions, due diligence is conducted by using one of the internationally known virtual dataroom providers.

One distinguishing feature of the Finnish M&A landscape is that it is established market practice for all information included in the data room (to the extent 'fairly disclosed'– a concept defined in the relevant purchase agreement) rather than just the specific details set forth in a disclosure memorandum to constitute disclosure material for purposes of qualifying the seller's representations and warranties. This is something that non-Nordic operators may not be used to and increases the importance of a high-quality data room process.

We have represented the sellers in most of the significant sale-side transactions in Finland during the past two years. What we have found to be quite helpful in facilitating the sale process is for the sale-side to prepare a legal guidance memorandum (rather than a traditional vendor diligence report) to provide buyer candidates with an overview of the target business and key issues from the legal perspective and a guide to the materials provided in the data room. This has become quite an established feature in recent exit processes.

In terms of other developments, we are seeing increasing use of M&A insurance, particularly in cases involving private equity funds. The product can be useful as a competitive tool for bidders in contested auctions as it allows them to present a 'clean exit' to seller (given that buyer will be looking to the insurance in case of any post-closing loss). Sellers may also instruct buyer candidates to make use of a pre-arranged insurance solution to staple as part of their bid package.

We have also made use of M&A insurance in industrial joint ventures where the parties contributing assets to the joint venture have different financial ability or willingness to back up possible claims. In these situations an M&A insurance where both parties obtain such insurance has proved an effective tool in placing the parties on a more equal footing and paving the way for a more harmonious future cooperation. Although insurance companies may perceive a heightened risk of conflicts of interest where both parties of a transaction obtain the insurance, such dual insurance solution has been available on the market (even from a single insurance provider).

GTDT: Are there any legal or commercial changes anticipated in the near future that will materially affect practice or activity in your country?

U-HK & IP: We are not expecting significant commercial changes in the near future. As discussed earlier, the main changes relate to certain pending industry-specific regulation and reorganisation that will likely have a significant effect on the commercial dynamic of the relevant industries, including most importantly the health and social care industry.

GTDT: What does the future hold? What activity levels do you expect for the next year? Which sectors will be the most active?

U-HK & IP: For the time being, we expect activity levels to remain quite high. Sectors that will continue to be busy are energy and infrastructure, where there is a solid pipeline of planned transactions. We are also seeing some of the leading private health-care companies coming to the M&A or IPO market as the investments spans of their private equity owners is coming to an end. We also expect to see further consolidation and reorganisation of the Finnish industrial base. Private equity will remain active (especially small to mid-cap). The Finnish state has also made it clear that it will continue to look for opportunities to divest some of its non-strategic holdings. And certain new sectors will continue to grow rapidly, including the mobile gaming sector.

Hubert Segain

M&A IN FRANCE

Hubert Segain is a partner in Herbert Smith Freehills' corporate group and managing partner of the Paris office. He has extensive experience in public and private mergers and acquisitions, joint ventures, restructuring and capital markets transactions. Hubert has advised a large number of international corporates on their M&A operations including BNP Paribas, Danone, Theolia, Virgin and Maurel & Prom. He also represents issuers, managers and financial institutions in enforcement procedures launched by the Autorité des Marchés Financiers.

Hubert has published more than 30 papers on M&A and financial markets regulation. He is regularly consulted by the regulatory bodies and other professional organisations on matters affecting corporate and financial regulations. Hubert is member of the Paris and New York State bars. *Chambers Global, Legal 500* and *Who's Who Legal* list him as a leading corporate lawyer.

Elise Favier is an associate within the Paris corporate team. Elise regularly assists clients on a wide range of public and private M&A, restructuring, corporate finance and capital markets transactions.

Photo: johny007pan/iStock/Thinkstock

GTDT: What trends are you seeing in overall activity levels for mergers and acquisitions in your country during the last year or so?

Hubert Segain & Elise Favier: While M&A activity in France remained stagnant in 2013, 2014 has so far shown promising signs, with the first six months recording €84.2 billion worth of deals, thus already surpassing the annual 2013 value of €30 billion. France alone totalled 32 per cent of all European transactions over the past year.

Though the number of deals has remained relatively stable, a substantial rise in deal value has been seen. The €29 billion merger of Lafarge and Holcim led the way to several other high-value deals, such as the sale of SFR by Vivendi to Altice for €17 billion or the sale by Alstom of its power and grid businesses to General Electric for €12.5 billion.

Among the factors which contributed to this increase of transactions was the fact that corporate indebtedness is at a historical low level and numerous companies have large amounts of cash to invest (a certain number of companies have secured their financial position through bond issues in the past months). Moreover, companies are finding it challenging to be competitive in the current context of pressures on price and seek to consolidate their position by regrouping.

GTDT: Which sectors have been particularly active or stagnant? What are the underlying reasons for these activity levels? What size are typical transactions?

HS & EF: Construction and telecommunications were the most active sectors in 2014.

With a total of €30.5 billion (36.2 per cent of French M&A activity as a whole), construction was the lead sector of the first half of the 2014 financial year, as illustrated by the merger between the French and Swiss major cement companies, Lafarge and Holcim, clearly a keynote deal of the year. One of the key drivers for this merger was to counter competing companies in emerging markets, the combined entity targeting annual synergies of €1 billion, through the alliance of their respective geographic coverage and products offering.

Telecommunications companies came second, totalling €21.3 billion worth of deals, as illustrated by Vivendi's decision to sell its mobile phone operator SFR to Altice-Numericable. The trend is clearly the consolidation of the sector driven by high capex requirements. While Vivendi's intention was to concentrate on its core business (ie, media activities) by selling SFR, Altice made this acquisition with the ambition to create a very-high-speed and mobile French leader operator and thus to generate growth in all markets where SFR and Numericable operate.


Elise Favier

There have been only a handful of mega deals, which do not represent the average size of transactions in France, that most often concern companies with a turnover of around €50 million. When considering the acquisition of a company in niche markets, the deal will not necessarily involve a great 'value' as far as cash is concerned, but it will enable the group to acquire very specific competence which will be key to developing its business.

GTDT: What were the recent keynote deals? What made them so significant?

HS & EF: One particularly noteworthy deal is the merger of equals between the French and Swiss cement companies, Lafarge and Holcim, thus creating the world's biggest construction materials company. This is clearly one of the megadeals of the year with a value of €30 billion. This transaction also demonstrated that a merger between two similar large-cap companies is possible.

In 2014, multinational cable and telecommunications company Altice Group increased its stake in French cable operator and telecommunications services company Numericable, of which it became the majority shareholder with 74.6 per cent of the share capital. Altice then successfully found an agreement with Vivendi regarding a combination between SFR, Vivendi's mobile telecommunications affiliate, and Numericable. During the same period, Altice also agreed to acquire through Numericable the French business of Virgin Mobile. Altice was one of the key players of the French M&A market in 2014.

The acquisition of a part of Alstom's energy businesses by General Electric for €12.35 billion can also be cited as a recent keynote deal for the significant political interference it triggered and which led to concessions being made by General Electric (eg, the sale of its rail signalling activities) and to the adoption of the 'Alstom' Decree which extended the number of sensitive sectors for which prior governmental approval is required [*as discussed further below*].

GTDT: In your experience, what consideration do shareholders in a target tend to prefer? Are mergers and acquisitions in your country primarily cash or share transactions? Are shareholders generally willing to accept shares issued by a foreign acquirer?

HS & EF: Bidders may offer cash, securities or a combination of both as consideration to the target's shareholders. Determining what type of consideration the shareholders will view as most attractive is essential to a successful bid. Until recently, cash was the preferred consideration, but equity and mixed consideration have been more frequently used this past year.

French shareholders do not seem to be reluctant to accept shares from foreign acquirers, especially in the case of European acquirers. The merger between Lafarge and Holcim, through an exchange public offer, is a good example of the success of such operations.

Another example is the ongoing merger between French real estate investment company Klépierre and Dutch-based real estate investment company Corio NV, which will create the leading pure play retail property company in Europe. The transaction will be completed via a recommended public exchange offer to be made by Klépierre for 100 per cent of the shares of Corio.

GTDT: How has the legal and regulatory landscape for mergers and acquisitions changed during the past few years in your country?

HS & EF: A new decree of 15 May 2014, referred to as the 'Alstom' Decree, was enacted to expand the list of sectors for which foreign investments require the prior authorisation of the French Ministry of Economy. The Decree extends the sectors listed as 'sensitive' to include six additional sectors (energy supply; water supply; transport networks and services; electronic communications networks and services; installations, facilities or structures of vital importance; and the health sector), so as to provide the government with the legal basis to justify its intervention.

With the adoption of the Alstom Decree, the French government was able to play a significant role in the negotiations between Alstom and General Electric, in particular by requiring the transfer of the nuclear activities of Alstom into a joint venture between Alstom and the French state and by imposing on General Electric an undertaking to create new jobs in the next years, subject to financial penalties.

Public takeover law has also recently been amended by the 'Florange' Law, passed on 29 March 2014, with the adoption of new measures against hostile takeovers and creeping acquisition of control in listed companies.

The reform reverses the principle of the neutrality of the target's board of directors in a takeover, by making the board's neutrality the exception. Therefore, in a hostile bid, the target's board of directors is now able to immediately take defence measures without the shareholders' prior approval.

This law also introduced an automatic cancellation threshold of 50 per cent of the share capital or voting rights on any mandatory or voluntary public takeover. Below this threshold (which cannot be waived by the bidder), the bidder is not entitled to keep the shares tendered to the offer.

The role played by the works council of the target company has been reinforced. In particular, whether the takeover is friendly or hostile, the new regulation requires the issuance of an opinion by the target's works council at the end of an 'ad hoc' information and consultation procedure. In order to be able to issue such opinion, the works council is entitled to request to hear the bidder and to appoint an expert. Its opinion has to be sent to the target's board of directors before the latter rules on the takeover and, provided all necessary information has been duly given to the works council, at the latest within one month from the filing of the draft offer.

Finally, a law passed on 31 July 2014 introduced a new additional obligation, applying to small and medium-sized French companies, requiring employers to inform their employees two months prior to any share sales or business transfers. The purpose of this measure is to enable the employees to potentially make an offer for the shares or the business. A failure to comply with such obligation could result in the transaction being held to be null and void.

GTDT: Describe recent developments in the commercial landscape. Are buyers from outside your country common?

HS: Figures regarding inbound spending into France from other countries during the first half of 2014 have been remarkably high, the top bidder being Switzerland. However, most of the M&A activity in France (72.7 per cent) remains French inbound activity.

In principle, foreign investment is not subject to any specific restrictions other than administrative notifications and statistical filings if certain conditions are met. However, investing in sensitive sectors may require prior approval from the French Ministry of Economy. The list of such sensitive sectors was recently significantly expanded, by the Alstom Decree, as already mentioned.

The French government's interference may come across as unwelcoming, such as in the case of the merger between Alstom and General Electric, where the state exercised close scrutiny before finally taking a 20 per cent stake in Alstom's capital (by entering into an agreement with Bouygues granting the state purchase options) and becoming the biggest shareholder in voting rights (by means of a securities lending agreement entered into with Bouygues for 20 per cent of Alstom's voting rights). A similar approach was taken in the merger between SFR and Altice-Numericable, as the former French Economy Minister, Arnaud Montebourg, had seemed reticent to witness the acquisition of the French telecommunications company by a firm whose chief executive officer was a Swiss resident.

The Alstom Decree and the recent examples of government intervention have sent a strong protectionist signal to foreign investors and will likely discourage foreign investors and therefore have an impact on M&A activity going forward.

GTDT: Are shareholder activists part of the corporate scene? How have they influenced M&A?

HS & EF: Unlike the United Kingdom where shareholder activism is traditionally prominent, the structure of concentration of ownership typically adopted in French listed companies, which are often controlled by founding families, has traditionally not been favourable to the development of shareholder activism in France.

However, instances where a shareholder or shareholder group would approach a company's board, or even its fellow shareholders, with a view to implementing changes within the company are now becoming more common.

In July 2013, the Enforcement Committee of the AMF decided to fine LVMH €8 billion for its failure to disclose its stake building in rival luxury goods manufacturer Hermès International through undisclosed cash-settled equity swaps amended at the last moment to be settled in Hermès shares. Numerous claims were made by Hermès family members in order to contest LVMH's stake. This interesting case, for which the AMF's investigation commenced in November 2010, led to a significant change in October 2012 in the French shareholding disclosure regime, which has now been amended to take into account the aggregation of cash-settled securities for the calculation of the threshold disclosure obligations.

THE INSIDE TRACK

What factors make mergers and acquisitions practice in your jurisdiction unique?

First, labour law considerations have to be carefully reviewed when contemplating transactions in France. The latest legislation tends towards increasing involvement of the employees' representatives in the M&A process.

Second, the French government has recently shown mistrust towards foreign investors seeking to acquire French firms. This wary attitude requires M&A players to be very attentive to the preparation stage and communication made around such projects.

Third, the duty to negotiate in good faith imposed by French courts has to be taken into account when entering into an acquisition process, as this may lead to liability if the negotiations are unfairly or abruptly terminated.

What three things should a client consider when choosing counsel for a complex transaction in your jurisdiction?

It is essential for counsel to understand quickly the client's commercial needs and business strategy and adapt its advice to the client's needs.

Counsel's past experience on similar deals is also of significant importance, as this will enable him or her to be more responsive to the client's constraints.

Finally, counsel has to be able to provide international services and to interact on a global scale, so as to provide high-quality services in France but also beyond France's borders. Working with lawyers having educational or professional experience abroad, which brings an ambitious international perspective into our practice, is therefore necessary.

What is the most interesting or unusual matter you have recently worked on, and why?

Danone, a major French-based food products manufacturing corporation, on the successful acquisition with Dubai private equity fund Abraaj of the Fan Milk Group. This deal represented one of the largest M&A transactions of 2013 in Sub-Saharan Africa outside of the energy sector. This type of co-investment between a private equity fund and an industrial company is completely new in Africa, which made this transaction so innovative. The deal comprised a due diligence exercise in six countries and the implementation of very complex agreements between Danone and Abraaj that will benefit both companies.

Hubert Segain & Elise Favier
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During past years, we have also seen the development of shareholder activism, with shareholders willing to play an important role in transactions and in particular an increase in minority shareholders' claims against public takeovers. Minority shareholders associations have been especially active to encourage minority shareholders to bring judicial actions in order to ask for independent experts to be appointed, the cancellation of the AMF's compliance decision, or the indemnification of the loss they suffered as a result of the takeover, with the revaluation of the offer as the ultimate underlying goal.

Even if the majority of claims are finally rejected by the court, these disputes are not without consequences as they generate long delays in the implementation of the takeover. In reality, although it is not compulsory, the AMF generally defers the closing of the tender offer in the event of judicial action in order to anticipate any difficulty which could result from an unfavourable decision of the court. For example, the claims of minority shareholders against the friendly takeover bid for Club Méditerranée by Fosun and Ardian, for which a public offer was made in May 2013, were rejected by the court in April 2014 only. Within this period, a new much higher takeover bid for Club Méditerranée was made by Global Resort and filed in June 2014, forcing Fosun and Ardian to withdraw their offer. Finally, Fosun and Ardian, with new co-investors, made a new public offer in September 2014. The closing of this revised offer is now expected for November 2014 – more than one year after the initial contemplated date.

GTDT: Take us through the typical stages of a transaction in your jurisdiction.

HS & EF: While it is perhaps more frequent for the CEO to initiate contact, communicating through bankers or lawyers is also very frequent, especially in large transactions. Contact through counsel may enable the client to structure the deal at an early stage of the negotiations. It also helps to maintain the confidentiality of the discussions between the parties to a contemplated transaction, which can be essential, especially to avoid any liability for abusive termination of negotiations under French law (as further explained below). Contrary to common law, 'legal privilege' does not exist in France for in-house lawyers (whose communications are therefore not confidential) and

the protection of exchanges can only be guaranteed by virtue of lawyers' professional secrecy. The professional secrecy means that the lawyer is bound to keep the communications confidential without disclosing it and also that the courts and other public authorities cannot force him or her to disclose it. Breach of the professional secrecy is subject to criminal and disciplinary sanctions.

Advisers are sometimes mandatory: for example, in a public takeover context, the bidder must appoint a presenting bank which presents the project to the AMF, guarantees the bidders' undertakings and generally structures the operations.

The initial steps of a classic merger or acquisition of private companies typically include the signing of a non-disclosure agreement, and in some cases, of an exclusivity agreement.

Lawyers or financial advisers generally then organise a virtual 'data room' on which the relevant documents are posted, but a physical data room may be preferred when sensitive information is involved. There can be two stages in releasing documents in the data room, meaning the most sensitive and confidential documents are not made available for viewing until the second stage of the process, to which only those bidders who have submitted interesting offers have access.

The information obtained will be used to value the target company, gauge the risks related to the transaction and negotiate the price (or abort the deal if the risk is considered too high).

The parties to a merger or acquisition process in France have to be careful to comply with the duty to negotiate in good faith imposed by French courts in all contractual negotiations, whether or not they have entered into a letter of intent. Indeed, even if the parties remain in principle free to terminate negotiations, they can be held liable in the event of abusive and abrupt termination of negotiations as a consequence of this duty of good faith. Decisions to break off negotiations therefore have to be handled very carefully.

Regarding listed companies, mergers and acquisitions are obviously much more regulated. In particular, listed companies are subject to disclosure obligations in the context of such operations. For instance, the presenting bank must file with the AMF an offer letter describing the terms and conditions of the offer, as well as a draft prospectus which provides a significant amount of information. The target may also be required to provide certain information, such as the existence of any restrictive clause likely to affect the assessment of the bid, or the conditions under which the board reached its informed decision.

The parties to a transaction will generally be advised by lawyers, accountants, financial advisers and public relation agencies. All these specialists are required to work together as a team, so as best to address the client's needs.

The merger and acquisition process will vary depending on numerous factors, including the business of the target, the project of the investor (for instance whether it is based on a long-term or a short-term strategy) and hence will have to be adapted to the specificities of each individual project. The requirement to consult employee representative bodies prior to the signing of any definitive acquisition agreement also has to be taken into account in the process.

GTDT: Are there any legal or commercial changes anticipated in the near future that will materially affect practice or activity in your country?

HS & EF: There have already been a lot of legislative changes in the past year, and regulatory focus seems to have shifted away from M&A practice for the time being, though a change in the political scene could lead to new issues being debated.

The new requirements to inform employees two months prior to any share sales or business transfers mentioned above come into force on 1 November 2014.

GTDT: What does the future hold? What activity levels do you expect for the next year? Which sectors will be the most active?

HS & EF: An increasing number of mergers and acquisitions have been recorded over the past year and the deal value, which had plummeted since 2011, rose substantially in 2014. The M&A sector seems therefore to be recovering. The post-financial crisis economic context has led companies to constitute record cash reserves which they are now willing to invest. Some feared that 2014 would be another difficult year for mergers and acquisitions; however, circumstantial evidence tends to indicate that an upturn in M&A activity can reasonably be expected.

This year's mega deals showed a renewed confidence in the market and short-term projections. The return of strategic deals has resulted in an increased confidence to invest through mergers and acquisitions. For the first time in years, confident and favourable comments are abounding from managers and the overall trend seems to indicate that optimists outnumber pessimists. Even the derailment of some of the announced transactions, such as the aborted merger between Publicis and Omnicom, does not seem to act as much of a deterrent in the present favourable climate.

It cannot be excluded that the telecoms, media and technology sectors will continue to be very active next year. The financial and pharmaceutical sectors may also be expected to be active on the merger and acquisition front in the coming months, as important transactions have already been completed this year in these sectors in North America and Europe.

Gerhard Wegen

M&A IN GERMANY

Gerhard Wegen is both a US and German-qualified lawyer, and admitted as a foreign lawyer to the Brussels Bar. His practice focuses on M&A, private equity, joint ventures, and international arbitration. His recent M&A work includes advising the Federal Republic of Germany on the renegotiation of the shareholder structure of EADS; Auchan on its acquisition of the retail operations of Metro's Real brand in eastern Europe for approximately €1.5 billion; Leighton Holdings in the ACS bid for Hochtief; Crédit Mutuel on its €5.2 billion acquisition of Citigroup Deutschland; and Robert Bosch on various cross-border transactions.

Christian Cascante has particular experience in public takeovers, private equity and cross-border transactions. He has advised on more than 60 planned or executed public takeovers, including banks on (so far) the largest German takeover in 2014 (Goldman Sachs and Bank of America on *McKesson/Celesio*) and the largest public takeover in 2013 (Perella Weinberg on *Vodafone/Kabel Deutschland*) and corporate bidders on the largest public takeovers in 2004 and 2010 as well as the largest hostile bid to date under the German takeover Act in 2006 (*Merck/Schering*). He also recently advised TRW on its intended US$13 billion merger with ZF.


Christian Cascante

GTDT: What trends are you seeing in overall activity levels for mergers and acquisitions in your country during the last year or so?

Gerhard Wegen & Christian Cascante: In the past 12 months we have seen increased M&A activity within, into and out of Germany. The most pronounced development has been the greater number of large deals, while the number of deals has not changed to the same extent.

To elaborate, 2013 was a good M&A year in Germany. However, it felt busier for most M&A practitioners than it was if you look at the sheer numbers. While we saw several large transactions which were responsible for the increased deal value, the overall number of deals was flat or even down compared to former years. What was remarkable – and indicated the direction 2014 could take – was the level of confidence in the German industry which was reflected in a very high value of inbound M&A investment, the highest since 2009.

In 2014, at least until now, we have not only felt very busy, but the statistics confirm this sentiment. All numbers clearly indicate increased M&A activity into and out of Germany.

The confidence in Germany as an industrial powerhouse further increased and has pushed the deal value of inbound M&A activity in the first half of 2014 to the highest level since 2007. This is even more impressive if you take into account that, unlike some other European countries, Germany has not profited from inversion deals from the US.

Also, the value of outbound M&A has made a breathtaking jump in the first half of 2014, being at more than six times the value of the first half of 2013. According to public sources, it was also a record high value for the country's outbound activity. German companies have pockets full of cash and are executing strategic deals which sometimes have waited to be completed for years and are mostly well received by the markets.

Financial sponsors have also become more active and are eagerly trying to do deals. However, there are too few attractive assets on sale and prices are often quite high – more and more at valuations which are at pre-crisis levels. Furthermore, in the current environment, corporate bidders are almost always at an advantage when bidding for the same target.

Overall, the situation is very positive and so is, in principle, the outlook. We are not yet back to the activity levels of 2007, but we have been getting closer. The question is how sustainable this situation will be.

GTDT: Which sectors have been particularly active or stagnant? What are the underlying reasons for these activity levels? What size are typical transactions?

GW & CC: If you look at the number of deals in 2013 and in the first half of 2014, industrials and chemicals has – as always – been the strongest sector by far. Deal count in 2013 was three times as high as in the consumer sector, which was the second most active sector.

In terms of deal value, in 2013 TMT was the strongest sector in particular due to two very large

deals [*see keynote deals, below*]. It was followed by industrials and chemicals, which saw the highest value of activity in the first half of 2014.

Clearly, the level of activity in the predominant industrials and chemicals sector is a reflection of German industry, this sector being the backbone of the strength of the German economy.

The greater number of transactions in Germany has a deal value between €20 million and €200 million, the median typically being around €50 million to €60 million.

GTDT: What were the recent keynote deals? What made them so significant?

GW & CC: In 2013, the largest deals with German involvement were the public takeover of Kabel Deutschland by Vodafone for around €8.7 billion and the acquisition of E-Plus by Telefónica, two transactions which made the TMT sector the most active by deal value in Germany for the year.

Recently, we have seen a whole string of mega outbound deals where German companies bought or are looking to buy (mostly US) foreign targets. These include Merck KGaA acquiring Sigma-Aldrich or the intended merger of ZF with TRW Automotive, both of which have a deal value over €10 billion, but also Bayer's proposed acquisition of Merck & Co's consumer care business, Siemens' bid for Dresser Rand or SAP's buy of Concur. Value of transatlantic deals are up both ways, but it has been a long time since German corporates were looking for targets in the US as extensively as they did in the past 12 months. They are making strategic moves which express confidence and determination.

The largest public takeover in Germany in 2014 so far and an interesting deal as it marked the return of activist shareholders in German takeovers was *McKesson/Celesio*. McKesson had already launched a €5 billion bid for Celesio in 2013. The deal was subject to a 75 per cent minimum acceptance threshold and McKesson had already bought 50 per cent of the shares in advance of the bid from the major shareholder, Haniel. The 75 per cent threshold was on a fully diluted basis assuming conversion of a larger number of convertible bonds which was outstanding. Activist hedge fund Elliott built a stake of approximately 25 per cent in shares and bonds and the first attempt to take over Celesio failed when only 72 per cent accepted the offer. In 2014 the second attempt of McKesson succeeded. Haniel bought Elliott's shares and sold the increased stake to McKesson which, after acquiring further convertible bonds directly from Elliott, ended up with over 75 per cent in Celesio on a fully diluted basis. It was, after *Vodafone/Kabel Deutschland* in 2013, the second transaction within a few months where activist shareholders publicly tried to influence the outcome of a billion-euro transaction.

Notably, in 2014 we also saw one of the few hostile offers where the target ended up successfully defending its position. Weidmüller's bid for R. STAHL failed to reach the 50.01 per cent acceptance it needed to satisfy the threshold condition.

GTDT: In your experience, what consideration do shareholders in a target tend to prefer? Are mergers and acquisitions in your country primarily cash or share transactions? Are shareholders generally willing to accept shares issued by a foreign acquirer?

GW & CC: M&A transactions in Germany are almost always cash transactions.

In private transactions, it is difficult to get reliable data on the consideration but experience shows that these are typically cash transactions. As regards public takeovers, of the 23 takeovers where an offer document was published between July 2013 and July 2014, only one takeover was a share-for-share transaction.

While on private deals it is at the discretion of the selling shareholder whether to accept shares as consideration, in public takeovers there are legal requirements to be complied with – which have a certain bias for cash as consideration. Thus, according to German takeover law, only liquid shares listed on a regulated market within the European Economic Area can be used as sole consideration in a takeover. Thus, bidders from the US or Switzerland have to offer – at least alternatively – cash to shareholders.

GTDT: How has the legal and regulatory landscape for mergers and acquisitions changed during the past few years in your country?

GW & CC: Recently, we have not had any legal or regulatory changes that have been of major impact for M&A activity, however there have been some court decisions.

As a general matter, the past few years have seen increased disclosure obligations, compliance as a major topic for all corporations, more litigation in connection with potential liability of management, and less litigation from individual shareholders to block post-closing measures to be implemented.

In the aftermath of transactions such as *Porsche/VW* and *Schaeffler/Continental*, the legislature introduced disclosure obligations for cash-settled derivatives in an effort to prevent secret stake building. However, when doing so, provisions were enacted which extend the disclosure obligations also to a number of mechanisms completely unrelated to any kind of stake building – like certain rights of first refusal in shareholder agreements. Private equity transactions are also facing increased disclosure obligations following implementation of the AIFM Directive in Germany.

Over the past few years, compliance in its broadest sense and with many facets has become

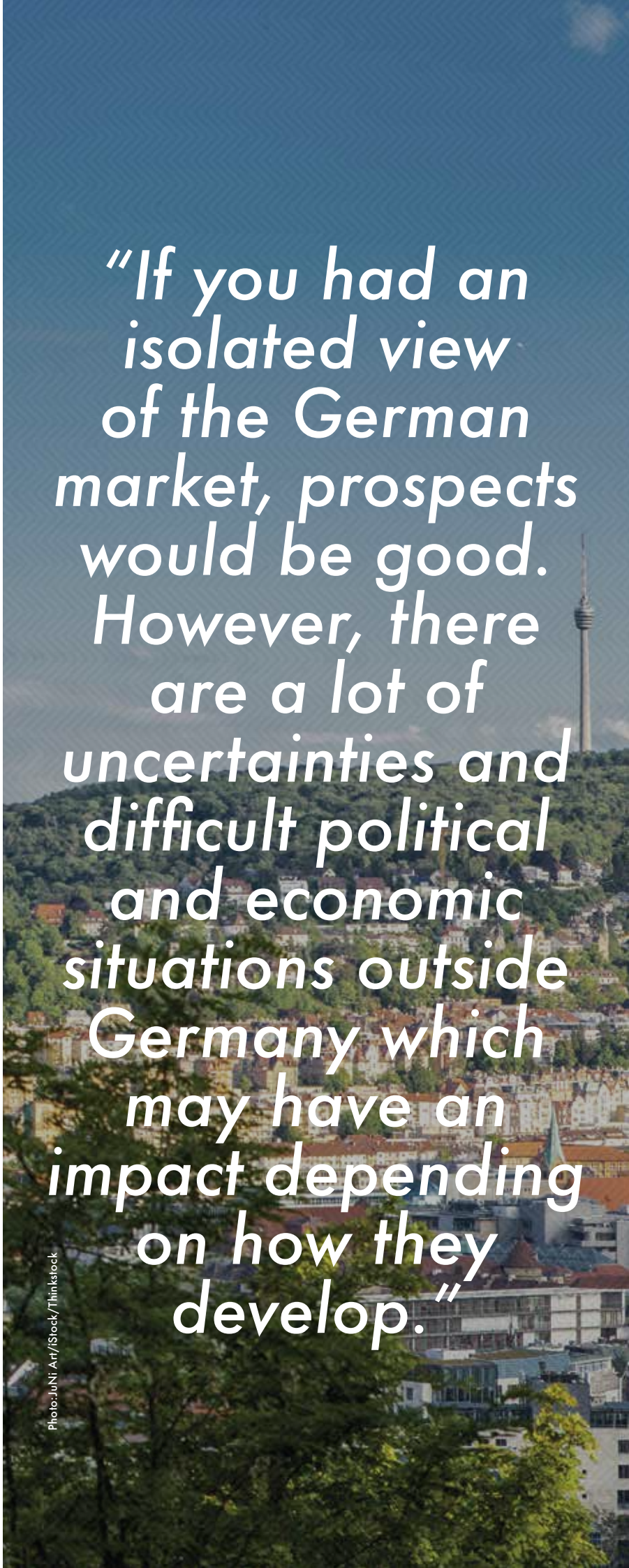
an extremely important topic for corporations in Germany. Thus, it also has an impact on M&A transactions, from its relevance for due diligence exercises to a compliance condition having been introduced in public takeovers for the first time in 2011 in Engine Holding/Tognum.

For many years, in Germany's two-tier board system there has been an obligation for the supervisory board members to sue management if they did not comply with their obligations. However, serious litigation against management was rather rare. This has changed completely in recent years, meaning that claims against management (and supervisory) board members are becoming more and more common and – therefore – risk awareness and averseness has become a recurring topic in connection with M&A transactions.

Roughly 10 years ago and for some years to follow, it seemed like a safe bet for a shareholder not to accept a public takeover and wait for a domination agreement, squeezeout or delisting to cash in a higher compensation. Now, there are a number of precedents where the shareholders waited for years until courts determined a compensation which was more or less equal to the tender offer price. Also, the scheme of some shareholders to block important decisions of the corporation – often following an M&A transaction – and hoping for a higher payment in exchange for release of the claim or sale of the shares is not as popular as it was. Judges tend to know the shareholders who pursue this professionally and laws have been introduced which make it more difficult to raise those claims without reason and make it easier for corporations to get these claims dismissed within a shorter period of time.

A recent court decision that may have an impact on post-M&A measures held that a shareholder vote is no longer required to delist a corporation and neither is a cash compensation to be offered to remaining shareholders. There are still stock exchange provisions to be complied with to execute a delisting, but this was a major change to former jurisprudence which substantially eased delisting requirements. Another court decision that drew the attention of public M&A practitioners dealt with the validity and effectiveness of certain (provisions in) business combination agreements. The court decided that the business combination agreement at hand was void because the parties had not complied with mandatory stock corporation law. We do not think that this should prevent bidders and targets from entering into business combination agreements in the future, but we see it as a reminder to all practitioners to take a more cautious approach as regards stock corporation law when drafting business combination agreements.

GTDT: Describe recent developments in the commercial landscape. Are buyers from outside your country common?



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THE INSIDE TRACK

What factors make mergers and acquisitions practice in your jurisdiction unique?

Compared to other jurisdictions, factors that distinguish Germany include:

- company laws are less flexible, which requires a careful structuring of a transaction and an early look at what clients want to achieve post-closing;
- regulators are more open and accessible;
- antitrust laws and other regulatory requirements are strictly legally interpreted – there is less political influence than in many other (also European) countries; and
- areas of law which in some jurisdictions are of marginal importance may be decisive for the success of the overall transaction.

What three things should a client consider when choosing counsel for a complex transaction in your jurisdiction?

First, consider the quality and track record of the law firm and the lawyers involved, not just the brand – unlike a Coke or Pepsi, a law firm may be very different in different countries.

Second, combine top M&A expertise with knowledge in all areas of the law material to the transaction (ie, full service).

Third, rely on recommendations from other players in the field and make sure your law firm follows a partner-focused approach. You need a lawyer who understands you, your requirements and the commercial aspects of the transaction, with whom you can discuss matters at your level.

What is the most interesting or unusual matter you have recently worked on, and why?

Gleiss Lutz advised Goldman Sachs and the Bank of America on the takeover of Celesio by McKesson. One of the largest public takeovers of the past 12 months, and one with the particularly interesting aspect that the target company had issued a large quantity of convertible bonds that were bought up, together with a large proportion of shares, by the hedge fund Elliott. Since our clients were based in the US, we had to provide extensive advice on German takeover law. Having typically represented corporate bidders and targets on many takeovers in recent years, it was a nice contrast providing advice to banks this time.

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GW & CC: In the past couple of years we have seen a pronounced increase in interest of Chinese buyers in German targets. It really started several years ago with some acquisitions of – mostly – smaller companies, but in the past 24 months there has been a number of transactions with a deal value of well over €100 million, the largest direct investment so far being the acquisition of the hydraulics business of and a large shareholding in KION by Weichai Power in 2012/13. These days, there is almost no auction without a Chinese bidder. Interestingly enough, by making generous commitments to employees and leaving management with substantial discretion, Chinese buyers have managed to develop a rather positive image as acquirors and for some target workforces seems a preferable option when compared to a US or some European buyers.

GTDT: Are shareholder activists part of the corporate scene? How have they influenced M&A?

GW & CC: You may distinguish between takeover-related and general shareholder activism. As regards takeovers, shareholder activists had been less active for a while, but that changed completely in 2013 and 2014. Elliott, in particular, was very active. They bought a stake of more than 10 per cent in Kabel Deutschland in connection with the takeover by Vodafone and are, post-closing, very actively pursuing their interests. On *McKesson/Celesio* they even bought a stake of approximately 25 per cent. Due to Elliott's late agreement with the bidder, McKesson's first takeover attempt of Celesio, which was subject to a 75 per cent threshold condition, failed, but in McKesson's second attempt, Elliott was able to sell its shares and bonds in the target company, as already discussed.

Irrespective of takeover situations, shareholder activists are also active in Germany, often without getting public attention. Experts who track shareholder activists claim that with more than three-quarters of activist campaigns focusing on the US, the countries following are the UK, France, Germany and Switzerland. In Germany, in the past 12 months, situations that garnered the most public attention were Cevian becoming a shareholder of Thyssen Krupp and several hedge funds said to have invested in Adidas.

The influence of shareholder activists on M&A is so far predominantly on general corporate governance and public takeover strategy. Every

bidder considering a large transaction will give a thought to potential involvement of activists and how to confront it. The influence of activists on having corporations split up and carve out certain parts of the business, as seen in the US, has – so far – not been in any way similar in Germany.

GTDT: Take us through the typical stages of a transaction in your jurisdiction.

GW & CC: The stages of a transaction depend very much on the type of transaction we are talking about. In private deals there are no legal requirements, only a certain market practice coupled with great flexibility. On the other hand, in takeovers, there are laws which provide for a clear process to be followed once a deal becomes public.

The first contact between buyers and sellers or targets can be established in different ways. Often, strategics know each other already for years before they engage in serious talks. Sometimes, contact is initiated by intermediaries. In auctions, intermediaries almost always have a leading role in reaching out to potential buyers.

In a very rough overview, typical stages in a private transaction would, after first conversations, be a letter of intent, memorandum of understanding or term sheet, followed by due diligence and negotiations on a share or asset purchase agreement.

In a takeover situation, before announcement you would have conversations between the bidder and the target and potentially larger shareholders which sometimes lead to agreements (business combination agreements with the target and SPAs or irrevocable undertakings to tender with shareholders), often limited due diligence.

Once a public takeover has been publicly announced, there are procedural requirements under the Takeover Act to be complied with that include the following: the tender offer document has to be prepared and submitted to the BaFin within four weeks. The BaFin then has 10 working days to allow (or reject) publication of the offer document. Once clearance has been granted, the offer document is published and shall allow for an acceptance period of four to ten weeks. After the end of the acceptance period, the shares that have been tendered are counted and the results are published. In a voluntary takeover offer, a subsequent acceptance period of two weeks commences thereafter, followed by publication of the final results of the offer.

There are a number of details to be considered and differences if you had a mandatory offer or (potentially) if you had a share-for-share offer but the above is the standard procedural framework that has to be followed.

The extent of due diligence varies depending on the type of deal, the expectations of the buyer as well as the willingness of the seller or target company to allow for due diligence. You may find extensive due diligences over weeks as well as very limited due diligence exercises. In particular in public takeover situations, due diligence is often limited for legal and practical reasons – and you may even encounter professionals who take the view – which is completely off market, but taken by some professors – that no due diligence at all is allowed.

GTDT: Are there any legal or commercial changes anticipated in the near future that will materially affect practice or activity in your country?

GW & CC: There are always legal or commercial changes that directly or indirectly affect the markets or specific sectors. For example, the political decision to shut down nuclear power plants has had an impact on investment in other energy sources and on infrastructure that is necessary to use renewable energy efficiently. It has also had (and potentially will have) an impact on energy prices, which indirectly has triggered reactions from energy-intensive producers.

However, as regards M&A practice or activity, we anticipate no changes that should materially affect it in the near future.

GTDT: What does the future hold? What activity levels do you expect for the next year? Which sectors will be the most active?

GW & CC: As mentioned earlier, the situation is very positive and so is, in principle, our outlook. Our impression is that, if you had an isolated view of the German market and the current situation of the players, prospects would be good. However, there are a lot of uncertainties and difficult political and economic situations outside Germany which may have an impact depending on how they develop. There are initial signs that we may face a slowdown in general economic activity as well as in M&A soon because of the levels of confidence going down owing to the situation in Ukraine, the Middle East, the unresolved issues around the public debt in many countries, the spread of the Ebola virus and so many other issues that could potentially trigger a crisis. It is not easy to be optimistic if you read the newspapers these days. Nonetheless, there are enough reasons here in Germany to believe that the positive development as to M&A activity levels could continue: there is enough cash available, eager buyers looking for interesting targets, most of the corporations have done their homework after the financial crisis and are in good shape, financing is cheap and M&A activity levels in the US as the most important country for inbound and outbound M&A are high. We shall hope that none of the current international trouble spots become worse. If that works out, we can hope for a good end to 2014 and a positive year for M&A in 2015.

Chris Parsons

M&A IN INDIA

Chris Parsons and Gavin Williams are partners at Herbert Smith Freehills.

Chris has been with the firm for almost 30 years and for the past seven has been the chairman of its India practice. Prior to this role, Chris was based in Hong Kong, Singapore and London, as a partner specialised in cross-border M&A.

Aside from the time he spends with clients, Chris lectures at a number of Indian law schools including on an annual programme developed jointly with Oxford University. He also guides the firm's social initiatives in India, including HSF Bridge, a project connecting law students with local causes. Chris is currently training to walk 30 marathons in 30 days from Mumbai to Bangalore and is aiming to raise $1 million for widows and their children for the Loomba Foundation.

Gavin follows in Chris's footsteps as an M&A specialist with a focus on India. His practice is rooted in high-value, cross-border deals spanning a range of sectors but with particular emphasis on power, infrastructure and transport.

Chris and Gavin have advised on some of the most high-profile Indian transactions of recent years. Keynote matters include Bharti's acquisition of Zain Africa, Essar's arrangements with Vodafone, United Breweries disposal of United Spirits to Diageo and the Strides sale of Agila to Mylan.

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GTDT: What trends are you seeing in overall activity levels for mergers and acquisitions in your country during the last year or so?

Chris Parsons & Gavin Williams: The past year or so for Indian M&A has been something of a curate's egg: good in parts.

A small number of large deals saw the value of M&A involving an Indian target rise markedly in the first half of 2014 relative to the same period during the previous year. And although the overall volume of Indian transactions reduced over the past 12 to 18 months, the number of cross-border acquisitions inbound to India continued on a gentle upward trend dating back to 2009.

But to look too hard for tendencies or indications based on the 2013 and 2014 data we suspect would be time poorly spent. A variety of drivers combined and conflicted to produce a mixed picture of acquisitions in India by either domestic or international buyers.

Foremost among the factors affecting the M&A market was the general election. Described by commentators as the largest democratic event in history, the election saw some 550 million Indians cast their ballot and deliver a clear victory to the saffron-coloured banner of the Bharatiya Janata Party (BJP) and its popular Hindu nationalist leader, Narendra Modi.

Before the poll, only the boldest of commentators predicted such a historic result – the first majority government to be returned in India since 1984. Since the vote, India and the world have scrutinised Mr Modi's every move for signs of what lies in store for the world's biggest democracy.

During the run-up to the general election and in its immediate aftermath, M&A activity in India has been affected by the uncertainty typically associated with such moments of considerable change. For some market participants this uncertainty represented a window of opportunity through which they clinched bargains, while for others it has been a time to wait and see.

Another factor at play during the same period has been persistent doubts around regulatory risks. High-profile controversies concerning tax investigations, the allocation of licences and the grant of permits have stymied investor appetite across a range of sectors. International investors attracted by the promise of India's economic fundamentals (eg, favourable demographics, rising earnings and growing urbanisation) remained wary of the lack of transparency which can detract from the ease of doing business in India.

For other would-be investors, it was the effects of a tight monetary policy that will have influenced their decisions. For some, the effects of high interest rates on domestic consumption will have pushed down valuations and so created opportunities for acquisitions. For others, however, the drag on consumer spending and business investment will have been reason enough to put off plans to commit.

GTDT: Which sectors have been particularly active or stagnant? What are the underlying reasons for these activity levels? What size are typical transactions?

CP & GW: According to independent data (Mergermarket), the most active sector for Indian M&A during 2013 was the pharma, medical and biotech sector, which saw 38 deals complete in India worth a total of $4.2 billion. The $1.6 billion acquisition by Mylan of Strides Arcolabs's Agila business was the largest deal in the sector in 2013, followed by GlaxoSmithKline raising its stake in its Indian arm at a cost of $1 billion. Pharma, Medial and Biotech continued this strong performance during the first half of 2014, led by the $4 billion acquisition of Ranbaxy by Sun Pharma.

The factors driving activity in the pharma, medical and biotech sector vary from transaction to transaction but one theme that can be identified is the need for sought-after, Indian-made pharmaceutical products to be married up with international distribution networks. In some cases, this challenge has been met by an acquirer with an existing distribution network acquiring the production facilities and licences needed to produce the in-demand drugs and in others, vice versa.

Turning to the airline sector, as a result of certain historical structural issues (eg, high rates of tax on jet fuel), India's six passenger airlines (Air India, Indigo, Jet, Jet Lite, Go and Spice Jet) have struggled to turn significant profits in recent years.

With highly levered balance sheets and limited further appetite on the part of lenders to debt finance Indian airline businesses, pressure has grown to admit foreign equity capital into the sector.

Recent reforms now mean that foreign ownership of up to 49 per cent in airlines is permitted, subject to regulatory approval and certain conditions. The first landmark deal in the sector since liberalisation saw Etihad take a 24 per cent stake in Jet Airways in Q4 2013. Since then, approval has been granted for joint ventures between the Tata Group and Singapore Airlines and the Tata Group and Air Asia, breathing much-needed life into an ailing industry.

Telecommunications is a sector where M&A activity in India has been somewhat in abeyance in the past year. Although the highly fragmented market is ripe for consolidation, the regional structure for licence allocations has combined with persistent regulatory questions hanging over previous licensing rounds to suppress significant M&A activity.

If regulatory uncertainty can be addressed by India's new government, telecoms investors may well look past some of the other structural and bureaucratic impediments to bring forward deals currently left on hold.

Foreign investment in both single- and multi-brand retail in India remains politically sensitive owing to the 100 million Indians involved in the retail sector in one way or another.

For this reason, the opening up of the retail sector in India to foreign investors has so far been tentative and cautious. Foreign investment can be approved by two routes: the 'automatic' route and the 'approval' route.

Under the automatic route no prior regulatory approval is required while under the approval route an application to the Foreign Investment Promotion Board (FIPB) is required.

Since 2006, foreign ownership of up to 51 per cent has been permitted in a single-brand retail and under the automatic route, and in 2012 foreign ownership of up to 100 per cent was permitted under the approval route. Approval is subject to several conditions including 30 per cent local sourcing of goods. This local sourcing requirement has meant that, until recently, there had been relatively little pressure to lift the foreign investment restriction above 51 per cent. Recently, however, proposals have been cleared for 100 per cent investments, including Paver (UK) and IKEA (Sweden).

Foreign investment in multi-brand retail outlets in India remains more complicated. Although in 2012, foreign ownership of 51 per cent was permitted under the approval route, a combination of the Indian states' policies and regulatory conditions have deterred significant activity. Conditions applied include a minimum investment of $100 million (of which at least 50 per cent in back-end infrastructure) and a minimum of 30 per cent locally sourced products.

GTDT: What were the recent keynote deals? What made them so significant?

CP & GW: We have already mentioned some of the keynote deals of 2013 and the first half of 2014. Standout transactions included *Mylan/Strides*, *Sun/Ranbaxy* and *Jet/Etihad*, all of which were breakthrough deals in their respective sectors.

Another set of transactions were noteworthy for a different reason. The Diageo, Vodafone, Glaxo and Unilever deals all saw international investors move to consolidate control in major Indian businesses. As promotors transfer their knowledge to international investors and their professional management, one of the reasons for a joint venture (as a vehicle for cooperation) recedes in importance. This wave of investment has also been seen as a maturing of the joint venture model

which had initially offered a means of establishing a presence in the Indian market.

GTDT: In your experience, what consideration do shareholders in a target tend to prefer? Are mergers and acquisitions in your country primarily cash or share transactions? Are shareholders generally willing to accept shares issued by a foreign acquirer?

CP & GW: M&A in India often involves acquisitions of minority stakes in promoter-controlled Indian public companies, frequently prompted by a need for equity capital infusion. These deals may well be structured as part-primary, part-secondary transactions in which the foreign investor will subscribe for new shares in the target and at the same time acquire a portion of the equity already in issue from the promoter group.

In transactions of this nature, existing shareholders will frequently wish to retain all or part of their stake in order to share in the benefit of the improved valuation resulting from the deleveraging of the target's balance sheet. Conversely, in control transactions, investors will be looking to sell and so reap the control premium as they monetise their investment.

Although the recent Sun/Ranbaxy deal was an all-share transaction, relatively few deals in India are structured in this way and foreign 'paper' as a form of consideration is particularly uncommon.

GTDT: How has the legal and regulatory landscape for mergers and acquisitions changed during the past few years in your country?

CP & GW: Local bar rules currently mean that international firms are unable to practise in India. As is the case for all international firms, we therefore draw on close relationships with India's leading lawyers to advise clients involved in M&A in India. This makes for a highly-effective model which sees both international and Indian clients supported by their choice of international and Indian counsel.

Our comments on recent developments in Indian law are therefore offered in our capacity as international counsel with a passionate interest in Indian M&A, acknowledging that the technical Indian law expertise remains the preserve of our friends in the leading Indian firms.

The most significant Indian legal development of recent years remains the introduction of the new Companies Act 2013. The new Act amounts to a set of sweeping reforms to – and codification of – Indian company law.

While the main aims of the legislation were on the one hand to promote transparency and


Gavin Williams

"The most active sector for Indian M&A during 2013 was the pharma, medical and biotech sector, which saw 38 deals complete in India worth a total of $4.2 billion."

THE INSIDE TRACK

What factors make mergers and acquisitions practice in your jurisdiction unique?

M&A in India is made unique by the degree to which personal relationships play a part. Particularly so in situations involving promoter-led companies, successful deal-doing in India depends more so than almost anywhere else in the world on forming effective working relationships with the decision-makers.

What three things should a client consider when choosing counsel for a complex transaction in your jurisdiction?

Clients should seek out international counsel with real experience of working in India and Indian counsel accustomed to working on cross-border transactions. Familiarity with rules and practice will be immensely valuable to any client handling investments in India. An assiduous attention to detail is another key characteristic for effective due diligence. Fact-finding is often a laborious process and not for the impatient or impetuous. An inventive and adaptable approach can be of great service. Developments which might otherwise derail a deal can often be overcome with sufficiently agile minds on the advisory bench.

What is the most interesting or unusual matter you have recently worked on, and why?

The sale by Strides Arcolab of its Agila injectibles business to Mylan was remarkable for many reasons. Not only was it one of the largest deals in the Indian pharma sector in history, it was emblematic of how attractive Indian-owned and managed global businesses can be to international acquirers.

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good governance and on the other to make doing business in Indian easier, concerns continue to be raised that the new Act has in fact made business more cumbersome in certain respects.

Key reforms include improved veto rights for minority shareholders, in particular safeguarding them against potential leakage of value through related-party transactions. The requirement for such arrangements to receive the approval of a majority of the (independent) minority represents a major advance and puts India at the vanguard of such reforms in the region [*as discussed below in relation to shareholder activism*].

Another key shift sees increased regulation of private companies which are brought onto the same footing as public companies in certain important respects. Examples of this increased compliance burden can be found in the extension of rules relating to preferential allotments (non-pre-emptive capital increases), issuance of differential classes of shares and insider dealing.

Although the attempt to improve transparency and ease of doing business will be welcomed by those involved in Indian M&A, how some of these reforms will be addressed in practice remains unclear.

Competition law remains a relatively new development in India. Under the Competition Act 2002 and the Combination Regulations which came into force in June 2011, any acquisition where the thresholds set out in the legislation are met requires the prior approval of the Competition Commission of India (CCI). There is a 210-day review period split in two: 30 days to state whether it believes the transaction will cause an appreciable adverse effect on competition and then 180 days to form a definitive view. Unfortunately, the CCI has sometimes adopted a very literal approach to the interpretation of the Act, contrary to international principles.

With regard to protections affecting foreign investment, as we have observed already, gradual liberalisation has allowed increased inflow of foreign capital into a growing number of sectors while maintaining safeguards in politically sensitive areas such as agriculture and multi-brand retail.

Recent indications suggest a continuation of this trend, most notably around insurance and infrastructure. The BJP has placed the development of the country's creaking infrastructure centre stage. The message being given to international investors in infrastructure is that many of the obstacles which previously blocked the path of foreign capital may soon be cleared out of the way.

Another fly in the investment ointment has been uncertainty affecting taxation and in particular the case of one of the world's leading mobile operators. Vodafone succeeded in its appeal to the Supreme Court in a case relating to indirect transfers. As a response to the decision the Indian government issued legislation that would

tax retrospectively transfers of shares when the transfer derived from underlying Indian assets. The constitutional validity of the retrospective amendment has been challenged before the courts and is pending. A government-appointed committee suggested that the legislation should only have prospective affect. Resolution of the controversy borne out of the *Vodafone* case is now seen as a priority for the Modi government, being as it is a key deterrent to foreign investors.

Litigation remains the main method of dispute resolution in India. However, it is relatively slow as there is a large backlog of cases. Arbitration is perceived to be relatively quick and efficient. As a result many foreign investors prefer to have an arbitration or alternative dispute in their agreements with Indian parties. The (Indian) Arbitration and Conciliation Act 1996 is the governing legislation.

It is important to remember that since September 2012, as a result of the decision in *Bharat Aluminium*, Indian courts no longer have the power to intervene in foreign arbitrations either by way of providing interim relief or by entertaining a challenge to foreign arbitral awards in India.

GTDT: Describe recent developments in the commercial landscape. Are buyers from outside your country common?

CP & GW: Foreign investors continue to be drawn to India by its favourable demographics, high levels of tertiary education and rising incomes. Although there remains significant room for improvement in transparency levels, the apprehension that permeated the pre-election period is steadily turning to anticipation of what changes will figure first on the new government's reform agenda.

GTDT: Are shareholder activists part of the corporate scene? How have they influenced M&A?

CP & GW: Historically, shareholder activism has not been a particularly prominent feature of the Indian corporate scene but in recent years the number of challenges has begun to grow. A recent survey by investment bank BNP Paribas in fact placed India at the vanguard of shareholder activism in Asia, citing the prevalence of majority-controlling promoters and recent reforms introduced by the new Companies Act as the underlying reasons. In an M&A context, minority shareholders have succeeded in several instances in derailing the plans of companies' promoters and boards. The new Companies Act requirement related-party transactions to be approved by a 'majority of the minority' is intended to guard against value leakage from public companies to related parties. Where a transaction is structured as a merger or acquisition, this same rule can be expected to apply. Approval of such deals by a majority of the independent minority is likely to require them to be convinced that they have been struck on arm's-length, commercial terms.

GTDT: Take us through the typical stages of a transaction in your jurisdiction.

CP & GW: The nature of the transaction will determine how it is most likely to originate. Deals involving promoter-led companies may emerge through existing relationships with international investors (perhaps in the supply chain) or through introductions effected by trusted advisers.

Where promoters are less of a dominant feature in a company, the deal origination process may be more akin to what is typical in more-developed markets, with professional intermediaries approaching potential investors on behalf of vendors.

Irrespective of the nature of a transaction, the process of negotiating and executing M&A in India can seem long and complicated. Reasons for this may include a lack of experience and disorganisation on the part of vendors and the pace at which third parties and arms of government respond to requests for consents and clearances.

That said, transacting in India can be just as straightforward as in many other parts of the world provided that the process is properly planned and potential investors take account of local differences from the outset.

Decision-making processes in Indian organisations can be relatively hierarchical by international standards. It is always important to identify the ultimate decision-makers and open a channel of communication with those people early on in any process.

Indian promoter groups may instinctively seek advice from advisers later in a process than may be typical elsewhere in the world. Foreign investors frequently seek to persuade promoter groups to obtain advice earlier than they would be inclined to naturally.

Documentation can sometimes be more general and open-ended in nature in the Indian context than would be typical in certain other places. As is the case anywhere in the world, first drafts of contracts are likely to favour the party preparing them. Counterparties must therefore be prepared to negotiate every point.

The due diligence process is an extremely important part of a transaction and there are certain difficulties to conducting a due diligence process on an Indian target. Indian companies do not usually have large in-house legal teams able to deal with due diligence exercise. The in-house

legal team might not have a sense of what might be required. Accordingly, it is recommended that long generic lists of questions be avoided and specific questions are used instead.

Another issue commonly faced is that the documents may be written in one of the many Indian languages. There are also issues around complex promoter holding structures and issues around related-party transactions which may not be documented.

Price-sensitive information and insider dealing legislation might affect information flow on a public transaction while the new Companies Act 2013 has also imposed restrictions relating to insider dealing.

Other areas of concern include title searches for real estate assets and the extent and reliability of public searches which are not readily available online.

GTDT: Are there any legal or commercial changes anticipated in the near future that will materially affect practice or activity in your country?

CP & GW: The scale and pace of the reform agenda together with monetary policy are likely to shape Indian M&A activity in the short to medium term. How swiftly the government moves to resolve cases such as the telecoms licensing controversy and the *Vodafone* tax case seems set to have a significant bearing on levels of international investment.

Mr Modi has also placed infrastructure at the heart of his plans and promised to bring forward the changes necessary to attract foreign capital. These moves are expected to include the streamlining of planning and permitting processes (eg, the reform of the Planning Commission) but doubts remain about the pace at which real change can be delivered.

In addition to improving regulatory certainty and transparency and reducing bureaucracy, some observers maintain that the government will be compelled to loosen monetary policy in order to deliver growth and rates of return required to attract foreign investment. Policymakers have recently shown themselves more reluctant to indulge in any form of quantitative easing. Whether this reluctance will continue remains to be seen.

GTDT: What does the future hold? What activity levels do you expect for the next year? Which sectors will be the most active?

CP & GW: Despite the challenges faced by M&A in India, the outlook remains an overwhelmingly positive one, especially when viewed over the medium term and with a global perspective.

The fundamental features of the Indian economy are compelling: favourable demographics, high levels of higher education, rising per capita incomes, and a flourishing and newly reinvigorated democracy. Investors come to India for the dynamic and youthful domestic market and the technological innovation capabilities of its companies.

It is hoped that Mr Modi's election will usher in further positive changes to the country's foreign investment policies. While it is clear that large-scale reform is at the heart of the BJP's electoral mandate, the shape and pace of reform remain to be seen. India has always been a complex place in which to bring about change and this will surely remain the case, come what may. To paraphrase a well-known slogan: the future's bright, the future's saffron!

"Despite the challenges faced by M&A in India, the outlook remains overwhelmingly positive, especially when viewed over the medium term and with a global perspective."

Ryuji Sakai and Kayo Takigawa

M&A IN JAPAN

Ryuji Sakai and Kayo Takigawa are partners at Nagashima Ohno & Tsunematsu, primarily handling corporate M&A matters. They represent various clients in and outside Japan, including both business and finance companies.

GTDT: What trends are you seeing in overall activity levels for mergers and acquisitions in your country during the last year or so?

RS & KT: Since the global financial crisis in 2008, and the Great East Japan Earthquake in 2011, as it is known, the economy in Japan has been slow. Overall, mergers and acquisitions have been somewhat sluggish. Despite this general trend, we have seen an increase in outbound transactions (ie, Japanese companies making investments in target companies in foreign jurisdictions). In particular, acquisitions by Japanese companies in China and South East Asia have become increasingly active recently.

Further, in December 2012, the Liberal Democratic Party of Japan (LDP) regained control of the government and started advocating its commitment to turning around the Japanese economy, which includes increased government spending and monetary easing measures. Thereafter, in response to this policy change, stock prices in the Japanese market have recovered, and the value of the Japanese yen against the US dollar and other foreign currencies has significantly depreciated. Although it remains uncertain whether this present trend will lead to the full

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recovery of the Japanese economy, the volume of inbound transactions, as well as purely domestic transactions, has also started to pick up (obviously, the recent downward trend of the yen should favourably affect inbound transactions). However, we do not think that the level of activity for mergers and acquisitions, as a whole, has returned to the level before the global financial crisis.

It may also be worth noting that private equity fund activity was almost entirely suspended after the global financial crisis, but has been increasingly more active recently.

GTDT: Which sectors have been particularly active or stagnant? What are the underlying reasons for these activity levels? What size are typical transactions?

RS & KT: The electronics industry, food and beverage industry, and pharmaceutical and health-care industry are currently the focus of M&A activity, and we predict that this trend will continue.

The underlying reason for the activity levels in each industry varies. In the electronics industry, many major Japanese electronics companies have faced hurdles for further growth or, in some cases, financial difficulties for various reasons, including the emergence of strong competitors in China and Korea, the high yen value (until recent monetary easing measures implemented by the Abe government), and pressure from their customers. In addition, there are arguably too many players in this industry in Japan. Accordingly, such electronics companies have been urged to undertake significant business restructuring efforts, including divestiture of non-core businesses, business alliances, and re-deployment of manufacturing functions to overseas locations that offer better opportunities for cost efficiency. Micron Technology's acquisition of Elpida Memory through a corporate reorganisation completed in July of last year and the acquisition of a health-care subsidiary of Panasonic by KKR completed in August 2014 are typical examples. However, the most notable transaction in this industry was the merger of Tokyo Electron Limited and Applied Material, Inc announced in September last year.

In the food and beverage industry, it appears that companies are in strong need of developing outbound transactions because of the saturation of the domestic market coupled with a widely expected sharp decrease in the Japanese population in the future. As a result, key players in the food and beverage industry are actively seeking to expand their business outside Japan through outbound transactions. The acquisition of Beam Inc by Suntory Holdings Limited is an example in this industry.

We understand that it is a global trend, not a trend particular to Japan, that pharmaceutical companies have recently been very active in mergers and acquisitions. Because of the large R&D costs for sustaining and expanding their businesses, pharmaceutical companies need to seek economies of scale, which may be a strong motivation for M&A deal activity. In addition, in Japan, the expected increase in the aged population and the increasing

sensitivity to health and medication problems seem to offer an attractive platform for pharmaceutical and health-care businesses, while there are many small and medium-sized companies remaining in Japan in this business sector. These factors could bolster both inbound and domestic transactions in the pharmaceutical and health-care industry in Japan. The above-noted KKR acquisition could be also cited as an example that shows this trend.

The size of M&A transactions in the above industries has varied greatly and we do not see any particular pattern in terms of deal size. However, given the underlying incentives for M&A transactions in these industries, it would not be surprising if many large-scale transactions come to light in the future.

GTDT: What were the recent keynote deals? What made them so significant?

RS & KT: The merger of Tokyo Electron Limited and Applied Material Inc is certainly noteworthy as one of the recent keynote transactions. Both companies have generally continued to accomplish good operational results for many years but nonetheless have decided to integrate their businesses across the border for further growth. This deal is a notable transaction from the viewpoint of its size, which is expected to be in the area of US$9.3 billion, as well as its unprecedented scheme in Japan of a merger between parties in different jurisdictions. In addition, the above-noted acquisition of Beam by Suntory, as well as the acquisition of Sprint Corporation by Softbank Corp completed in July 2013 and Lixil Corporation's acquisition of Grohe Group Sarl announced in September 2013, are also keynote deals taking into consideration their size and the 'outbound' nature of the transactions.

GTDT: In your experience, what consideration do shareholders in a target tend to prefer? Are mergers and acquisitions in your country primarily cash or share transactions? Are shareholders generally willing to accept shares issued by a foreign acquirer?

Generally speaking, Japanese shareholders seem to have a strong preference for cash deals, and consideration used in most of the acquisitions in Japan is cash. However, in the case of merger transactions, it is common to offer as consideration the shares of the acquiring company to the shareholders of the target company.

We rarely see any significant acquisition transactions where the shares of foreign acquirers are offered to the shareholders of a Japanese target company (with a possible exception of Citi Group Inc's acquisition of Nikko Cordial Group several years ago).

GTDT: How has the legal and regulatory landscape for mergers and acquisitions changed during the past few years in your country?

RS & KT: The most significant change is the amendment to the antimonopoly law in 2010, which introduced a pre-notification system for share acquisition. Accordingly, for any share acquisition with a size exceeding the applicable threshold, a notification must be filed with the Japan Fair Trade Commission at least 30 days before the closing. Previously, pre-notification was required only for a merger, business transfer or demerger. The recent amendment is in line with the global trend. However, it should be noted that this pre-notification will be required in two instances: (i) where the stake in the target company exceeds 20 per cent; and (ii) where it exceeds 50 per cent.

In addition, in Japan, there is increasing sensitivity to so-called gun-jumping issues for the parties to M&A deals. Exchange of information in the context of M&A transactions would not

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Ryuji Sakai

"The increase of inbound transactions is one of the most notable changes we have been seeing recently."

normally give rise to issues of non-compliance under the Japanese antimonopoly law. However, it has now been recognised in practice in the case of M&A transactions between global businesses that gun-jumping issues under foreign competition law must be duly taken into account, unlike the situation in previous years where a party could plead ignorance. As a result, this issue has come to significantly affect the information exchange process in the due diligence phase for M&A transactions that have a global aspect.

GTDT: Describe recent developments in the commercial landscape. Are buyers from outside your country common?

RS & KT: The increase of inbound transactions is one of the most notable changes we have been seeing recently. There were many buyers from outside Japan in the 1990s when many financially troubled Japanese businesses, including banks, were rescued by foreign buyers, some of which were not well received in Japan then. Recently, there have not been many inbound transactions compared with the high point in the 1990s, but generally there is no longer any discernible bias against buyers from outside Japan in friendly, negotiated deals, and, in this sense, it would be fair to say that foreign buyers are common in Japan.

GTDT: Are shareholder activists part of the corporate scene? How have they influenced M&A?

RS & KT: Shareholder activists, as well as some attempts at hostile takeovers, experienced somewhat of a boom in Japan in the early 2000s. However, we have not seen much of either since the global financial crisis. One of the reasons may be that some of the key players in shareholder activism and hostile takeovers were involved in scandals and convicted of securities fraud, etc. During the era when they were active, a large number of Japanese listed companies introduced a Japanese version of anti-takeover plans (ie, the announcement of possible dilutive issuances of stock acquisition rights), and many of those plans still remain in effect (the statistics of Tokyo Stock Exchange indicate that approximately 19.4 per cent of Japanese listed companies adopted such plans as of September 2012). This appears to be an after-effect of the shareholders activism of the early 2000s. It should be also noted that Japanese culture that is somewhat biased against hostile takeover attempts (eg, it appears to be a general policy of Japanese banks not to provide financing support to hostile takeovers) seems to have set a high hurdle to be cleared by acquirers in hostile takeover transactions.

On the other hand, we note that Japanese listed companies have become very sensitive to the voting policies from time to time adopted by

THE INSIDE TRACK

What factors make mergers and acquisitions practice in your jurisdiction unique?

In Japan, aside from legal theory, it is often not very clear whose interest is represented by the management of the target company. Almost always, the welfare of the employees is a very important issue. In addition, the possible reaction of governmental authorities and other peers in the relevant industry, not to mention that of suppliers and customers, could be a concern. These factors tend to affect, and sometimes skew, the outcome of the transaction. This may be a matter of cultural differences but frequently seems to have more substance to it.

What three things should a client consider when choosing counsel for a complex transaction in your jurisdiction?

It seems clear that they should consider availability of resources and in-depth experience for dealing with complicated Japanese law issues; skill and experience for communication in English, both orally and in writing; and capability of efficiently and carefully preparing necessary documentation.

What is the most interesting or unusual matter you have recently worked on, and why?

A client came to us after 5pm on Friday and requested us to work on a sizeable M&A transaction indicating that a certain document needed to be signed the following Monday. We certainly thought that the document would be an NDA or, in the unlikely event, a simple MOU. It turned out, however, that what was meant by the client was a definitive agreement for the deal. The next 48 hours was sheer chaos, but through a great deal of concerted effort, the document was signed as scheduled. This was unprecedented and will likely never be repeated.

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institutional investors, in particular, well-respected foreign institutional investors, and tend to try to ensure that the management proposals submitted to shareholders' meetings will receive their endorsement. This trend has led to the introduction by the Japanese government of Japan's so-called Stewardship Code, suggesting the principles that institutional investors should preferably comply with.

GTDT: Take us through the typical stages of a transaction in your jurisdiction.

RS & KT: The ways to start a transaction vary, but we understand that, in many cases, contact is initiated through the financial advisers to the parties. However, occasionally, initial contact is made at the senior management level.

There is nothing particularly unique to the transaction process in Japan. That is, if both parties are interested in moving forward, a non-disclosure agreement is typically executed first and the due-diligence process starts. In many cases, a non-binding or binding MOU is also executed before the start of the due-diligence or after the completion of the preliminary due diligence. In large-scale transactions, an MOU is often executed at an early stage so that full-scale due diligence may be conducted with participation of a large number of team members. With very few exceptions, only after the completion of the due diligence process, which may or may not be comprehensive depending on the particulars of the transaction in question, do the parties enter into a definitive agreement. Due to fiduciary duty concerns, generally, a due diligence exercise is viewed in Japan as a 'must' for significant transactions.

GTDT: Are there any legal or commercial changes anticipated in the near future that will materially affect practice or activity in your country?

RS & KT: With respect to legal matters, generally speaking, there have been major changes in corporate law and other relevant laws that have been fundamental to mergers and acquisitions over the past several years, and accordingly, we do not see any further substantial changes to come in the near future. However, an amendment to the corporate law of Japan has recently been enacted, and is expected to become effective in April or May 2015, which includes one major change to the procedure for a share acquisition. That is, under the amended corporate law, when a seller company is to sell the shares of its material subsidiary, such sale should be approved by a supermajority shareholders' resolution (ie, at least two-thirds of the votes at a general meeting of shareholders). This requirement is applicable where the book value of shares to be sold exceeds one-fifth of total

assets of the seller company, and, as a result of such sale, the target company will not be a subsidiary of the seller company. The impact of this amendment could be significant, since there has been no such requirement for a shareholders' resolution in the case of a share acquisition.

In addition, this amendment to the corporate law will add new processes for certain issuance of new shares as a result of which the purchaser of such new shares will come to hold the majority of voting rights of the issuing company. While, under the current corporate law, a company may issue new shares only by a board resolution within the authorised capital (so long as the issuance price is not especially advantageous to the purchaser), the issuing company will, after the amendment, be required to notify the information concerning the purchaser to the existing shareholders, and, if such existing shareholders holding one-tenth or more voting rights of the issuing company raise objections to such issuance of new shares, the issuing company must obtain an approval at a general shareholders' meeting.

We might add that the government led by Prime Minister Abe is pushing for deregulation to open up certain heavily protected business areas, such as medical and agriculture, to the private sector. If this is actually accomplished, there could be additional investment opportunities through M&A deals for foreign buyers.

As for commercial matters, unless there is any drastic improvement in the Japanese economy, we do not anticipate any significantly favourable changes taking place in the near future.

GTDT: What does the future hold? What activity levels do you expect for the next year? Which sectors will be the most active?

RS & KT: We do not think there will be any drastic change in the next year or so; and the active sectors will not likely change swiftly either. However, it seems that the retail industry may also become more active in mergers and acquisitions, the reason for which is almost the same as that for the food and beverage industry. That is, the shrinking Japanese population will require retail companies to be more consolidated in the domestic market and expand their business outside Japan.

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Tim Stevens

M&A IN THE NETHERLANDS

Tim Stevens specialises in corporate and securities law and is particularly experienced in public and private mergers and acquisitions. He has been recognised by *Chambers Global* for his work in capital markets.

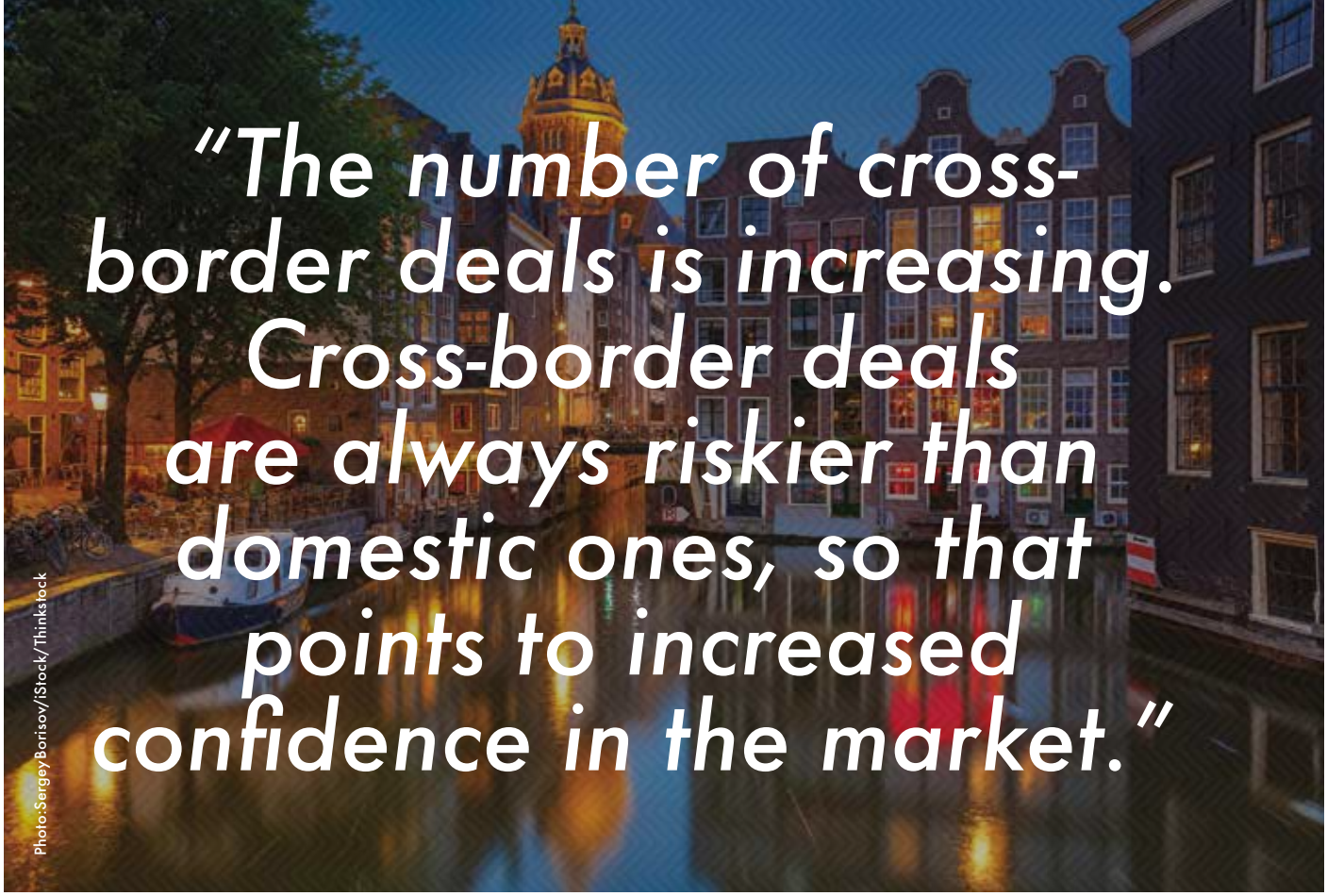
His recent experience includes advising Corio on its takeover by and merger with Klépierre; Liberty Global on its offer for Ziggo; KPN on the attempted takeover by América Móvil; TNT on the attempted takeover by UPS; and Crucell on the public takeover by Johnson & Johnson.

GTDT: What trends are you seeing in overall activity levels for mergers and acquisitions in your country during the last year or so?

Tim Stevens: The market has not yet recovered, but we are getting there. Purely domestic transactions are still a bit low. The number of cross-border deals is increasing. Cross-border deals are always riskier than domestic ones, so that points to increased confidence in the market.

The conditions for private equity investment are improving, as is the overall economic climate. Since funds eventually need to process their idle money, we think this trend will continue and generate higher deal activity. In particular, the number of defaults on existing loans is decreasing, interest rates will foreseeably remain low, and stock market valuations are high.

Also, many listed companies seem to be increasingly optimistic and ready to invest in high-rated assets.



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GTDT: Which sectors have been particularly active or stagnant? What are the underlying reasons for these activity levels? What size are typical transactions?

TS: The telecoms and communications market has been particularly active in the past year (eg, *Telefónica/KPN*; *Liberty Global/Ziggo*), as we are in a phase of technological innovation (eg, 4G network rollouts) which requires heavy investment. This is one reason for consolidation in a number of European national markets in this sector.

Furthermore, as banks, insurers and other financial institutions are finally regaining stability and footprint, projects in the frame of restructuring these institutions will remain the core business in this sector. However, for the time being it seems unlikely that a major acquisition of a bank is going to occur in the foreseeable future, as the market is aiming at restabilisation of the playing field rather than the expansion of certain players.

Other markets are more or less active, and there are no particular trends that can be highlighted at the moment.

GTDT: What were the recent keynote deals? What made them so significant?

TS: The KPN saga: a partial offer by América Móvil for 30 per cent of the shares, a large rights issue, an announced sale of its German star company E-Plus to Telefónica, followed by a cash offer by América Móvil, blocked by a protective foundation, all in the scope of a year.

Liberty Global's cash and share offer for Ziggo, creating a national cable company in the Netherlands.

Corio's takeover by the French Klépierre, the first cross-border merger of a Dutch company.

GTDT: In your experience, what consideration do shareholders in a target tend to prefer? Are mergers and acquisitions in your country primarily cash or share transactions? Are shareholders generally willing to accept shares issued by a foreign acquirer?

TS: Cash is always preferred, but shares will also be accepted. Liberty's offer for Ziggo consists of shares in an English plc, listed on the NASDAQ. Klépierre's offer for Corio is for Klépierre shares, so shares in a French company, which will be listed in Amsterdam.

THE INSIDE TRACK

What factors make mergers and acquisitions practice in your jurisdiction unique?

The Netherlands is run on the basis of consensus. This is apparent also in how M&A transactions get done in this country. Hostile deals are rare and frowned upon. Employees have a say in M&A, their 'works council' can render advice on transactions and their advice is taken seriously. Likewise, company boards are required to act in the interests of all stakeholders, so not just the shareholders. Any public offer agreement contains 'non-financial covenants', setting out the future strategy, identity of the company, undertakings towards the workforce, R&D spend, environmental aspects and other items that ensure the buyer will be a good owner. Enforcing this is a different matter, although in practice some hefty mechanisms have been agreed.

What three things should a client consider when choosing counsel for a complex transaction in your jurisdiction?

1 It is critical that your lawyer knows how deals get done in the Netherlands. More often than not, clients rely on their trusted advisers, but they do not know their way around Dutch practice. It may seem deceptively familiar to some, but while it follows international practice in a lot of ways there are in fact quite a few traps to avoid. So look for local experience.
2 Holland grew rich on international trade, and prides itself on being pragmatic. What that means is it is ready to copy anything foreign if it is of use here. It can be a real benefit if foreign solutions can be brought to the table in Dutch deals, because the Dutch will readily adopt it if it works. So look for lawyers that are attuned to international practice and developments.
3 Because it is a small country, everybody knows everyone, and conflicts are rife. Before instructing or even talking to a lawyer, try to find out to what extent he or she is already involved, in some way or another.

What is the most interesting or unusual matter you have recently worked on, and why?

The last one is always the most interesting one. The takeover of Corio by Klépierre was interesting because it is the first time a Dutch company will merge into a foreign one. The rules on cross-border mergers apply to all Dutch companies, regardless of whether they are listed or not, which means there are no specific rules addressing the needs of listed companies like Corio.

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GTDT: How has the legal and regulatory landscape for mergers and acquisitions changed during the past few years in your country?

TS: The legal framework applicable to Dutch private limited liability companies has become more flexible recently. Dutch companies can now adopt a one-tier board structure, which is more familiar internationally.

Corporate activities are increasingly being influenced and checked on European level. For example, in merger control and other competition law frameworks, the European Commission has shown a strong willingness to handle systematically interesting and major cases on its own, consistently denying requests for referral from the national authorities. Cases of special concern regularly peak in heavy remedies negotiations with the European Commission. Regarding domestic transactions, the Authority for Consumers and Markets (ACM) has shown a tendency to handle cases rather informally if justifiable.

GTDT: Describe recent developments in the commercial landscape. Are buyers from outside your country common?

TS: Holland is a small country; any larger deal will always have some international angle to it. It is common for foreign companies to invest in larger transactions in the Netherlands. The Dutch government has historically prized itself on allowing and promoting foreign investment. América Móvil may beg to differ, as its bid for KPN was thwarted, but so far the government has resisted the urge to protect its 'national champions'.

GTDT: Are shareholder activists part of the corporate scene? How have they influenced M&A?

TS: There is activism in the Netherlands, as in any other country, and there are some bad experiences. The TCI attack leading to the break-up of ABN AMRO was and still is a traumatic experience for a lot of people in Holland. Activists also pushed for the breakup of TNT Express and PostNL, and the subsequent sale of TNT to UPS from the United States. The deal failed on antitrust grounds, but by then the activists had already sold out of TNT. ASMI was the subject of a break-up campaign for years, not resulting in anything tangible. The Netherlands has not yet seen any examples of shareholder activism leading to a good outcome.

GTDT: Take us through the typical stages of a transaction in your jurisdiction.

TS: Most of the time it is CEOs who meet directly and mull over possibilities together. Sometimes bankers float ideas. Other times it can be analysts or shareholders pushing for action. After first contact is made, a second or third meeting is held with a broader team, to test the waters. Then a more formal written proposal may be sent. The proposal must be specific enough to enable the recipient to form a view, and evoke a formal response, which may be in writing, or over the phone. Then non-disclosure agreements are signed, the deal terms are discussed in ever more detail and due diligence gets under way.

A lot of hand-wringing on bid letters is about disclosure. A target may fear the bidder sending the letter to the press, putting pressure on the target. Likewise a bidder may fear that the target will leak the letter, to 'test the waters', or to see whether other bidders come out of the woodwork. Once it has been leaked, the Netherlands Authority for the Financial Markets (AFM) may require the target to confirm the situation with a press release. Sometimes the AFM can also require the bidder to do so. This can be tricky because as soon as a bidder puts out concrete information on a bid, it must provide a status update within four weeks, and submit a final offer within 12 weeks. So it is effectively drawn into a process and loses flexibility.

GTDT: Are there any legal or commercial changes anticipated in the near future that will materially affect practice or activity in your country?

TS: The current increase in M&A activity is largely driven by the fact that money has nowhere else to go than into equities. Valuations are up, IPO activity is up, companies are buying other companies to put their money to work. The public M&A rules were changed fairly recently, so it is unlikely that they will be overhauled any time soon, although minor tweaks may be made. There are no legal changes anticipated that are going to affect the underlying drivers of M&A.

GTDT: What does the future hold? What activity levels do you expect for the next year? Which sectors will be the most active?

TS: In the financial sector, M&A was quiet in the wake of the crisis. We expect this to pick up, as the government is looking to sell its shares in the banks and insurance companies that it nationalised.

A period of sustained low interest will mean cheap money, so we would expect private equity to continue to benefit. Companies looking for investment opportunities would do well to look at the Netherlands – they will find it a very benign market.

"Companies looking for investment opportunities would do well to look at the Netherlands – they will find it a very benign market."

Ole K Aabø-Evensen

M&A IN NORWAY

Ole K Aabø-Evensen is one of the founding partners of Aabø-Evensen & Co, a Norwegian boutique M&A law firm. Ole assists industrial investors, financial advisers, private equity funds, as well as other corporations in friendly and hostile takeovers, public and private mergers and acquisitions, corporate finance and other corporate matters. He has extensive practice in all relevant aspects of transactions, both nationally and internationally, and is widely used as a legal and strategic adviser in connection with follow-up of his clients' investments. Aabø-Evensen is also the author of a 1,500-page Norwegian textbook on M&A. He is recognised by international rating agencies such as *Chambers*, *European Legal Experts*, and during the past 10 years he has been rated among the top three M&A lawyers in Norway by his peers in the annual surveys conducted by the *Norwegian Financial Daily* (*Finansavisen*). Both in the 2012 and in the 2013 edition of this survey, the *Norwegian Financial Daily* named Aabø-Evensen as Norway's No. 1 M&A lawyer. He is also the former head of M&A and corporate legal services of KPMG Norway. Aabø-Evensen is the co-head of Aabø-Evensen & Co's M&A team.

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GTDT: What trends are you seeing in overall activity levels for mergers and acquisitions in your country during the last year or so?

Ole K Aabø-Evensen: I would say that the most characteristic trends for the Norwegian M&A market for the past year have been an increase in public M&A activity and an increase in the overall deal values – even for private M&A transactions – but with a reduction in the total number of deals. If you look at data from Mergermarket for the 12 months ending 30 June 2014, the number of deals was down around 10 per cent compared with the 12-month period ended 30 June 2013. However, the aggregate value of the private M&A market for the same period was about €15.2 billion – a substantial increase compared to the €8.9 billion for the preceding 12 months. The deal size seems to be increasing on average, and for Q2 2014 was at an estimated €246 million, up from €195 million for Q1 2014.

Entering 2014, much of the optimism has returned to the Norwegian capital markets, and an increased interest among investors for the equity markets seems to be having a positive effect on IPO and public M&A activity. During 2013 and the first half of 2014, there have also been substantial improvements in the availability of credit, and credit for acquisition financing is now broadly available in the Norwegian market. The banks' margins are under pressure and leverage multiples have generally increased. At the same time, we have seen an remarkable development in sources of acquisition financing, mainly from the Norwegian high-yield bond market but also from alternative funds lenders.

For the moment you could say that a strong public market is leading the way for Norwegian M&A activity, and that the increased availability of credit has contributed to the increased deal size; while at the same time, the oil companies' delayed investments have contributed negatively to the overall deal volume in the Norwegian market.

GTDT: Which sectors have been particularly active or stagnant? What are the underlying reasons for these activity levels? What size are typical transactions?

OKA-E: The energy sector has been the most active sector for years. Activity in this sector slowed down in 2013, but seems to be improving. For the first half of 2014, energy, oil service and offshore together accounted for 21 per cent of the total Norwegian M&A deal volume, which once again made it the most active sector in the Norwegian M&A market, surpassing the technology, media and telecoms sector (18 per cent of the total deal volume), and the business service sector (15 per cent).

There continues to be a robust flow of capital to the oil and gas sector for M&A transactions. The underlying reason for the continuing activity in the energy sector seems to be that most experts anticipate increased investment in the Norwegian continental shelf from 2016. Several players seem prepared to trust these predictions, and are therefore willing to position themselves for such growth on a medium- to long-term basis, even though it is difficult to find a consensus on exactly where oil and gas prices are going, which in general will be an important factor for

the transaction volumes. History has also shown that the oil prices very often are difficult to predict, since sudden shortage from hurricanes, war or threat of war in oil-exporting areas cause these prices to spike. Moreover, the M&A activity within this sector seems driven by consolidations, for both asset heavy and asset-light companies within the oilfield services.

For deal activity within the TMT sector, the underlying reasons can partly be explained by Norway's highly developed infrastructure (transport, energy and technology), and partly by Norway's high consumer spending. Traditional forms of TMT revenue growth also seem to have begun slowing down, and margins are under pressure. As a result, technology players are under constant pressure to consolidate to create a larger global footprint. Norway seems particularly attractive to invest in because of the population's and local businesses' constant willingness to implement new technology.

Within the business services sector some deals seem to have been motivated by former owners deciding to exit stakes in non-core assets to generate cash without affecting the returns generated from core businesses.

Deal sizes in Norway overwhelmingly tend to be small and medium-sized. For the first half of 2014, 58 per cent of the deals did not disclose the size, 10 per cent had a reported deal value of less than €20 million and 23 per cent were between €20 million and €199 million. Only 3 per cent of the deals had a reported deal value exceeding €1 billion, and 6 per cent of the deals had a deal size between €200 million and €1 billion.

GTDT: What were the recent keynote deals? What made them so significant?

OKA-E: One notable recent deal in the Norwegian market would be Cinven's co-investment in Visma, which valued Visma at an enterprise value of €2.52 billion. Another keynote deal is Alfa Laval's €1.58 billion acquisition of Frank Mohn. I would also mention Det Norske Oljeselskap's acquisition of Marathon Oil Norge for an enterprise value of €1.54 billion. These deals were significant due to the size of the purchase price.

When it comes to EV/EBITDA multiples, worth mentioning is NXMH BVBA's acquisition of the famous Norwegian manufacturer and wholesaler of prams and baby furniture for 3.2 billion kroner, which valued the company at more than 16 times EBITDA for 2013. Quite a remarkable achievement for the sellers.

GTDT: In your experience, what consideration do shareholders in a target tend to prefer? Are mergers and acquisitions in your country primarily cash or share transactions? Are shareholders generally willing to accept shares issued by a foreign acquirer?

OKA-E: Cash is preferred. If you look at Mergermarket's figures for the first half of 2014, approximately 56 per cent of the deals did not disclose what type of settlement the parties had agreed, but for 41 per cent of the deals it was cash, while only 3 per cent of the deals included a combination of cash and equity as settlement. In 2013, only 1 per cent of the deals offered equity as settlement and 1 per cent offered a combination of cash and equity. In 2012, only 3 per cent of the deals where the parties disclosed the type of settlement contained a combination.

In 2013, only 9 per cent of the total public M&A volume offered a consideration of shares or cash and shares. This trend has continued into 2014, with none of the seven public tenders issued during the first half of 2014 offering shares as part of the consideration.

The reasons are that sellers normally prefer cash to shares because of difficulties evaluating the future value of such consideration in a volatile macroeconomic environment compared with the certainty of cash. I would not say that Norwegian shareholders are not willing to accept shares issued by a foreign acquirer as consideration in an M&A transaction, but the acquirer may find getting their shares accepted challenging, especially if the shares are not publicly traded on a stock exchange or other regulated market. If a buyer persuades a seller to accept shares in a non-listed company as consideration, the buyer will usually have to offer the seller the opportunity to continue to be part of the acquiring group's management team post-closing. Alternatively, the buyer can provide the seller with a realistic exit plan (typically an IPO or a trade sale) within a foreseeable period.

GTDT: How has the legal and regulatory landscape for mergers and acquisitions changed during the past few years in your country?

OKA-E: In recent years there have been numerous legal and regulatory changes that have had or most likely will have an impact on the Norwegian M&A landscape. I would say there are three notable changes worth mentioning.

The first relates to the new competition filing thresholds implemented from 1 January 2014, which substantially increase the thresholds for having to notify any M&A transaction to the Norwegian competition authorities. In many ways this has made it easier and faster to execute and complete M&A transactions under Norwegian law since most Norwegian M&A transactions fall below the new thresholds. On the other hand, a buyer should note that the Norwegian Competition Authority, subject to certain conditions being fulfilled, may still order that business combinations falling below these revised thresholds be notified.

The second is the new rule implemented in the Norwegian Tax Act taking effect from 1 January 2014, which imposes significant restrictions on

the deduction of interest paid to related parties for interest expenses exceeding 5 million kroner. This new rule may also, subject to certain exemptions, apply to loans raised from an external lender (typically a bank), where a related party to the borrower has issued 'downstream' security for loans from such external lenders. The new limitation rule has made it extremely important to ensure that the security packages agreed in leveraged buyouts are structured so that no third-party financing is caught by the new interest limitation rule.

Also worth mentioning is the new Act on Alternative Investment Fund Managers. The Act imposes a completely new set of disclosure obligations for sponsors acquiring control over a Norwegian target if the target's shares are listed on a stock exchange or for non-listed target companies that fulfil certain criteria with regard to number of employees, turnover and assets. Subject to such criteria being fulfilled it will also be necessary to issue a special notification to the Norwegian Financial Supervisory Authority if an alternative investment fund's portion of shares reaches, exceeds or falls below certain thresholds. These funds and their sponsors will also, for 24 months post-closing, be caught by anti-asset stripping rules aimed at limiting certain distributions of assets, funds and so on from the target to its new owners and which typically would be carried out for the purpose of repaying the new owner's acquisition financing.

GTDT: Describe recent developments in the commercial landscape. Are buyers from outside your country common?

OKA-E: I would say that the improved credit availability we have seen throughout parts of 2013 and during 2014, combined with a strong high-yield Norwegian bond market is a recent development worth mentioning. This has again led to an increased use of bonds as a source of acquisition financing in Norway, and now we are seeing such financing even for small and medium-sized transactions.

Another notable commercial development is the increased use of warranty and indemnity insurance to reach agreement on liability under the SPA. Typically, private equity sponsors may want to use such insurance products to achieve a clean exit. Buyers may also propose such insurance to gain a potential competitive advantage in a bidding process.

Now, momentum is building to push up the valuation multiples, but here buyers will find that there are slight variations between industries. Still, buyers seem to continue to remain fairly risk-averse when it comes to the other deal terms, and overall these continue to be fairly buyer-friendly, of course with exceptions for particularly attractive assets.

The share of cross-border transactions continues to be fairly stable; during the first half of 2014, approximately 50 per cent of the buyers in Norwegian M&A deals were foreign. If, on the other hand, you compare this figure with the first half of 2013, you will find that the foreign buyers in 2014 took a higher share of the market compared with the 44 per cent foreign involvement during the first half of 2013. At the moment, it seems as if European buyers in particular are increasingly present in deals.

GTDT: Are shareholder activists part of the corporate scene? How have they influenced M&A?

OKA-E: So far, shareholder activists have played no major part on the corporate scene in Norway. However, 'operational activism' as a reaction of shareholders against the management's running of listed and unlisted companies occurs, but not as frequently as in other jurisdictions.

A few examples of hedge funds trying to intervene against the management of Norwegian companies exists, but these funds have not particularly managed to influence the M&A scene. It is also uncommon for activists to seek to interfere with the completion of announced transactions in Norway. One example to the contrary is the 'DNO Initiative', which consisted of 450 minority shareholders who tried to stop the acquisition and subsequent merger by RAK with DNO unless RAK accepted certain compromises that they proposed. These shareholders actually succeeded in the sense that RAK had to agree to these compromises in exchange for their support.

I also think the trend of increased activism experienced in many other jurisdictions could become more prevalent in the Norwegian market during the next decade. Why? Because business is steadily becoming more global, and also because people in general have a tendency of trying to copy some of the methods for earning money that are used in larger jurisdictions. Shareholder activism is actually just a way of trying to earn money. However, to what extent my prediction will materialise will most likely depend on how good the Norwegian companies' management are at maintaining the profitability of the companies they're managing. The best protection against such campaigns will normally be good corporate governance and making sure that the

"During the first half of 2014, approximately 50 per cent of the buyers in Norwegian M&A deals were foreign."

THE INSIDE TRACK

What factors make mergers and acquisitions practice in your jurisdiction unique?

The fact that there can often be a wide variety in the contractual documentation and agreement structures used from deal to deal in Norway compared with what you find in many other jurisdictions. Norwegian acquisition agreements in many cases will be far less detailed than in most Anglo-Saxon jurisdictions. A foreign buyer may also experience that Norwegians very often seem to be much more pragmatic and may take a very relaxed approach to the legal documentation compared with sellers or buyers in our neighbouring countries. The reason for this approach is that Norwegian courts traditionally have used a principle of reasonableness, good faith or fair dealing in their interpretation of contracts, to avoid unjust solutions based on a literal interpretation of a contract. As a result, a Norwegian contractual party would very often expect some interference, either to integrate or to correct the agreed contractual provisions. A Norwegian party would therefore often feel no need to cover all possible scenarios in the contract, and a foreign buyer would often experience tension between what it felt was needed to be covered in the acquisition agreement, compared with what the seller wanted to accept or thought was necessary to include. However, for the past 10 to 15 years the Norwegian Supreme Court has taken a more literal approach, particularly when interpreting contracts between business parties. As a result the documentation used on these type of deals today very often resembles what's used in more Anglo-Saxon jurisdictions even though that they're usually not as detailed. Still, you could, even today, meet a seller that insists on the acquisition agreement being no more than a couple of pages.

What three things should a client consider when choosing counsel for a complex transaction in your jurisdiction?

1 Don't look at the size of the firm. Instead, consider whether the counsel involved on your project is skilled in negotiation with the necessary experience and industry insight from previous complex M&A transactions, and that the law firm has shown that it is able to handle such transactions.
2 Ensure the law firm is able to provide you as a client with sufficient senior attention from an experienced partner to help you through the pitfalls of such transactions. As a client you want to ensure that the lawyers that are going to do the job on your behalf know what they are doing and are not simply put on the project to learn how to do it.
3 That the counsel involved is able to show a mix of sound commercial acumen, deep knowledge of the legal and regulatory framework for such transactions, but also for the project management side of such transactions. Excellent project management and an understanding of how to run these type of projects are vital when interacting with the other deal teams involved.

What is the most interesting or unusual matter you have recently worked on, and why?

The most interesting and unusual matter I have recently worked on is unfortunately something I cannot talk about due to attorney–client privilege. However, it is not necessarily the transactions involving the largest amounts that are the most interesting or the most unusual, the reason being that nowadays the largest transactions are often carried out as structured sales processes. On these large deals, you will normally have a set of very knowledgeable lawyers involved on each side, making sure that no 'one drops the ball'. Consequently, quite often these transactions are rather predictable, at least for a lawyer who has been in this game for a while. However, if I were going to rate something, I think that some of the transactions I was involved in during the credit freeze back in 2008–2009 might qualify, because they involved acquiring assets in distress, which makes it a bit more exiting. I could probably also mention Gjensidige's acquisition of Citibank's consumer bank business in Norway, mainly because it involved a carve-out of an existing business from a large global banking conglomerate, and which involved some fairly complex transitional issues.

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business is creating returns to its shareholders above the relevant industry benchmark. Poor governance, a high number of related-party transactions at questionable values, too lucrative remuneration packages for poor performance, and an unwillingness among the management to conduct necessary turnarounds of the businesses to increase profitability will, on the other hand, increase the chances of activists' intervention being successful.

GTDT: Take us through the typical stages of a transaction in your jurisdiction.

OKA-E: Norwegian M&A transactions have tended to follow the structures used elsewhere, with intermediaries playing a key role in particular for medium-sized and large deals. Intermediaries include members of the acquirer's board, its outside legal counsel, accounting firm, investment banker or a broker or finder. Private equity sponsors may often also approach the target owners directly. Between smaller corporations, contact often starts from one CEO or one controlling shareholder to another.

Small to medium-sized deals involving non-listed companies, and where contact is initiated by a potential buyer, will often follow a traditional pattern in which the buyer, after initial discussions to establish the owner's interest, starts by proposing a term sheet or letter of intent. Such documents are typically aimed at creating a consensus on the main terms of the deal, and to grant the potential buyer due diligence access to the target's books and records, and potentially also granting the buyer exclusivity for a limited time to negotiate a final sale and purchase agreement (SPA). During the due diligence, the buyer will normally want to take control of the drafting, and will produce a draft SPA for the seller to review. After the due diligence, which in theory could last from one to six weeks, depending on the complexity of the target's operations, the parties will seek to finally negotiate the SPA, and if the parties reach an agreement, the document will be signed. After this the parties will, depending on the deal size, have to notify the relevant competition authorities, and ensure that any other conditions to closing which the parties have agreed are fulfilled prior to completion. Sometimes the parties may want to negotiate variations, and may introduce various other heads of terms, process agreements, etc before reaching a final agreement. Typically, the seller's counsel could also insist that the parties sign a conditional purchase agreement before the buyer is granted due diligence access. Such conditional purchase agreements will typically be aimed to limit or qualify the potential buyer's ability to withdraw from the transaction owing to findings in the due diligence. The seller may also insist on taking control over the drafting, even if this is still less common for these type of smaller deals.

Medium-sized to large transactions involving non-listed companies are very often conducted as a structured sales process, and for these type of transactions the sellers and their advisers tend to take more control of the process, preparing draft sales documents, etc. Such processes seem to follow a similar route as in most other jurisdictions, with indicative offers from various bidders that have been invited by the seller's advisers, followed by due diligence and mark-up of sale and purchase agreement and final bids. Thereafter there will take place negotiation of legal documentation, and sometimes a confirmatory due diligence and then completion.

If the prospective target is a listed company, the takeover processes will take a completely different form. If a listed target is controlled by certain key shareholders, the bidder may, however, very often approach them via intermediaries and seek to enter into an irrevocable undertaking under which the shareholders agree to accept a public tender offer launched by the prospective bidder. Alternatively, the parties may enter into a conditional SPA. Examples of such conditions could be that the buyer achieves control over more than 90 per cent of the target's issued shares in a subsequent public tender offer process and that the target grants the buyer due diligence access prior to issuing a public takeover offer to acquire all of the target's issued shares.

In most cases, a prospective bidder will also seek to enter into an agreement with the listed target's board that allows the bidder due diligence access or additional information about the target. In such an agreement, the bidder will also want to obtain the target's board support for a proposed voluntary tender offer. These support agreements, typically called a 'transaction agreement', will contain provisions on how to conduct the due diligence process and the timetable for issuing a public bid to acquire all of the target's issued shares, and such agreement will also document the terms of such tender offer in detail. If the bidder is able to enter into such transaction agreement with the target's board, the bidder will then, following its due diligence review, normally issue a voluntary, but sometimes also a mandatory, tender offer to the target's shareholders, in which the shareholders are asked to accept the offer being made to them by the bidder. A voluntary tender offer gives the bidder more flexibility than a mandatory offer, since the voluntary offer can be made subject to the satisfaction of preconditions, while a mandatory offer can under Norwegian law not be made subject to any conditions. However, if a bidder acquires more than one-third of the votes in a Norwegian listed target, the bidder must make a mandatory offer for the outstanding shares. The bidder's obligation to issue a mandatory offer is, with certain exceptions, also repeated when the bidder passes 40 per cent and then 50 per cent of the voting rights. As a result, a bidder will generally start by issuing a voluntary tender offer that will be subject to the bidder being able to achieve acceptance from more than 90 per cent of the shares and voting rights in the target. The reason being that the bidder then will be able to squeeze out the remaining minority shareholders by a forced purchase at a redemption price.

When going after a publicly listed company, a bidder can never can be sure if the target will grant due diligence access. As a result it is also quite normal for the bidder's legal and financial advisers to conduct some type of pre-bid due diligence of publicly available information. If the target's board is not willing to recommend the shareholders to accept a bid from the bidder, or if the bidder assumes that the target will not grant such access, a prospective bidder may sometimes

decide to go hostile, and issue a voluntary offer without at first having obtained any support from the target.

To increase its chances of success, a bidder can also seek to gradually build a stake in the target through off or on market share purchases outside the offer process. Lately we've also seen an increasing number of takeovers of publicly listed companies being conducted as a partly structured sales process, organised by the target's board, or a controlling majority shareholder. In such partly structured processes, prospective bidders are invited to provide indicative offers, before the target's board select a limited number of bidders that are granted due diligence access, etc.

A takeover of a publicly listed company under Norwegian law is more regulated. The prospective buyer of listed targets and the targets' boards will have to observe detailed rules comprising insider dealing rules; mandatory offer thresholds; disclosure obligations with regard to ownership of shares and other financial instruments; limitations on the content of the offer documents; filing and regulatory approval of the offer documents; the length of the offer periods, employee consultations; limitations on type of consideration offered, etc.

GTDT: Are there any legal or commercial changes anticipated in the near future that will materially affect practice or activity in your country?

OKA-E: The most imminent expected change is a further reduction in the general corporate tax rates, which may improve the attractiveness of Norway for foreign investors. This may have a positive impact on M&A activity in Norway. In recent years, and following Lehman Brothers and the eurozone sovereign debt crisis, several new directives, regulations and clarifications have been proposed and adopted within the European Union. Some of these may eventually influence the regulatory framework for public takeovers in Norway, which has tended to quickly implement EU directives into Norwegian law in accordance with EEA Agreement obligations. In recent years, however, Norway has started to lag behind in its implementation, particularly in the capital markets area. Nevertheless, we expect to see several proposed amendments to the framework for takeovers over the next couple of years to bring the Norwegian legislation in line with some EU initiatives.

I also think that the change in government that took place last year may contribute to an increased number of privatisations, which will possibly have a positive effect on M&A activity in the market. This is taking place at the moment with Entra ASA, one of the largest owners of government real estate and offices, preparing for listing on the Oslo Stock Exchange.

GTDT: What does the future hold? What activity levels do you expect for the next year? Which sectors will be the most active?

OKA-E: It is difficult to predict the level of M&A activity for Norway for the next few years due to an expected slowdown within the oil and gas sector resulting from reduced prices. However, several factors indicate that overall M&A activity could improve, and that we will experience an increasing number of larger transactions. The reason for assuming that deal sizes are likely to increase is mainly attributable to the greater availability of credit. At the same time, as more and more businesses, particularly on Norway's west coast, start to experience the reduction in the level of investment activity in the oil and gas sector, this could level out the total M&A activity in the market. In the worst case, the reduction in oil and gas activity could contribute to a continuing reduction in deal volume for the next 12 months.

However, provided that we don't experience any new global crisis, I think it fairly likely that we'll see an increase in the overall M&A volume. There is a lot of cash waiting to be invested, and many corporates are turning their attention back to growth, which normally leads to increased deal activity. At the same time, several international surveys indicate that we will see an increase in the valuation multiples for the period throughout 2015. Currently, the Norwegian market is experiencing an exit overhang in the portfolio of many equity sponsors. If the valuation multiples are about to increase, this will likely lead to many sponsors attempting to initiate more exit processes over the next 12 to 24 months. As mentioned, I believe that the new government is likely to use such momentum to launch additional privatisation processes. I am therefore cautiously optimistic for the overall activity level during the next 12 months, in particular for deals within TMT and business services, but also in the food and retail, and the industrial sector. Even if the oil and gas sector for the moment may seem a bit depressed, I am fairly sure that we will continue to see M&A activity within this sector also for the next 12 months. Some investors may even use the short-term depressed outlook for this sector as a 'window of opportunity' to position themselves for further expected growth within this sector from 2016 to 2017 and onwards.

"Several factors indicate that overall M&A activity could improve, and that we will experience an increasing number of larger transactions."

Mark Geday

Tomasz Woźniak

M&A IN RUSSIA

Mark Geday and Tomasz Woźniak are English-qualified partners at the corporate practice in Herbert Smith Freehills' Moscow office.

Mark has experience dealing with all aspects of company law including M&A, disposals, reconstructions, joint ventures and fundraisings. He has particular experience advising private equity, hedge fund, real estate and wealth managers and has acted as co-head of the firm's asset management practice.

Tomasz has been working in Russia since 2007 and has particular expertise in public and private M&A, private equity, joint ventures and initial public offerings. Tomasz works closely with clients in the financial services, energy and natural resources sectors, and represents many international investors.

GTDT: What trends are you seeing in overall activity levels for mergers and acquisitions in your country during the last year or so?

Mark Geday & Tomasz Woźniak: There have been a number of high-profile 'mega deals' over the past couple of years, including deals in key sectors for the economy such as energy, mining and financial services but also in the consumer, real estate and technology sectors. Generally, however, the depressed levels of M&A activity experienced in 2013 have continued into 2014. Reported deal data indicates that in the first six months of 2014 alone there had been a 15 per cent drop in deal numbers compared with the same period in 2013; a decrease which far outstripped that experienced across emerging markets as a whole. Looking back further, overall 2013 saw a 25 per cent decrease in deal volume as against 2012.

The state and state backed-corporations such as energy companies Gazprom and Rosneft and banking giants VTB and Sberbank drive much of the economic activity. An ambitious programme of privatisations was announced in 2010 when Dmitry Medvedev, the incumbent prime minister, was president. The aim of the privatisation plan was to

revive the Russian economy and reduce the state's dominance in it. The programme is not without its opponents and a number of the targets initially set have been missed or revised. At the start of 2014, Mr Medvedev announced that he hoped to raise more than US$5.5 billion during the course of 2014 through the sale of stakes in state companies. This, as he made clear, would depend on market conditions, and these have not been favourable. As a result, a number of sales that had been expected to take place this year have been pulled.

As we discuss later, when considering the changes seen recently in the Russian legal, regulatory and commercial landscape, market conditions have become even more challenging in 2014 than they were in 2013. A slowing economy, regulatory uncertainty and most significantly the ongoing political situation in Ukraine and the consequential sanctions imposed by the EU, the US and other Western jurisdictions have all combined to create a difficult deal environment. It is not possible at this time to predict what further developments there may be in response to the Ukrainian situation and how the market will respond over time. However, as relations with investors from the EU and the US falter, there are signs of increased interest from Asian, in particular Chinese, investors.

GTDT: Which sectors have been particularly active or stagnant? What are the underlying reasons for these activity levels? What size are typical transactions?

MG & TW: The traditional powerhouses of the Russian economy – energy and financials – continue to dominate M&A activity. Alongside telecommunications, they together accounted for over 60 per cent of the M&A deals announced in the first two quarters of 2014.

Given the abundance of oil and gas in Russia and the technological complexity and expense involved in developing these natural resources, it is not surprising that energy and power account for a significant level of M&A deals. State-owned Rosneft and Gazprom continue to be the main drivers of M&A activity in this sector. However, as Russia looks to exploit new oilfields (particularly in the Arctic) and to continue the growth of its LNG production capabilities, the state companies need to identify and partner up with other investors to achieve these goals. In response to sanctions imposed by the US, the EU and others against aspects of the Russian oil and gas industry, Vladimir Putin has recently announced that China will be invited to take a stake in one of its largest oilfields in a tie-in with Rosneft.

As one of the largest and fastest-growing consumer markets in the region, retail activity is becoming increasingly important in the Russian M&A market. A recent example is the announced proposed investment by the Russia-China Investment Fund in a leading Russian toy retailer. The growth in this sector can be attributed partly to the increase in disposable income of middle-income Russians and, despite Russian sanctions on certain food imports, partly also to the perception of this sector as being one less susceptible to

domestic and international political factors. Although some existing market participants have increased their investment in Russia, for example the US$2.5 billion investment programme by IKEA announced in September 2014, other existing participants are adopting a 'wait and see' approach, investing where necessary to maintain their existing portfolios in Russia, reducing their exposure risk in the jurisdiction where possible and in some case investing to facilitate an exit.

GTDT: What were the recent keynote deals? What made them so significant?

MG & TW: Towards the end of 2013 and early 2014 we saw a number of private equity IPOs including the IPO of Lenta, the retailer backed by TPG and VTB Capital, and the IPO of Tinkoff Credit Systems Bank, the leading card-only bank, backed by a range of financial sponsors. It was hoped that these, together with other eagerly awaited exits, would mark a turning point in the approach of foreign private equity to Russia and more generally investment appetite for Russia. However, the subsequent events in Ukraine combined with the generally deteriorating economic conditions have tempered further public market activity.

As mentioned earlier, Vladimir Putin has announced that China will be offered the opportunity to invest in Rosneft's Vankor development. Although the deal is yet to be negotiated, it is a significant development as Russia has historically been reluctant to partner with foreign investors on onshore projects and has had a rather nervy relationship with its eastern neighbour. However, Russia appears to be reassessing its approach, not least as a result of its access to Western investment having been severely curtailed due to the recent EU and US sanctions. The potential Vankor joint venture follows the deal struck by Gazprom with China's CNPC in May this year to sell reportedly US$400 billion of natural gas over 30 years and the acquisition by CNPC last year of a 20 per cent stake in the South Tambeyskoye gas field project in the Yamal peninsula in north-west Siberia.

There remains a significant level of domestic activity among Russian-based groups. For example, Onexim Group completed two significant transactions in 2013 – the disposal of its 37.78 per cent stake in the London listed gold mining company, Polyus Gold International Limited, and the acquisition of a 21.75 per cent stake in Uralkali, the Russian potash producer – both deals each having a reported value of over US$3.5 billion. It is likely that activity among these Russian-based groups will continue in the upcoming period as they may pick up some of the slack resulting from foreign and PE investors being less active than they have been historically.

GTDT: In your experience, what consideration do shareholders in a target tend to prefer? Are mergers and acquisitions in your country primarily cash or share transactions? Are shareholders generally willing to accept shares issued by a foreign acquirer?

MG & TW: Generally cash is king in Russian M&A deals. Shares in Russian companies, even in those that are listed, tend to be relatively illiquid and so tend not to be preferred as a form of consideration. As noted below, another factor to bear in mind is that for certain Russian entities their ability to issue shares as consideration in international M&A transactions is limited by the sanctions to which they are currently subject.

While shareholders in Russia have been prepared to accept shares issued by foreign purchasers, particularly shares admitted to trading on overseas exchanges, it is unusual for consideration to take this form and where it does occur it tends to be where the foreign purchaser is an overseas holding company of a Russian group. It is yet to be seen what impact the political tension between the US, the EU and other Western jurisdictions on the one hand and Russia on the other will have on the willingness of domestic shareholders to accept foreign shares in the short to medium term.

GTDT: How has the legal and regulatory landscape for mergers and acquisitions changed during the past few years in your country?

MG & TW: Significant changes are being introduced to the Russian Civil Code. The amendments aim to provide for certain legal instruments and concepts that are commonly used in Western jurisdictions but that were previously unenforceable under Russian law (see further below). It is hoped that the changes, once in force, will help create a more flexible onshore legal environment. The changes that have already come into force include concepts of irrevocable powers of attorney and escrow arrangements, and allowing shareholders to choose the governing law of shareholders' agreements in relation to Russian companies. A number of other changes to the Russian Civil Code are still being considered.

Alongside the changes to the Civil Code, the Russian government is pursuing a 'de-offshorisation' programme aimed at stemming the considerable level of capital flight from Russia and encouraging the repatriation of capital previously channelled into offshore jurisdictions. There is a wide range of measures which may be viewed as part of the de-offshorisation drive, including the changes to the legal system noted above, changes to the tax system and to a degree the programme of intended privatisations.

As discussed, the sanctions imposed by the EU, the US and certain other Western jurisdictions on certain Russian entities and industries in response to the political situation in Ukraine have changed the legal and regulatory position in Russia and are having an impact on relations with foreign investors from these jurisdictions.

GTDT: Describe recent developments in the commercial landscape. Are buyers from outside your country common?

MG & TW: It is clear that recent political events in Ukraine are having a considerable impact on the commercial landscape in Russia. The sanctions imposed by the US, the EU and other Western jurisdictions target key sectors of the Russian economy and apply to a number of major Russian entities, including Gazprom, Rosneft, Sberbank, VTB Bank and VEB. Even entities that are not subject to sanctions may find it harder to attract overseas investors, as these potential investors are reassessing the risks and challenges (perceived or otherwise) of investing in Russia.

However, as one market closes, another opens. There has been much talk about a pivot to the East, with signs of increased interest from Chinese and other Asian investors in potential Russian investment opportunities and a possible shift in the attitude of the Russian state towards allowing China to invest in its strategic industries. Interest is also being expressed from investors in India and South Korea. Russian companies are also looking to raise capital from other capital markets particularly those centred on the Hong Kong and Singaporean markets.

It is likely that these alternatives to traditional Western investment will take time to come on stream.

GTDT: Are shareholder activists part of the corporate scene? How have they influenced M&A?

MG & TW: While there have been some examples of shareholders taking a more active role in the management and governance of public listed and unlisted companies in Russia, generally shareholder activists are not part of the corporate scene and do not have a significant influence on M&A in Russia. Unlike the experience in jurisdictions such as the US and the UK, the combination of low free floats and controlling shareholders means that it is unlikely that shareholder activism will become a prevalent feature of Russian M&A in the near future.

GTDT: Take us through the typical stages of a transaction in your jurisdiction.

MG & TW: While some deals are conducted through auctions processes or intermediaries, the majority are sourced through direct contact between the prospective business partners. Once the deal is initiated, the process tends to follow those adopted in other markets with a period of due diligence ahead of final negotiation of transaction documents.

Certain transactions involving Russian entities or that may have an effect in Russia may require regulatory approval. Subject to certain exemptions, the acquisition of 'control' by foreign investors of Russian companies operating in 'strategic business sectors' requires government consent. The strategic business sectors include the development of subsoil fields of federal significance and the nuclear, military and aviation industries. Companies incorporated in Russia and operating in any of these strategic business sectors will be presumed to be 'strategic companies' and therefore within the remit of the Strategic Investment Law. The concept of 'control' for these purposes is broadly defined and generally includes controlling the majority of the votes at a shareholders' meeting, having the power to appoint the majority of the board of directors and being entitled to appoint the CEO of the company.

Separately, and in common with many other jurisdictions, there are antimonopoly laws that need to be considered in relation to proposed mergers in Russia. The consent of the Federal Antimonopoly Service (FAS) will be required for transactions that

"As one market closes, another opens. There has been much talk about a pivot to the East, with signs of increased interest from Chinese and other Asian investors in potential Russian investment opportunities."

THE INSIDE TRACK

What factors make mergers and acquisitions practice in your jurisdiction unique?

The dominance of state-owned enterprises on the M&A market and the general political environment make Russia a challenging jurisdiction in which to do M&A transactions. Often we are faced with novel legal issues when dealing with the interaction between the Russian legal regime and international business practices. As a result clients tend to rely heavily on their lawyers to help navigate the complexities of transacting in Russia and deliver legally robust and commercially appropriate outcomes.

What three things should a client consider when choosing counsel for a complex transaction in your jurisdiction?

1 Can counsel provide seamless advice on Russian legal, regulatory and tax practices and the legal, regulatory and tax issues across the range of other jurisdictions and governing laws involved?
2 What experience does counsel have in dealing with local counterparties and regulatory authorities?
3 Does counsel have experience of negotiating and bringing to fruition complex transactions based on practical experience across Russia and other markets?

What is the most interesting or unusual matter you have recently worked on, and why?

China National Petroleum Corporation (CNPC) acquired a 20 per cent stake in the South Tambeyskoye gas field in a deal signed before President Putin at the G20 summit in September 2013 (and which completed in January 2014). The stake was acquired through the acquisition of shares in JSC Yamal LNG from Novatek, Russia's largest independent natural gas producer, which retains a 60 per cent interest in Yamal. The other co-investor is Total. The deal was a key investment by China in the developing Russian LNG market.

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may affect competition in Russia where certain prescribed thresholds are met. As the thresholds are relatively low, it is often necessary to approach the FAS for consent on transactions.

GTDT: Are there any legal or commercial changes anticipated in the near future that will materially affect practice or activity in your country?

MG & TW: For a variety of reasons, the majority of deals in Russia are structured using offshore vehicles and are governed by English law. Steps are being taken to try to change this approach and to bring structures onshore and make Russian law a more attractive alternative to English law.

As part of the de-offshorisation programme mentioned earlier, draft laws are currently being considered by the Russian government in relation to controlled foreign corporations (CFCs). The scope of the CFC rules are yet to be settled, but it is clear that the government is keen to restrict the availability of benefits provided under double tax treaties for recipients of Russian-source passive income where these recipients are not the beneficial owners of the income.

Alongside this, the Russian Ministry of Finance (Minfin) has published guidance on the concept of beneficial ownership. Minfin has made it clear that it views as abusive structures by which income is passed through a treaty country, thereby benefiting from the reliefs available under the treaty, but then subsequently paid on to non-treaty countries. The Minfin guidance links the concept of 'beneficial ownership' to the ability to derive benefit from the income and to determine its economic fate. These developments demonstrate that the Russian tax authorities are becoming more rigorous in their assessment of applications for reliefs contained in double tax treaties. The substance of ownership structures and the nature of the relationships between, and the functions of, the various entities in such structures are likely to be subjected to greater scrutiny. If entities are acting as mere conduits for the true beneficial owners, they may be disregarded for tax treaty purposes.

As already mentioned, further changes to the Civil Code are also expected to be introduced. Key concepts that are being considered as part of this process include equivalents to option agreements, and warranties, representations and indemnities.

It is not possible to predict at this point whether any further sanctions will be introduced in relation to Ukraine or when existing sanctions may be lifted. Equally it is not clear whether Russia will introduce any further measures that will affect the Russian M&A market. The current Russian sanctions restrict the import of certain food products from the EU, the US and other Western jurisdictions but are currently not at a level that affects overall M&A activity in Russia.

GTDT: What does the future hold? What activity levels do you expect for the next year? Which sectors will be the most active?

MG & TW: In the short term at least it would be surprising if activity levels picked up sharply as the political, economic and regulatory outlook remains uncertain. It is likely that the restrictions imposed by the EU, the US and other Western jurisdictions will continue to tighten market conditions, both directly and indirectly. Domestic buyers (with no significant ownership link to these jurisdictions) are not subject to these sanctions and can freely transact with entities on the sanctions lists. However, a number of the major Russian lending banks are subject to the lending restrictions imposed by the EU and the US and this may hamper the ability of these potential buyers to raise the finance necessary to make significant acquisitions.

As a result of these sanctions, and the various other issues discussed, we expect that deals made by state-owned enterprises are likely to continue to dominate Russian M&A activity. Foreign investor confidence is clearly being undermined by the recent events and it is very hard to predict how international investment in the Russian market will develop over the coming year.

While generally one would assume that the oil and gas, telecommunication and financial services sectors will continue to dominate the Russian M&A market, the sanctions imposed by the EU and the US target the energy and financial services sectors in particular and these will therefore influence activity levels and the identity of investors in these sectors while they are in force.

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Ezra Davids

M&A IN SOUTH AFRICA

Ezra Davids is the chairman of corporate and M&A at Bowman Gilfillan, specialising in mergers and acquisitions, capital markets and securities law.

Some of the most recent transactions in which Ezra has acted as lead partner include advising Marriott International in the acquisition of the Protea Hotel Group (the largest hotel group in Africa); BNP Paribas in the acquisition of RCS, a retail credit card business jointly owned by The Foschini Group and Standard Bank; Tata Communications in the disposal to Vodacom (the South African JSE-listed subsidiary of Vodafone) of its controlling shareholding in Neotel, the second-largest fixed-line telecommunications operator; and Orange (previously known as France Telecom) in the disposal to Africell, of its Ugandan subsidiary, Orange Uganda Limited.

Ezra is also the relationship partner for a number of the firm's major clients such as Bharti, Verizon, Barrick Gold Corporation, Nokia, UPS, Goldman Sachs, Merrill Lynch, UBS, Eskom and Transnet.

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GTDT: What trends are you seeing in overall activity levels for mergers and acquisitions in your country during the last year or so?

Ezra Davids: M&A activity began picking up again in the first quarter of 2013 and this trend has continued in the first half of 2014. Although activity levels are approaching the levels seen prior to the financial crisis, in respect of larger deals there remains a relatively higher number of aborted deals.

While there has been some inward investment into South Africa, M&A activity has been more pronounced between South African companies and by companies investing from South Africa into other African jurisdictions.

GTDT: Which sectors have been particularly active or stagnant? What are the underlying reasons for these activity levels? What size are typical transactions?

ED: Most recent M&A activity in South Africa has been in the telecommunications, financial services, real estate, mining and resources, private equity and hospitality and leisure sectors. The average size of transactions is around US$250 million.

Recent significant transactions in the financial services sector include the re-listing of Alexander Forbes, a major player in the South African insurance and financial services industry, following the exit of the private equity consortium which took the company private in 2007. With the consortium ready to exit, Alexander Forbes opted to re-list and offer a partial sale of 34 per cent to Marsh & McLennan Co's subsidiary Mercer, which will be an anchor investor. The IPO was the JSE's largest listing in almost four years.

The listed real estate sector has been one of the most active in terms of real estate acquisitions and capital markets activity in the last few years. This is set to continue with every current listed property fund committing to convert to real estate investment trusts (REITs). The sector is also likely to see a number of large new property fund listings (or reverse listings) as significant privately held property funds look to leverage off the tax benefits afforded to listed REITs. Consolidation happening in the sector looks set to continue, with many of the smaller listed funds being targets for the bigger players.

The mining sector in South Africa is experiencing significant and ongoing labour unrest following the strike-related violence that left 44 people dead at Lonmin's Marikana mine in August 2012. The platinum sector has also been hit by a strike that started in January 2014 and was only resolved at the end of June 2014. This will have an impact on the broader economy as significant job losses in the sector are anticipated as mining companies restructure and streamline their operations in South Africa.

Prior to the global 'credit crunch' in 2008, South Africa experienced a significant increase in large private equity deals. Examples of large deals that have taken place include the acquisition by Bain

Capital of Edcon Limited, a major South African retailer, for US$4.5 billion and the acquisition by a group of private-equity investors, including Actis LLP, of Alexander Forbes. Mainly due to the higher cost of debt, the private equity market in South Africa has been slow in terms of the number and value of deals. However, the numbers of private equity exit transactions are set to increase as investment periods (usually five to seven years) come to an end.

In the hospitality and leisure sector, Marriott International recently acquired the 116-hotel Protea Hospitality Group for 2.02 billion rand, thereby becoming the largest hotel company in Africa. A number of other chains are renovating their properties or planning to open new hotels and the sector is likely to remain active for some time to come.

GTDT: What were the recent keynote deals? What made them so significant?

ED: Recent transactions involving foreign investors have included Marriott's acquisition of the Protea Hotel Group and BNP Paribas's acquisition of RCS Investment Holdings Ltd. Also of significance is Alexander Forbes' IPO, which returned the company to the JSE after it was delisted following its acquisition by a consortium including locally based private equity groups Actis and Ethos.

GTDT: In your experience, what consideration do shareholders in a target tend to prefer? Are mergers and acquisitions in your country primarily cash or share transactions? Are shareholders generally willing to accept shares issued by a foreign acquirer?

ED: To date, shareholders have preferred to receive cash rather than accepting shares in a foreign entity, however, given recent changes in the exchange control environment, we anticipate more cross-border share-for-share deals in future.

GTDT: How has the legal and regulatory landscape for mergers and acquisitions changed during the past few years in your country?

ED: The introduction in 2010 of the new Companies Act, 2008 has modernised South Africa's company law. In particular, in relation to listed companies, it contains extensive provisions regarding accountability, corporate social responsibility and stakeholders' rights. The Act simplified and made significant changes to the law governing takeovers and mergers, and replaced previous takeover rules with a more comprehensive, modernised set of Takeover Regulations. The Act includes more comprehensive provisions regarding accounting records, financial statements and corporate governance, but allows great flexibility in the design and governance of companies. It also replaced the judicial management system with a more modern and practical business rescue regime.

Among other things, the Companies Act prescribes shareholder approval for the disposal by a target of a greater part or all of its assets or business; it provides for the compulsory acquisition of minority shareholdings when an offeror acquires 90 per cent of the shares in the target; it regulates schemes of arrangement (a statutory procedure commonly used to implement acquisitions, primarily in the context of public deals) and appraisal rights for dissenting minority shareholders to schemes of arrangement; and it provides for a statutory merger procedure where two corporate entities amalgamate into one.

The Financial Markets Act, 2012 was promulgated in 2013, repealing and replacing the Securities Services Act, 2004 in its entirety. The Financial Markets Act consolidates the law relating to the regulation and control of, among other things, exchanges and securities trading, central securities depositories (relevant for dematerialised shares), the custody and administration of securities, market abuse matters, restrictions on who may market securities and ancillary matters.

Another recent change is the relaxation of the restrictive exchange control regime to allow all South African residents to invest in inward listed shares without utilising their foreign investment allowance. The new regime relating to inward listings permits a foreign issuer to utilise its scrip as acquisition currency in acquiring a South African target, and allows South African institutional investors, authorised dealers, corporates, trusts, partnerships and private individuals to accept the inward secondary listed shares as consideration without restriction.

GTDT: Describe recent developments in the commercial landscape. Are buyers from outside your country common?

ED: Buyers from outside the country are increasingly common, and since 2010, there has been an upturn in foreign involvement in M&A transactions in South Africa. Recent examples of this are: the successful hostile takeover by Japan's Kansai Paint Co Limited of Freeworld Coatings Limited; the acquisition by Wal-Mart Stores of 51 per cent of Massmart Holdings Limited; the acquisition by Aon of Glenrand MIB; the acquisition by Marsh & McLennan Co's Mercer of a 34 per cent stake in Alexander Forbes Group Holdings; the acquisition by Marsh of Alexander Forbes Risk Services; and the acquisition by Marriott of the intellectual property and hotel management and franchise business of the Protea Hotel Group.

THE INSIDE TRACK

What factors make mergers and acquisitions practice in your jurisdiction unique?

Practising as a lawyer in South Africa is exciting – our laws are new, and that, in itself, is creating new opportunities. South Africa is seen by foreign investors as a gateway to Africa because of its mature business environment and highly developed financial system, and this means constantly dealing with international clients and transactions at a highly sophisticated and challenging level.

What three things should a client consider when choosing counsel for a complex transaction in your jurisdiction?

When selecting counsel, a client should look for a firm with a well-established reputation in respect of technical ability and expertise. The firm must have an intimate understanding of the local environment and knowledge of the principal players in government and the regulators. It is also essential that the firm has sufficient depth and resources to handle large, complex transactions.

What is the most interesting or unusual matter you have recently worked on, and why?

The hostile takeover of the JSE-listed Freeworld Coatings by Kansai Paint, a Japanese company listed on the Osaka and Tokyo Stock Exchange. This was the first successful bid by an international company for a South African target, and posed unusual challenges in that it was necessary to manage political involvement in the deal, which necessitated broad stakeholder engagement. It was also highly unusual for a Japanese company to choose to pursue a hostile takeover bid, and so dealing with the cultural dynamics of the deal was interesting.

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There have also been numerous investments by mainly Chinese, Indian and Korean companies in South Africa, often focused on the resources sector.

In the health-care sector, Chilean company CFR Pharmaceuticals failed in the first few months of 2014 in its takeover bid for JSE listed Adcock Ingram.

Recently there have been announcements of prospective deals which could potentially shift the legal domicile of certain major South African corporates or their subsidiaries offshore for the purpose of easily accessing international capital markets. The announced deals include AngloGold Ashanti's aborted plan to split its South African mines from international assets; Steinhoff seeking a listing on the Frankfurt Stock Exchange; and the food division of Bidvest seeking a London listing following improved performance.

South African and multinational companies are investing in key growth jurisdictions in Africa (such as Nigeria, Ghana, Kenya, Uganda and Tanzania) using South Africa as their base. For example, in acquiring the Protea Hotel Group based in South Africa, Marriott has also acquired hotel operations across seven other African countries. Marsh acquired the short-term insurance broking business of Alexander Forbes in 2012 that gave it reach from South Africa into Namibia, Botswana, Uganda, Malawi, Zambia and Nigeria. In addition, large South African-based companies such as PPC Cement, Shoprite (supermarket retailer) and Nampak (packaging company) have expanded rapidly into the rest of Africa through a mix of greenfield investments and acquisitions.

GTDT: Are shareholder activists part of the corporate scene? How have they influenced M&A?

ED: Though at a nascent stage, shareholder activism is nonetheless a factor to be considered in transactions. The group of shareholder activists in South Africa primarily comprises institutional investors and fund managers who have been active in seeking out greater shareholder value. Investors in these activist funds now include an increasing number of large pension funds and institutions.

To date shareholder activists have not played a significant role, although the market has taken note of the influence that shareholders can wield. Recent examples include AngloGold Ashanti's withdrawal of a US$2.1 billion rights issue and restructuring following billionaire hedge-fund manager John Paulson's declaration that his company would not vote its shares in favour of the proposed transaction.

Further evidencing an increase in shareholder activism are the statements made against the board by former CEO of PPC, Ketso Gordhan, whose unexpected resignation rocked the cement

producer's share price recently. Following his resignation, Gordhan remains one of the biggest individual shareholders in the company and has issued statements affirming his commitment to PPC and his willingness to return as CEO if the company's shareholders see this as being in the best interest of the business.

GTDT: Take us through the typical stages of a transaction in your jurisdiction.

ED: The M&A legislative framework in South Africa comprises both statute and common law. In private M&A deals, where much is regulated by agreement between the parties, the uncodified common law of contract plays a particularly significant role. In public M&A deals, once an offer is made the process is highly regulated by the provisions of the Companies Act (including the Takeover Regulations) and the Listings Requirements of the JSE.

GTDT: Are there any legal or commercial changes anticipated in the near future that will materially affect practice or activity in your country?

ED: The Promotion and Protection of Investment Bill, published in November 2013, regulates the protection of foreign investors. The Bill is intended to promote investment by modernising the current investment regime and striking a balance of rights and obligations that apply to all investors when investing in South Africa. Importantly, it provides a foreign investor with the same rights as a domestic investor in South Africa, and provides that foreign investors will be treated no less favourably than domestic investors.

GTDT: What does the future hold? What activity levels do you expect for the next year? Which sectors will be the most active?

ED: Although South Africa faces social challenges in respect of unemployment, a large current account deficit, a volatile currency and slower demand for commodities, there is huge scope for foreign direct investment in resources, financial services, telecommunications and information technology, retail, pharmaceuticals, hospitality and the fast-moving consumer goods sectors. This is mostly driven by the African growth story, which South Africa, through its well-developed infrastructure, financial services, telecommunications and legal system, is well placed to benefit from through its unique position as the gateway to the rest of Africa. This creates great opportunities for increased M&A activity. This is reflected by the continued interest shown by Chinese, Indian, Brazilian and French investors and the increased interest shown by Japanese, Korean and US investors.

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Alexander Kolb

M&A IN SPAIN

Alexander is a partner in Linklaters' Madrid corporate department. His practice combines private M&A, private equity, as well as public M&A (in particular, takeover bids, public-to-private deals and mergers) transactions. He regularly advises both domestic and international clients in relation to their investments in Spain and abroad. He also has extensive experience in a variety of sectors.

In recent years Alexander has advised Banesto on the merger with its parent company Banco Santander; a Canadian pension investment manager in relation to the €500 million investment in Isolux Infrastructure; ACS on its takeover bid for German infrastructure company Hochtief AG; International Petroleum Investment Company (IPIC) on the around €4 billion takeover bid for the acquisition of a stake of around 53 per cent in Spanish listed oil corporate CEPSA; Enagás on the acquisition of a minority stake in the Trans-Adriatic-Pipeline project; N+1 on the acquisition of a 55 per cent stake in Spanish Alternative Stock Market (MAB)-listed audio-visual company Secuoya; and Cintra on the merger with its also listed parent company Grupo Ferrovial.

"There has been a 10 per cent increase in the overall number of M&A deals compared with the previous year, in all the market segments."

GTDT: What trends are you seeing in overall activity levels for mergers and acquisitions in your country during the last year or so?

Alexander Kolb: Uncertainties surrounding the Spanish economy and its financial system have taken a back seat. The better outlook for the Spanish economy has meant that there is room for growth and we are seeing good investment opportunities in all sectors. We are experiencing a return of traditional M&A transactions, which had been limited during the financial crisis. Also, distressed international opportunity funds have kept very active this year investing mainly in real estate related assets and debt portfolios. There has been a 10 per cent increase in the overall number of M&A deals compared with the previous year, in all the market segments: smaller, middle and high-end. The overall investment was stable in 2013, but with a slight decrease, compared with the previous year. As the data indicate, this positive trend should mark the M&A sector in the upcoming years.

Given the limited access to credit, in 2014 we have seen more transactions in the securities markets, as an alternative means for companies to obtain financing. Two clear examples include, on the one hand, the various SOCIMIs (comparable to European REITs) that have been created and floated, and, on the other hand, very recently we have seen infrastructure companies tapping the markets by setting up 'Yieldco' structures, where part of a company's business is split off and 'packaged' in a separate company, part of whose capital is listed on a stock exchange. To date, Abengoa is the only Spanish company to have put this structure in place by setting up Abengoa Yieldco plc, which has been listed on the NASDAQ in the first half of 2014 (being the first non-US issuer to do so). However, there are indications that other Spanish infrastructure companies are already following the example.

Another trend resulting from the financial crisis has been for companies to focus on their core business. In this regard, the past year has seen various divestments, whether driven by business strategy, financial reasons or otherwise, of assets or stakes or business divisions considered to be non-core. Examples include, among many others, the sale by Gas Natural Fenosa of its telecommunications arm to Cinven, the sale by Bankia and FCC, of their stake in SIIC de Paris, or the sale by Abertis of various assets in its airport business.

GTDT: Which sectors have been particularly active or stagnant? What are the underlying reasons for these activity levels? What size are typical transactions?

AK: The telecommunications, energy and infrastructure sectors are the main sectors that have been particularly active in recent months. In the telecoms sector, for example, Vodafone acquired Ono, and Orange is currently in the process of taking over Jazztel. Cinven bought the telecoms subsidiary of Gas Natural Fenosa and Hispasat has been in talks to potentially acquire the Israeli satellite operator Spacecom.

The energy and infrastructure sector has also been quite active during the past few months, with

transactions such as the sale by E.ON of its assets in Spain, the acquisition of a stake by Enagás in the Trans Adriatic Pipeline consortium or the ongoing partial privatisation of AENA, the Spanish public authority that owns and operates the majority of Spanish airports.

The distressed asset world has also been highly active this past year. Spain's economic situation created a favourable environment for opportunistic funds to invest in distressed assets and debt (ie, assets with a high risk of default or low demand and, accordingly, at prices with significant discounts on the asset's nominal value). The large volume of assets of this kind that were available in Spain (due to, among other things, the restructuring of the financial sector and the bursting of the 'real estate bubble') paved the way for some of the most significant deals in recent times, such as the recent sales of loan portfolios of Catalunya Banc and Eurohypo.

GTDT: What were the recent keynote deals? What made them so significant?

AK: Apart from those notable transactions already mentioned, among the keynote deals one should mention the sale by Repsol to Shell of its liquefied natural gas (LNG) assets, one of the largest M&A transactions in Spain in recent times and the largest transaction ever carried out in the LNG sector worldwide. Also the cash takeover bid for Spanish listed company Campofrío, the largest European company in the processed meats sector, made by Sigma, a subsidiary of Mexican group Alfa, which has been the first 'real' takeover bid in recent years, as the bids in Spain in the last three years were largely transactions initiated by existing (majority) shareholders of the relevant listed company, as was the case, for example, with the merger between Banco Santander and its subsidiary Banesto.

Further relevant M&A transactions include the acquisition by Apollo of Altamira, the servicing platform of Banco Santander, or the set-up of a series of joint venture financial companies between Banco Santander and Banque PSA, the captive financing arm of PSA (the French manufacturer of Peugeot, Citroën and DS vehicles), a transaction involving more than 11 jurisdictions.

It is also worth mentioning the growth in IPOs that we've seen this last year in Spain. This includes the flotation of Lar España Real Estate SOCIMI, which was the first Spanish property investment company (comparable to a REIT) to be listed on the Spanish regulated stock exchanges, and the float of MERLIN Properties SOCIMI, also a Spanish property investment company, which used a portion of the proceeds to acquire a substantial seed portfolio and at €1.25 billion was one of the two largest European real estate IPOs ever. We have also experienced a resurgence in sponsors' exits by means of IPOs, as has been the case of the IPO of eDreams ODIGEO (previously owned by Permira) and the float of Applus Services (previously owned by Carlyle), which at €1.1 billion was one of the largest IPOs in the Spanish market thus far this year.

GTDT: In your experience, what consideration do shareholders in a target tend to prefer? Are mergers and acquisitions in your country primarily cash or share transactions? Are shareholders generally willing to accept shares issued by a foreign acquirer?

AK: Although the limited access to credit has been a factor that has led to share exchange transactions becoming more popular, as a general rule, Spanish shareholders have a preference for cash, rather than for share considerations and most transactions are made with a cash consideration. It is fair to say that share-for-share transactions are mostly seen in the context of large mergers and takeover bids involving listed companies where the shareholders of the target or absorbed company receive shares in the acquirer's capital (usually listed and, therefore, liquid).

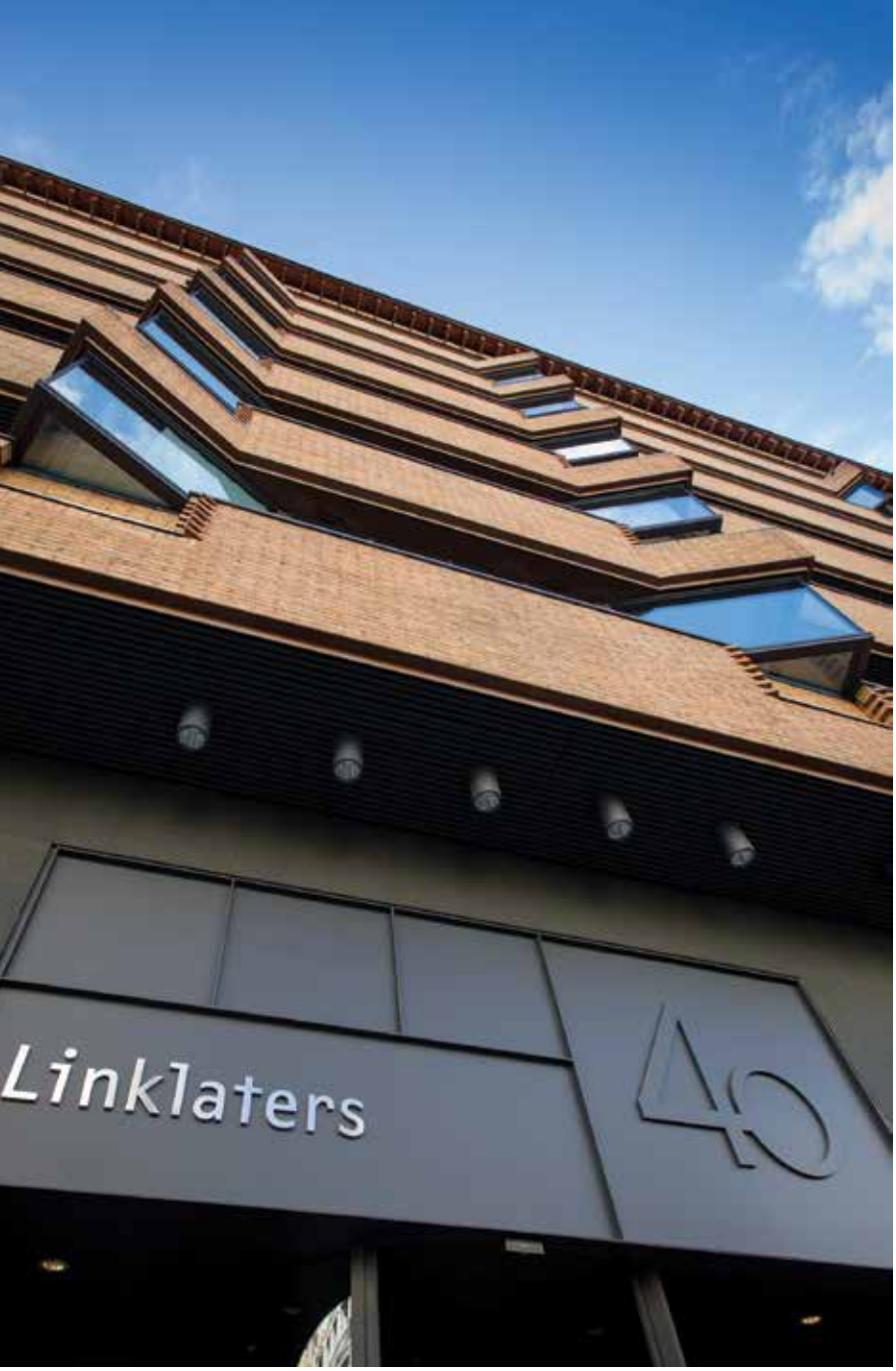
GTDT: How has the legal and regulatory landscape for mergers and acquisitions changed during the past few years in your country?

AK: In recent times, the crisis and the critical need of the Spanish government to reduce the public deficit have put Spain's tax laws in the spotlight, having a significant impact on how deals (including M&A transactions) have to be structured.

One of the main measures that have impacted M&A transactions in general (and restructurings in particular) has been the restriction on the use of carried forward tax losses (with particular relevance in transactions involving debt restructurings – with embedded losses).

The impact of this measure has been clear: at first, many M&A transactions failed to be completed given the related tax costs. Once the restriction was amended, deal flow increased as the types of companies involved in M&A transactions in recent times had material tax losses. Finally, with the new legislation currently in force, many M&A deals are structured through the acquisition of the target company's debt, which is subsequently capitalised in exchange for shares (so that the investors take ownership but avoid a taxable gain upon reducing the leverage of the target company, as was the case under the previous legislation).

In the real estate M&A sector, certain improvements to the tax rules applicable to SOCIMIs (that make it possible to significantly reduce taxes payable on real estate properties to be let and the upstreaming of related funds to non-Spanish investors) have clearly bolstered the number of deals. Basically, the new tax measures currently in force have encouraged the acquisition of real estate



properties and have allowed Spanish managers to raise around €2 billion to invest in the Spanish real estate sector.

Legislative reforms have also been made in respect of regulated industries, although the most important of these was the new regime applicable to power generation plants using renewable sources, cogeneration and waste. The new rules, which introduced a new remuneration scheme applicable to existing renewable energy facilities, have entailed a review of the investments made in this sector.

Major reforms have also been seen in the insolvency field. These include laying down a legal framework to help overindebted but operationally viable companies to survive.

GTDT: Describe recent developments in the commercial landscape. Are buyers from outside your country common?

AK: Spain has experienced a huge increase in international investors looking at opportunities in the country. This includes not only financial sponsors from Asia or the US, but also private investors from Latin America.

There are a number of reasons for this. On the one hand, a large cut-price market was created during the crisis, made up of distressed (NPLs, platforms, etc) and non-distressed assets. On the other hand, the resurgence in the Spanish economy and the measures taken by the government have increased the confidence of international financial sponsors (private equity funds as well as sovereign wealth funds) in the country. In recent years, this led to deals such as the takeover bid for CEPSA made by Abu Dhabi-based IPIC, or the acquisition of approximately 5 per cent of the shares in Repsol by Singapore-based Temasek. There is also a stronger connection with Latin American countries and a growing interest from investors in those countries to invest in Spain, as they see Spain, for many reasons (including cultural and language), as an entry point into European markets. An example of this could be the Mexican group Alfa taking over Campofrío.

In recent years we have also seen Spanish companies expanding internationally and, consequently, investing abroad (mainly in Latin America, but also in other regions), as a way not only to grow but also to spread their country-risk and dilute their exposure to the Spanish economy. Notable examples can be found in the infrastructure sector, such as listed companies OHL and Abertis (OHL transferred its toll motorways in Chile and Brazil to Abertis in consideration of a stake in the latter), Enagás (which recently acquired a stake in the Trans Adriatic Pipeline (TAP) project and was also awarded with the Gaseoducto Sur Peruano project in consortium with Oderbrecht) or Gas Natural Fenosa (which announced the agreement to acquire Chilean utilities company Compañía General de Electricidad). Further, Spain

"Spain has experienced a huge increase in international investors looking at opportunities in the country. This includes not only financial sponsors from Asia or the US, but also private investors from Latin America."

THE INSIDE TRACK

What factors make mergers and acquisitions practice in your jurisdiction unique?

Following a period in which Spain has been very severely hit by the crisis (and which has involved, among other things, an in-depth restructuring of the financial sector, a labour reform and many other significant legal reforms) and now that the uncertainties surrounding the Spanish economy and its financial system have to a certain extent vanished, the current landscape is one of good investment opportunities in many sectors.

The availability of many investment opportunities (whether deriving from privatisations or disposals), combined with the increased international expansion of Spanish corporates and the renewed optimism and confidence among the international business community in a fresh start into a new cycle make Spain a very exciting and unique market for M&A.

What three things should a client consider when choosing counsel for a complex transaction in your jurisdiction?

First and foremost, a good knowledge and understanding of the Spanish market and the relevant sector. Second, a commercial and practical hands-on approach to the transaction combined with soft skills which ensure a smooth transaction management. Clients need their advisers to be problem-solvers. Third, since M&A transactions are becoming increasingly complex and international, it is key to use a firm that offers the full range of expertise typically involved in a transaction and the ability to handle international aspects in a seamless one-stop-shop approach.

What is the most interesting or unusual matter you have recently worked on, and why?

In particular, I would single out one public M&A transaction abroad, involving a target company in a sector that is highly strategic from a regulatory and national security perspective. In addition to numerous regulatory complexities involving various jurisdictions, several securities laws related issues came up, some of which were novel under local law and, therefore we looked for potential solutions in other similar legal systems. This is a good example of a situation where Linklaters' international network helped to bring suitable solutions from other jurisdictions to the table. Apart from the professional challenges, the transaction offered a great opportunity to work with a multicultural team in a highly interesting cross-border deal and enjoy a great working atmosphere.

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is increasingly becoming a bridgehead for many foreign multinationals that deploy their international expansion into certain markets (particularly, Latin America and, to a lesser extent, Africa) out of Spain.

GTDT: Are shareholder activists part of the corporate scene? How have they influenced M&A?

AK: Unlike in other European countries, shareholder activism (understood as activism promoted by institutional investors) is a phenomenon quite rarely seen in Spain so far. The few notorious cases include the precedent of Viscofan, where the pressure made by activists led to certain corporate governance changes being made by Viscofan's board of directors.

Therefore, generally speaking, shareholder activism has not been a major topic on the agenda of M&A transactions in Spain. However, this landscape could potentially change in the near future since we are observing an increasing sensitivity of institutional investors, a legal environment promoting the use of voting rights, proxy advisers, etc, an increased presence of international investors in the Spanish market and a growing corporate governance culture.

We also note that Spanish listed companies are more sensitive to this phenomenon and directors increasingly endeavour to secure the approval by the shareholders and, particularly, by institutional investors of any proposals submitted to the general meeting. Therefore, it cannot be ruled out that shareholder activism may increasingly become an issue in Spain.

GTDT: Take us through the typical stages of a transaction in your jurisdiction.

AK: There is no general rule and the details tend to vary depending on a number of factors: deal size, identity of the seller, strategic rationale of the transaction, etc.

That said, lately a significant number of deals in Spain have been conducted by way of competitive processes (typically auctions), as, given their nature, maximising sale proceeds was a top priority (as opposed to other transactions where price is of course relevant but other factors, such as strategic

fit, were also key). This is the case, for example, of sales of distressed assets and sell-offs by the Fund for Orderly Bank Restructuring (FROB) of banks previously taken over by the government (such as NCG Banco, acquired at the end of last year by Banco Etcheverría, SA/Grupo Banesco, or more recently the sale of Catalunya Banc, acquired by BBVA).

In these kinds of transactions, it is usually the financial advisers who contact potential buyers. Those interested in the deal are requested to submit an indicative offer which allows shortlisted bidders to initiate a detailed due diligence process. Through the due diligence the potential investor is able to obtain further information necessary to assess and objectively determine the price, the optimal deal structure and identify any areas of concern or that require particular attention. Based on such information, interested bidders are requested to submit a binding bid by a certain date, which typically includes a marked-up version of the transaction documents in a form which, by and large, the bidder would be prepared to sign if its bid is finally selected. Having received the binding bids, the seller usually selects one (or even a few) preferred bidders and negotiates the final details before signing the binding transaction documents.

As opposed to such competitive processes, in bilateral transactions, after initial contacts between the parties (either directly or prompted by a financial adviser who has identified the potential transaction), a pre-agreement is usually entered into (eg, a letter of intent or a memorandum of understanding) which sets forth the main terms agreed between the parties, the next steps (due diligence, negotiation of transaction documents, etc) as well as a set of rules and an indicative calendar to continue negotiating the terms and conditions of the transaction in more detail. Often, the buyer is granted exclusivity during a certain period of time, in order to be prepared to incur the cost involved in conducting the due diligence and continuing the negotiations.

GTDT: Are there any legal or commercial changes anticipated in the near future that will materially affect practice or activity in your country?

AK: Since the beginning of its mandate following the elections in late 2011, the current Spanish government has implemented an intense reform programme (in some cases, to implement legislative changes deriving from EU law). These reforms are mainly aimed at correcting inefficiencies in the Spanish economy and promoting its growth and competitiveness.

Notable among the most important measures expected in the coming months are changes to the tax system, a boost for lending to businesses (through the implementation of alternative sources of financing) and reforms in the infrastructure, transport and energy industries. In terms of corporate law, amendments will be made to improve corporate governance at companies. This is in addition to a number of steps already taken, including the reform of insolvency law to guarantee the survival of overindebted but operationally viable companies.

It seems reasonable to anticipate that these changes will contribute to increased M&A activity, both indirectly (as a consequence of market improvements and increased confidence, better access to financing, etc) and directly (ie, where these legislative changes prompt investments or divestments in Spain). In any event, it remains to be seen over the coming months what actual impact these changes will have on the Spanish M&A market.

GTDT: What does the future hold? What activity levels do you expect for the next year? Which sectors will be the most active?

AK: We live in complex times and certainly do not have a crystal ball to predict how the markets will develop but we are optimistic about the future. As mentioned, there is more confidence in Spain. Indicators also show that lending is on the rise again after years of stagnation and at the same time we have witnessed the appearance of new financing sources, such as alternative credit providers.
It looks like there will continue to be plenty of activity (and presumably more than in recent times), particularly in certain sectors, including infrastructure, energy and, to a lesser extent, in other sectors such as telecoms. This is partly because Spanish corporates still wish to raise cash, which they can obtain through disposals, whether in private sales, through IPOs or by setting up joint ventures with strategic investors. In particular, looking at the number of listings recently made and those in the pipeline, IPOs seem to be back and high activity levels can be expected.

Also, privatisations of publicly owned companies (such as the ongoing partial privatisation of Spanish airports operator AENA or potentially the privatisation of the Spanish lottery system which was suspended a few years ago and is bound to return at some stage) are expected to give rise to M&A activity. On top of this, the improved prospects of the Spanish economy make it likely the government will increase its investment, compared to previous years, particularly in the infrastructure sector.

Further, as previously mentioned, in the context of their implementing a 'back-to-the core' strategy, companies are expected to continue disposing of non-core assets.

All in all, it seems reasonable to anticipate that M&A activity levels will increase over the coming months, with international investors remaining very active in the Spanish market and large Spanish corporates continuing their expansion into foreign markets.

Christoph Neeracher

M&A IN SWITZERLAND

Christoph Neeracher specialises in international and domestic M&A transactions (focusing on private M&A and private equity transactions, including secondary buyouts, public to private transactions and distressed equity), transaction finance, corporate restructurings, relocations, corporate law, general contract matters (eg, joint ventures, partnerships and shareholders agreements) and all directly related areas such as employment matters for key employees (eg, employee participation and incentive agreements).

He is experienced in a broad range of national and international transactions both sell and buy side (including corporate auction processes) and the assistance of clients in their ongoing corporate and commercial activities. Additionally, Christoph Neeracher represents clients in litigation proceedings relating to his specialisation.

Chambers Europe ranks him as a leader in the field of M&A (2010–2012) and *The International Who's Who of M&A Lawyers 2012* lists Christoph Neeracher as one of the world's leading M&A lawyers.

His clients include Capvis, Migros, Partners Group, SK Capital Partners and Valora.

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GTDT: What trends are you seeing in overall activity levels for mergers and acquisitions in your country during the last year or so?

Christoph Neeracher: After a subdued 2013 in the Swiss M&A environment, the beginning of 2014 was characterised by a comeback of mega deals, most notably the 41 billion Swiss francs blockbuster merger between Lafarge and Holcim. According to a market survey by Ernst & Young, 154 Swiss companies were involved in M&A transactions in the second quarter of 2014. As several of those deals were valued over 1 billion Swiss francs, the transaction volume for the second quarter amounted to a record 82 billion Swiss francs, exceeding the 2013 second quarter result by four times. In the third quarter, the deal count rose to 165. However, due to the lack of mega deals, the volume declined to 50 billion Swiss francs, which is, however, still a very strong result. In total, the first three quarters of 2014 resulted in 434 deals and a total deal volume of 152 billion Swiss francs. The number of deals remained nearly identical to the same period in 2013. However, the total volume exceeded the same period in 2013 by 10 times: an amazing result!

In line with the strong M&A activity, the Swiss Market Index (SMI) rose by 6 per cent in the first three quarters of 2014. Despite the heavy M&A activity, the delayed increase in export growth, which is caused by the slow recovery of the world economy and the relative strength of the Swiss franc, the Swiss business cycle research institute lowered the GDP forecast for 2015 to 1.9 per cent.

GTDT: Which sectors have been particularly active or stagnant? What are the underlying reasons for these activity levels? What size are typical transactions?

CN: For the fourth consecutive quarter, the industrial goods and services sector was the most active industry sector. Twenty-one per cent of all M&A transactions in the third quarter 2014 took place in this sector. Other very busy sectors included health care (17 per cent) and media, technology and telecommunications (16 per cent). This means a declining activity for the industrial goods and services sector and a strong increase of 7 per cent for the health-care sector owing to some mega deals. The latter was contributing an astonishing 78 per cent of total volume, which translates to 39 billion Swiss francs. This was mainly driven by the 23 billion Swiss francs acquisition of Alliance Boots GmbH by Walgreen Co and the 8 billion Swiss francs acquisition of InterMune Inc by Roche Holding AG. The underlying reasons for these activity levels are, among other things, the performance of the stock listed shares (this industry outperforms the SMI by 10 per cent), higher paid multiples and higher realised gross margin, all compared to the SMI average during the past 12 months.

In the third quarter of 2014, 35 per cent of the deals had a higher volume than 250 million Swiss francs, and 39 per cent of the concluded deals had a volume lower than 50 million Swiss francs.

GTDT: What were the recent keynote deals? What made them so significant?

CN: The most impressive deal was the merger of the two cement giants Holcim AG and Lafarge SA. While Holcim created a strong position in South America and Asia, Lafarge concentrated to the Near and Middle East and Africa. This combination will lead to the world's largest cement company. Another recent keynote deal is the takeover of Alliance Boots GmbH by Walgreen Co for approximately 23 billion Swiss francs.

Furthermore, Novartis AG announced in April it wanted to strengthen the company's innovative pharmaceuticals business by acquiring GlaxoSmithKline plc oncology products, and divest vaccines (excluding flu) to them. The two companies will also create a joint venture, combining their consumer divisions to create a world-leading consumer health-care business.

In a separate transaction, Novartis announced a definitive agreement with Eli Lilly to divest the animal health division, further focusing its portfolio on the leading businesses of innovative pharmaceuticals, eye care and generics.

In August, Roche AG announced its intention to acquire InterMune Inc for 8 billion Swiss francs. Roche is paying 63 times more than the turnover of InterMune and primarily wants access to InterMune's sole product, which fights pulmonary fibrosis and is classified to the sector of the immunology.

Other impressive deals include Kering's acquisition of the Swiss luxury watchmaker Ulysse Nardin (which is still subject to closing), and the acquisition of a 49 per cent minority stake in Ringier's new media Scout24 Schweiz and Omnimedia by the US private equity giant Kohlberg Kravis and Roberts. In terms of legal complexity, the most remarkable deal in the past 12 months was SK Capital Partners' acquisition of three business units from Clariant. The deal required close coordination of legal advisers over a period of approximately nine months and across 35 jurisdictions, as a new stand-alone business, now operating under the name Archroma, was created through numerous share deals and asset carveouts.

GTDT: In your experience, what consideration do shareholders in a target tend to prefer? Are mergers and acquisitions in your country primarily cash or share transactions? Are shareholders generally willing to accept shares issued by a foreign acquirer?

CN: This mainly depends on the intentions of the selling shareholders and the acquisition type. Generally, acquisitions in Switzerland tend to be settled in cash. If a purchaser offers shares, sellers usually accept such consideration only if the shares are readily marketable (possibly after a lock-up period). The necessity of the shares being marketable rules out share-for-share deals involving private companies as buyers. Parties are, however, free to combine cash, share and other purchase price components. The recently published acquisition of the Swiss AAE Ahaus Alstätter Eisenbahn Holding AG by VTG AG, which is listed in Germany, was financed by way of newly issued VTG shares, a cash component and a subordinated vendor loan note with equity characteristics.

In public transactions, mandatory offers have to be made in cash or must at least include a cash alternative when making an exchange offer.

Finally, as the AAE Ahaus Alstätter Eisenbahn Holding AG acquisition proves, Swiss shareholders are willing to accept shares issued by a foreign acquirer, as long as such shares are marketable.

GTDT: How has the legal and regulatory landscape for mergers and acquisitions changed during the past few years in your country?

CN: On 1 May 2013 an important amendment to the Federal Act on Stock Exchanges and Securities Trading (SESTA) entered into force and introduced changes to both takeover law as well as market abuse and insider dealing rules. The amendment,

among other things, prohibits the payment of control premiums to main shareholders in public takeover offers. Additionally, the amendment aims at closing regulatory gaps and harmonising Swiss law with international standards. The scope of application of SESTA has been extended regarding the disclosure duties of share ownership and public offers for companies with offices in foreign countries, which have their shares primarily listed in Switzerland. Furthermore, the reorganised procedural responsibilities allow officials to act more effectively against insider trading. Insiders may now be punished with imprisonment of up to five years as well as fines of up to 1 million Swiss francs. The intentional breach of disclosure duties may be sanctioned by fines of up to 10 million Swiss francs.

Furthermore, Swiss voters approved a new law against 'fat cat' salaries, which is, however, only applicable to companies listed in Switzerland. It calls for extensive new mandatory rules on transparency and compensation of board members and senior management. The new law, among other things, prohibits severance payments, advance payments and similar extraordinary payments to directors or senior managers. As of the annual general meeting 2015, shareholders' approval regarding the aggregate compensation of the board of directors and the senior management will be mandatory. On top of that, the articles of association of listed companies will have to include rules for directors and senior managers on loans, retirement benefits, incentive and participation plans, and the number of mandates outside the group. Furthermore, the institutional voting representation by governing bodies of the company itself or custodians is henceforth abolished, which will strengthen the role of the independent proxy.

As a consequence of this new law, some smaller listed companies may consider a delisting in order to avoid the new regulations and related legal and compliance costs. As witnessed in the course of last year, a public Swiss company (Acino Holding) was taken private.

"Generally, acquisitions in Switzerland tend to be settled in cash. If a purchaser offers shares, sellers usually accept such consideration only if the shares are readily marketable."

GTDT: Describe recent developments in the commercial landscape. Are buyers from outside your country common?

CN: The Swiss economy is traditionally very export-orientated. In 2013 the Swiss Federal Statistic Office registered exports of more than 212 billion Swiss francs. Nearly 60 per cent thereof had its destination in Europe. Therefore, it is obvious that the weak euro (or the strong Swiss franc) is still a problem for the commercial landscape. But the Swiss National Bank continues to reaffirm the minimum exchange rate between the Swiss franc and the euro, which should stabilise the Swiss export industry.

Growing uncertainty concerns the Swiss commercial landscape also in relation to new regulations and laws. Many Swiss banks are still in negotiations with the US regarding potential violation of US tax laws. Additionally, the Swiss unexpectedly voted for the 'fat cat' initiative and the initiative against mass immigration – two initiatives which are (at least according to some analysts) not at all in the best interests of the Swiss commercial landscape.

However, the Swiss market is still very attractive for foreign investors. Generally, there are very few restrictions on foreign investors acquiring companies in Switzerland. One restriction limits the direct or indirect acquisition of real estate by foreign companies or individuals (Lex Koller). Other restrictions foresee disclosure duties, regulatory approvals or special requirements in case of acquisition of a banking, financial, insurance, or casino company. In recent M&A deals, foreign investors mainly originated from western Europe (5.4 billion Swiss francs), North America (1.4 billion Swiss francs), Russia (800 million Swiss francs), Africa (600 million Swiss francs) and Asia (300 million Swiss francs). This statistic shows that despite the strong Swiss franc, which leads to even pricier Swiss targets, said targets are not only interesting for local and western European investors, but for investors around the globe.

GTDT: Are shareholder activists part of the corporate scene? How have they influenced M&A?

CN: In recent years, shareholder activism has risen significantly in Switzerland. In contrast to other jurisdictions, shareholders of Swiss companies cannot use the channels of the company to communicate with other shareholders and have no right of access to the share register. This means that the communication between activists and the

THE INSIDE TRACK

What factors make mergers and acquisitions practice in your jurisdiction unique?

Switzerland's stable political system, liberal economy, highly educated workforce, sophisticated and efficient legal environment, and traditionally mild tax regime all contribute to an excellent environment not only to the M&A market, but to the business environment in general, and well-established national corporations are often involved in M&A deals.

What three things should a client consider when choosing counsel for a complex transaction in your jurisdiction?

The most important thing is without a doubt deal experience, followed by industry knowledge and responsiveness.

What is the most interesting or unusual matter you have recently worked on, and why?

Every deal raises interesting and unique questions. One of the most interesting and challenging deals we worked on in the past few months was definitely SK Capital Partners' acquisition of Clariant's textile chemicals, paper chemicals and emulsions business units. As the transaction consisted of share and asset carveouts in over 35 jurisdictions around the globe, we liaised with dozens of colleagues from other law firms all over the world. It was just fantastic to see how this transaction turned out to be a success for both parties.

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target's shareholders is reduced to the information, that is normally available to a shareholder. In combination with the disclosure requirements of the SESTA in case of acquiring or selling equity, defensive measures of the company, for example, voting restrictions, and other measures, can ensure that activists are hindered effectively.

The newly applicable Ordinance Against Excessive Compensation might change this in the future because it stipulates the duty for pension funds to vote in general meetings of companies in the interest of their insured persons. Therefore, pension funds will probably more frequently take advantage of the advice of proxy advisers such as ISS, Glass Lewis, Ethos, Swipra or zCapital. Consequently, it is very likely that such movements will become more important especially regarding the approval of management compensation in the near future.

GTDT: Take us through the typical stages of a transaction in your jurisdiction.

CN: Every M&A transaction is different and must be individually structured to take into consideration the specific needs of the purchaser and the seller as well as the target business. The features of an M&A transaction depend mainly on the legal form of the target business (share corporation, limited liability company or others), the purchaser (foreign or domestic, public or private), the seller (foreign or domestic, public or private), the legal form for the transaction (asset deal, share deal, mixture of asset and share deal or statutory merger) as well as tax considerations.

A common private M&A deal could consist of the following phases:

During the first phase – the preparation phase – the sales documentation, the marketing material, etc need to be prepared by the seller. In the marketing phase, the first contact with the potential bidders is initiated. This can happen through intermediaries or the executive management. However, the larger the deal size and the more complex the deal structure, the more common it is to use professional financial advisers. If a bidder is interested, the parties typically enter into a letter of intent which contains the principal terms of the contemplated transaction as well as the terms for the negotiations (exclusivity, confidentiality, due diligence, termination). As a rule, the parties agree that the section of the letter of intent setting forth the principal terms of the contemplated transaction is not binding. Afterwards an information memorandum and a non-binding offer can be dispatched.

In a third phase – the marketing and due diligence phase – management visits take place and the clarification of offers can be conducted. Then the due diligence starts, Q&A sessions are held and the transaction agreement can be revised. In the fourth phase – the negotiation, signing and closing phase – the transaction agreement is finally negotiated. The parties can then proceed to the signing and closing.

The parties are, of course, free to structure the process in their own best interests. As is common practice in some other jurisdictions, parties sometimes decide to sign the share purchase agreement prior to conducting a due diligence,

which will have a major impact on the share purchase agreement.

GTDT: Are there any legal or commercial changes anticipated in the near future that will materially affect practice or activity in your country?

CN: On 9 February 2014, the Swiss populace unexpectedly voted for the initiative against mass immigration, which aims to reintroduce quotas for the number of foreign nationals allowed to work in Switzerland and therefore limit immigration to Switzerland. This contradicts, at least according to the majority of analysts, the free movement of workers agreement that Switzerland has signed with the European Union. As the Federal Council's negotiations with the EU have not come to any real results yet, the outcome of such negotiations is highly unclear. As Swiss companies often rely on foreign specialists, the Swiss commercial landscape has a big interest in maintaining the free movement of workers agreement.

The Third Reform of Corporate Taxation, which may come into force in 2018 at the earliest, is still at a very early stage. The legislature intends to put an end to the different taxation of domestic and foreign company profits by some Swiss cantons. Therefore, special tax regimes for holding, mixed, domiciliary and principal companies as well as the Swiss finance branches are intended to be abolished, mainly due to heavy pressure from both the EU and the United States.

GTDT: What does the future hold? What activity levels do you expect for the next year? Which sectors will be the most active?

CN: As hard as it is to predict the future, Swiss M&A players are fairly optimistic. It is quite possible that the Swiss M&A market will gain further momentum. While a comparatively strong Swiss franc does make acquisition in Switzerland expensive, the rising GDP, positive stock market trends, low interest rates and good quarterly results recently published by many major Swiss companies with strong balance sheets and large cash reserves are quite strong indicators of a stable environment and lay the foundation for a busy M&A market. Additionally, the high stock prices could also lead to private equity companies placing assets from their portfolios up for sale on the market.

Further deals are expected in the health-care industry, where stock prices are relatively high (eg, price/earnings multiples from September 2013 to September 2014 (P/E) of 24.4x) compared with those of the whole SMI (P/E of 21.0x). Therefore, it is attractive for big players to follow their strategies of concentration by selling some non-core business units, as demonstrated in the Clariant deal. With regard to the financial services sector, the process of consolidation will likely be followed by several banks.

Last but not least, it will be interesting to see how the revised legislative and regulatory framework will affect not only the M&A market, but also the Swiss commercial landscape in general.

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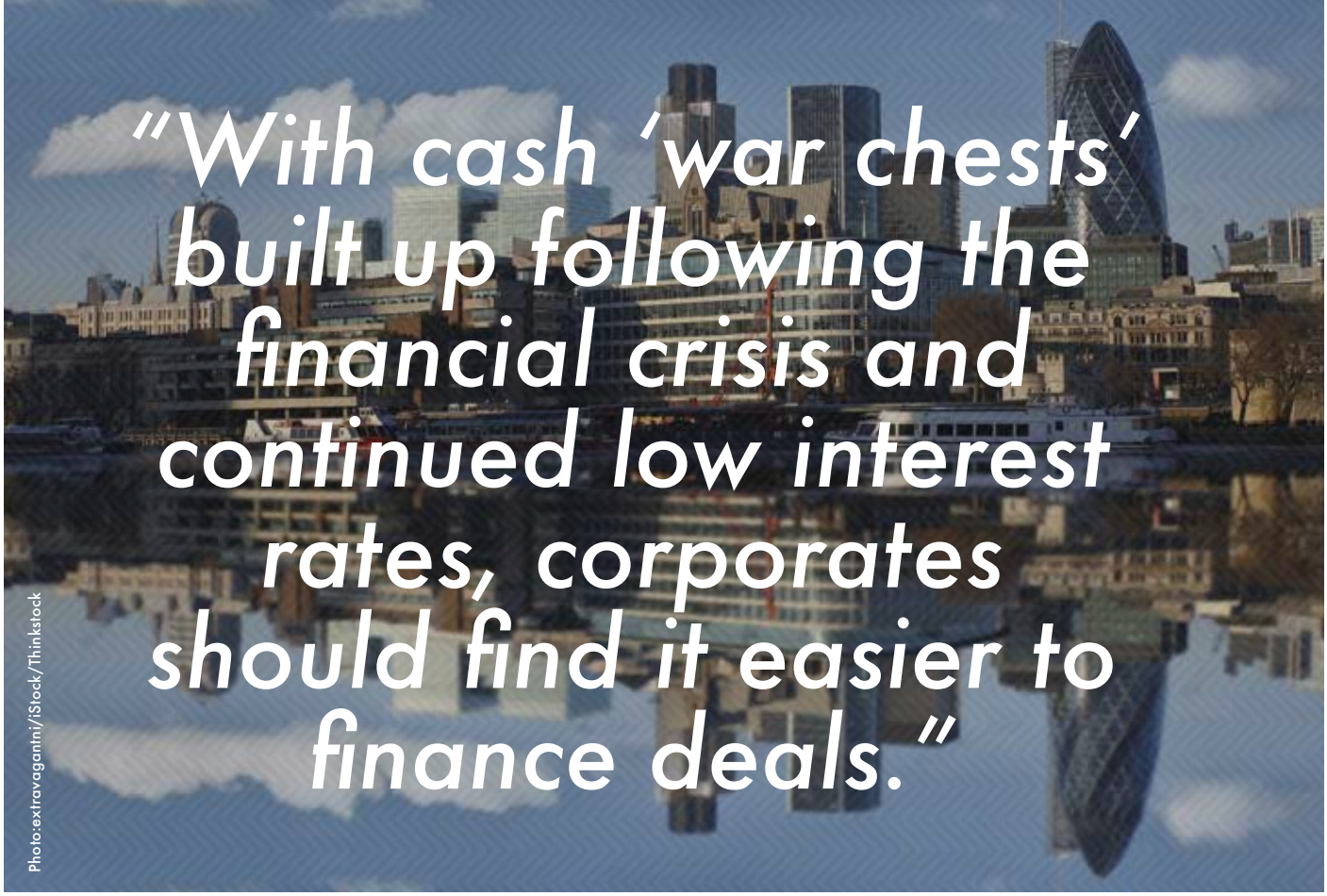
Graham Gibb

M&A IN THE UNITED KINGDOM

Graham Gibb and Harry Coghill are partners within the Macfarlanes corporate team.

Graham is active in all fields of company and corporate law, including private acquisitions and disposals, public takeovers, joint ventures and public equity offerings. He has a particular focus on cross-border work and has been involved in many high-profile transactions. Graham is named as a leading individual for 'Corporate/M&A: High-end Capability' in *Chambers UK 2014*. Graham also chairs the firm's international committee.

Harry has broad transactional experience, including in the areas of public and private M&A, equity fundraisings and group reorganisations, and also advises listed clients on general company law and corporate governance matters. In addition to the *Verizon/Vodafone* transaction, recent highlights include advising GAME Digital, the leading omni-channel specialist retailer of video games in the UK and Spain, on its £340 million flotation on the main London market; Better Capital on the acquisition of 90 per cent of Jaeger, the fashion retailer; and OpCapita on its purchase of electrical retailer Comet.



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GTDT: What trends are you seeing in overall activity levels for mergers and acquisitions in your country during the last year or so?

Graham Gibb & Harry Coghill: Despite greater market confidence and renewed optimism that the pace of M&A activity will start to increase meaningfully, the number of successful UK deals remains low, with a handful of mega deals and potential deals colouring the current outlook.

Various favourable conditions are contributing to this renewed optimism and expectation of greater M&A activity. With cash 'war chests' built up following the financial crisis and continued low interest rates, the right corporates should be finding it easier to finance deals. Financing is also easier to obtain for the right type of assets, with investors flocking to the perceived safety of certain UK sectors in light of the continuing macroeconomic uncertainty and political instability in Russia, Ukraine and the Middle East. While traditional bank lending may still not be as readily available as before the financial crisis, alternative lenders such as credit funds are in some cases helping to bridge the funding gap.

However, these favourable conditions are not reflected in the underlying numbers, with only 37 domestic acquisitions taking place in the second quarter of 2014 according to figures from the Office for National Statistics. A handful of mega deals (many of which have not come to fruition) are creating a perception of increased activity and distorting the statistics. Overall conditions are still challenging, with many purchasers still finding it difficult to obtain funding in light of continued economic uncertainty both in the UK and in the eurozone and inflated equity prices discouraging M&A activity.

GTDT: Which sectors have been particularly active or stagnant? What are the underlying reasons for these activity levels? What size are typical transactions?

GG & HC: The pharmaceutical sector has seen several large transactions including the asset swap between GSK and Novartis and Pfizer's attempted bid for AstraZeneca. With several profitable patents nearing expiration and research and development not yielding immediate replacements, many big players are turning to acquisitions as a quick way to secure future product pipelines. Another recent trend that has fuelled activity in this sector, as well as others, is increasing US interest in 'tax inversions', a practice whereby a US company or group can move its tax base to a different jurisdiction by acquiring, and thereby 'reversing into' the jurisdiction of, a foreign company. M&A activity in the technology, media and telecommunications sectors has also been consistently strong, with the convergence of services such as telephony and content driving key players to consolidate.

Finally, the real estate sector has also continued to attract inward investment as foreign buyers flock to the safe haven of the London property market

(be it residential, commercial or retail) in light of continuing political unrest and instability in other parts of the world.

While the aggregate value of deals appears to have increased, this is in large part due to the distorting effects of a handful of mega deals, such as the attempted *Pfizer/AstraZeneca* combination (£69 billion) and Abbvie's £32 billion takeover of Shire plc. If one looks beyond these headline transactions, the majority of the activity has comprised low-value deals under £100 million. M&A transactions in 2014 have been consistently polarised in terms of value size – there has been very little mid-market activity in the £200 million to £1 billion range.

GTDT: What were the recent keynote deals? What made them so significant?

GG & HC: Although unsuccessful, Pfizer's proposed bid for AstraZeneca is notable for rekindling political interest in the extent to which the government should be able to intervene in takeovers. This debate is not new, having been initially sparked by the takeover of Cadbury in 2010 and Kraft's failure to honour its prior promise to keep a key UK factory open. At present, the Secretary of State has the power to intervene on public interest grounds, enabling the government to require potential buyers to give certain pledges before the deal can go ahead. However, without prior authorisation from Parliament and, in certain instances, the European Commission, these powers are only available in a limited number of circumstances where matters of national security, financial stability or the plurality of the media are in issue. The preservation of UK jobs or UK research and development is outside the scope of the government's current powers. While the failure of Pfizer's approach has delayed the debate, questions surrounding the need for more far-reaching public interest tests to make it more difficult for foreign buyers to acquire strategically important UK companies may soon resurface if the Pfizer deal comes back to life.

Abbvie's acquisition of Shire is another example of increased inward interest from the US, partly driven by tax motivations.

Verizon Communications' $130 billion acquisition of the 45 per cent stake in Verizon Wireless held by Vodafone also stands out as the third-largest deal of all time and the largest for more than a decade. While this was the purchase of a US asset, much of the consideration went directly to UK shareholders as part of the largest UK return of value to shareholders, resulting in a considerable cash injection into the UK economy.

GTDT: In your experience, what consideration do shareholders in a target tend to prefer?

Are mergers and acquisitions in your country primarily cash or share transactions? Are shareholders generally willing to accept shares issued by a foreign acquirer?

GG & HC: Cash has been and generally still is 'king', preferred by investors and in particular by individual shareholders. However, other types of consideration are not only becoming more common, but can also be preferable in certain circumstances as a means of facilitating deals.

Paper consideration can be effective in bridging the value gap where there is a discrepancy between buyer and seller views as to the value of the target. Contingent consideration is also becoming more attractive to both buyers and sellers where there are differing views on the future performance of a target. In these circumstances, consideration can be structured in such a way as to offer shareholders continued economic exposure to the performance of the target or the group of the acquirer.

For those deals worth billions (or tens of billions) of pounds, some form of alternative consideration is generally unavoidable and, in some instances, even preferable. This is especially true in the current climate where inflated equity prices have made cash-only transactions more difficult and buyers more concerned to ensure they are not overpaying.

Where one of the goals of the transaction is to achieve a tax inversion, shares are the requisite currency. In order for the re-domiciliation to be effective, more than 20 per cent of the shares of the new combined entity must be held by foreign investors. This therefore requires that at least part of the consideration is made up of the bidder's domestic shares. Although they have not altered this basic position, the rules recently announced by the US Treasury with the aim of discouraging tax inversions may have a bearing on how consideration is structured for potential future deals.

Traditionally, shares issued by foreign acquirers have been less attractive to certain types of shareholders and bidders have been concerned that their shares will quickly 'flow back' to their domestic jurisdiction and thereby weaken their share price. However, there are ways to mitigate such risks in order to facilitate cross-border deals, as was seen in the *Verizon/Vodafone* transaction, where $60 billion of US stock was issued to Vodafone shareholders.

GTDT: How has the legal and regulatory landscape for mergers and acquisitions changed during the past few years in your country?

GG & HC: The UK takeover regime, and in particular the City Code on Takeovers and Mergers (the Code), which contains the principal rules governing the conduct of takeovers in the UK, was


Harry Coghill

substantially revised in September 2011. In light of strong criticism following the *Cadbury/Kraft* takeover, wide-ranging changes were introduced with the aim of redressing the balance of power in favour of the target company and making hostile takeovers more difficult.

One such change was the introduction of a rigorous 'put up or shut up' regime, requiring a potential bidder that has been publicly identified as such (for example, as the result of a leak) to make clear its intentions within 28 days by either making an offer or walking away. If a potential bidder chooses to walk away from the deal, it is prohibited from making a further offer for six months. The introduction of this regime, combined with stricter confidentiality requirements, was aimed at protecting target companies from being 'under siege' for prolonged periods. Given the difficulty many bidders would face in preparing their bid within 28 days, this has significantly strengthened the position of the target company, particularly in the context of hostile takeovers. Such bidders are now reliant on obtaining an extension from the Panel on Takeovers and Mergers (the Panel), the takeover regulator. In addition, break fees and a wide range of other pre-offer deal protections which had become standard practice in the market are now prohibited by the Code.

There was significant concern among commentators at the time that the new rules came into effect that they could have a negative impact on UK M&A activity by deterring potential bidders. It is clear that these changes have had some impact, at the very least on the conduct of UK takeovers, with bidders forced to adopt new strategies and ensure they are as prepared as possible in the early stages of the deal before approaching the target. However, given that the M&A market has remained subdued since the introduction of these changes, it is still difficult to assess with any certainty the extent of their impact.

GTDT: Describe recent developments in the commercial landscape. Are buyers from outside your country common?

GG & HC: Although quantitative easing has adversely affected the ability of foreign buyers to enter the UK M&A market by artificially inflating equity prices, foreign buyers are still common for a variety of reasons. As discussed above, in light of continuing macroeconomic uncertainties, the real estate sector has profited from a flight of capital to London from various countries.

More recently, there has also been a rise in M&A activity driven by inversion tax planning. US companies with large offshore cash reserves, which wish to avoid triggering a significant US tax charge in bringing such cash into the US, are increasingly looking to the UK market as a way of utilising these so-called 'trapped' funds and in order to reduce their overall tax bill. However, this controversial trend has come under increasing scrutiny, with Barack Obama labelling companies interested in pursuing this tactic as 'corporate deserters'. In an attempt to curb this practice, the US Treasury recently announced new regulations which are intended to make it more difficult for US companies to realise tax savings following a successful inversion. The new regulations apply to any deals closed on or after 22 September 2014 and further guidance is expected soon.

GTDT: Are shareholder activists part of the corporate scene? How have they influenced M&A?

GG & HC: Shareholder activism receives almost daily press coverage in the UK. However, by comparison with the US, shareholder activism in the UK remains much more muted, continuing

THE INSIDE TRACK

What factors make mergers and acquisitions practice in your jurisdiction unique?

In contrast with the US, UK public M&A involves very little litigation beyond simple breach of warranty claims. Public transactions are primarily regulated by the Takeover Panel, which draws its members from key financial and business institutions, with courts generally unwilling to intervene (for example, through judicial review) given the Panel's expertise. The Panel's approach to regulation is unique in that it is highly interactive, with issues being resolved in real time and often within short deadlines. This leaves little room for lengthy litigation and helps to reduce the overall costs of transactions.

What three things should a client consider when choosing counsel for a complex transaction in your jurisdiction?

With increased regulatory, legal and market challenges making it more difficult to get deals through to closing, clients should look for the following qualities in their lawyers:

- technical excellence mixed with an ability to think 'outside the box';
- pragmatism; and
- personability.

In a world where relationships are becoming increasingly institutional, clients want to know their deal matters and that their team of lawyers will fight their corner.

What is the most interesting or unusual matter you have recently worked on, and why?

We both had the pleasure of advising Verizon Communications on its acquisition of the 45 per cent stake in Verizon Wireless held by the Vodafone group for $130 billion. The deal was memorable for many reasons – not only for its value. The structure of the deal comprised a unique and complex blend of US and UK law, combining a US stock purchase agreement with a UK court-approved scheme of arrangement. Due to the size of the transaction, a significant number of issues needed to be addressed that are not normally seen in M&A deals, such as the risk of legislative change to specifically address the transaction.

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to take place largely behind the scenes and focusing primarily on governance issues such as director remuneration. However, it is becoming an increasingly significant and more commonplace part of the UK corporate scene, with much to suggest that the rise in UK shareholder activism will continue.

The current legal, regulatory and commercial landscape is increasingly conducive to shareholder activism. New regulations giving shareholders a binding say on directors' remuneration policy at least once every three years, in addition to an annual advisory vote on whether remuneration is consistent with this policy, are reflective of changing attitudes towards UK corporate governance, partly in light of past shareholder rebellions over excessive director pay. A number of other developments (such as the establishment of the Investor Forum to facilitate collective engagement by institutional investors in UK companies) are giving activist investors a greater opportunity to effect change and air their views. There is also much greater political pressure in the current climate for shareholders to be proper participants in the market, with large institutional shareholders in particular increasingly showing greater willingness to support activist investors in skirmishes with management boards.

Activism around strategic issues and shareholder value also appears to be on the rise. US activists are increasingly looking to the UK, where companies tend to be less closely held than elsewhere in Europe, in search of targets where they can enjoy meaningful returns. It will be interesting to see whether the arrival of US activist funds in the UK encourages UK shareholders to adopt a more US-style activist approach.

GTDT: Take us through the typical stages of a transaction in your jurisdiction.

GG & HC: In private M&A deals, the parties have relative freedom to set their own timelines and processes in following the conventional stages of a transaction from the initial approach through to due diligence, negotiations and completion.

Public M&A deals are much more heavily regulated. The Code contains several key restrictions and principles which significantly affect the public M&A process but do not necessarily feature as prominently in private M&A.

In the early stages of a public deal, it is of utmost importance that secrecy is maintained until the bid is formally announced. Where leaks result in a target company becoming the subject of rumour and speculation, or there is an untoward movement in its share price, an announcement identifying the bidder may need to be made. This will automatically trigger the 28-day 'put up or shut up' period discussed earlier.

Once an offer is announced, it effectively commits the bidder to proceed. Unlike in private M&A, the scope for making bids subject to preconditions or conditions is relatively limited. Generally, only preconditions that relate to regulatory clearances or that the Panel has approved in advance are permitted. While there is slightly more flexibility in relation to conditions and these do not require prior consent from the Panel, they must nevertheless not be subjective. Similarly, since September 2011, bidders can no longer obtain comfort from a target company through exclusivity arrangements, break fees or other deal protections.

Public deals also generally involve much more limited due diligence. Hostile bidders will only have access to publicly available information. Even welcome bidders will be restricted by the Code's strict secrecy constraints and the requirement that the same information must be provided to all potential bidders on the same terms. Target boards may be unwilling to risk a breach of confidentiality or to share information with a welcome bidder which they would not want to share with all other potential bidders, including potential competitors.

In terms of structure, schemes of arrangement continue to be popular for public M&A and especially for larger deals where the bid is recommended and there are no competing bidders. Unlike a contractual tender offer made directly to the target's shareholders, a scheme of arrangement must be approved by the court.

"While the number of successful UK deals will likely continue to trail behind increasing market confidence, there are grounds for cautious optimism."

GTDT: Are there any legal or commercial changes anticipated in the near future that will materially affect practice or activity in your country?

GG & HC: With Scotland having decided to stay in the union, the debate surrounding the impact of a 'yes' vote on UK businesses is no longer a live issue. However, there is still considerable uncertainty surrounding the UK's future in the EU and the prospect of the UK leaving the EU could significantly adversely affect inward investment into the UK. This is because some foreign companies that operate globally choose the UK in part as it offers access to the EU market.

Uncertainty in general is not conducive to M&A activity, with deals relating to Scottish targets said to have been 'on hold' pending the result of the recent referendum. While the possibility of similar questions arising in the future cannot be excluded, the result of the referendum is to be welcomed. The government's reassurance that its pre-referendum promises to Scotland will be honoured is also helpful as prolonged uncertainty in this respect could discourage future deals.

GTDT: What does the future hold? What activity levels do you expect for the next year? Which sectors will be the most active?

GG & HC: While the number of successful UK deals will likely continue to trail behind increasing market confidence, there are grounds for cautious optimism as business conditions continue to be favourable and market sentiment surveys suggest that corporate appetite is strong. Nevertheless, given that the market has remained relatively subdued, and in light of the persisting macroeconomic uncertainty, activity levels are difficult to predict. With the recent surge in IPOs and secondary issues, newly listed companies and other companies that have tapped the equity markets will also likely be looking to consolidate in their respective markets (particularly, perhaps, in the retail sector). However, the IPO surge may also dampen M&A deals, as private equity funds opt to exit by listing rather than selling.

There are also suggestions that the insurance sector is likely to see an increase in activity over the next year, with many companies looking to consolidate to expand their products or divest non-core assets.

Until recently, interest in inversion tax planning was expected to continue driving M&A activity across all sectors. However, it remains to be seen whether the new regulations discussed above will be successful in deterring potential US purchasers or whether there is still a window of opportunity for interested parties.


Alan M Klein

M&A IN THE UNITED STATES

Alan M Klein is a partner of Simpson Thacher and Bartlett LLP and a member of the firm's corporate department. He has extensive experience in mergers and acquisitions, as well as in shareholder activism and corporate governance matters. In 2012, *The American Lawyer* named him a 'Dealmaker of the Year'. Past co-chair of the International Bar Association's Corporate and M&A Law Committee, he has chaired the International Bar Association's Annual Mergers and Acquisitions Conference in New York City for the past five years. He is a frequent commentator on M&A issues. Alan serves as Simpson Thacher's co-administrative partner and is a member of the firm's executive committee.

GTDT: What trends are you seeing in overall activity levels for mergers and acquisitions in your country during the last year or so?

Alan M Klein: Deal volume in the US has increased in the first nine months of 2014 by 65 per cent over the same period in 2013. Many observers believe that the value of mergers and acquisitions in 2014 will exceed the previous record year of 2007. To put the current amount of activity in perspective, the US$1.7 trillion total value of M&A transactions for the first three quarters of 2014 exceeds the total value for any entire year in each of the past five years.

Each quarter of 2014 to date has had activity levels that far exceeded prior year levels. However, the third quarter did have a somewhat lower level of activity than the record amount of transactions in the second quarter. It remains to be seen whether this dip is just a reflection of the usual ebb and flow of activity, or whether it represents a settling down from the fevered pace of earlier in the year.

The average purchase price paid in US transactions during the first nine months of 2014 was over 15 times the earnings of the target company. This 'exit multiple' was the highest in the world, a sign of the perceived strength of the US

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economy and of the stability and growth prospects that the US economy has demonstrated over the past few years. The steady, although slow, return to economic health of the US since the financial crisis and recession of 2008 and 2009 is a significant reason for the current levels of mergers and acquisitions in the US.

One aspect of the increase in deal volume in the US to take note of is that it is almost entirely driven by a significant increase in the size of transactions. Transactions over US$5 billion have reached record levels. The overall number of transactions has increased only very slightly.

Interestingly, private equity activity in the US, although up in 2014 from the comparable period in 2013, made up only US$200 billion of the over US$1.5 trillion of deal volume. Of those private equity investments, the classic public-to-private buyout was down 27 per cent in the US in deal value. This is a demonstration both of the struggle by financial buyers to compete with strategic buyers, who are able to factor potential expense synergies into their valuations of targets and of the high stock market valuations of potential US targets, dampening interest in those targets by private equity firms.

GTDT: Which sectors have been particularly active or stagnant? What are the underlying reasons for these activity levels? What size are typical transactions?

AMK: Sectors with the highest levels of activity in the first nine months of 2014 are energy, media and entertainment and health care, particularly pharmaceuticals. These three sectors together comprise almost 50 per cent of deal volume in that period. The consumer staples and high-tech sectors were also quite active.

Energy sector activity continues to be driven by consolidation in the energy services industry as well as the reshuffling by producers of their portfolio of reserves, particularly shale oil reserves. Two mega deals make up two-thirds of the volume of the media and entertainment sector for the first nine months of 2014: Comcast's agreement to acquire Time Warner Cable and AT&T's agreement to acquire DirecTV. Together they account for almost US$140 billion of the US$193 billion of deal volume in that sector. The global consolidation in the pharmaceutical industry, with many of the transactions structured as inversions, accounted for the significant activity in the health-care sector.

Strikingly few deals took place in the materials, retail and consumer products and services industries. These three sectors combined made up barely 10 per cent of the deal activity involving US companies through the first three quarters. Sharp declines in the prices of commodities since the beginning of 2013 have no doubt affected the desire and ability of materials producers to enter into transactions. Some activity in that area may start to develop, however, as companies need to start to offset the price declines in their products with expense synergies available from combinations.

Transactions in the retail sector and in the consumer products and services sector have similarly been held back by the lack of demand

by consumers that persists following the financial crisis and recession. With employment growing at muted rates and wages barely showing any real growth, there are few prospects for great growth in consumer-driven businesses. Again, the best prospects for activity in these sectors may be driven by the need for businesses in these areas to find ways to create expense reductions through eliminating overlap in connection with combinations. It is very telling that the one area of growth in the retail sector is in the so-called 'dollar store' chains, where inexpensive or deeply discounted goods are sold. This is the one area where there has been any significant transactional activity in the retail sector.

GTDT: What were the recent keynote deals? What made them so significant?

AMK: The two largest deals announced in 2014 at the end of September were the acquisition of Time Warner Cable by Comcast and the acquisition of DirectTV by AT&T. The convergence of the variety of devices used to access content developed for different media, the convergence of means of internet access and the merging of delivery of traditional radio, television and internet content have led to the desire for consolidation among businesses that provide access to radio, television, the internet and its content. Regulators will have thorny issues to grapple with in assessing whether to ultimately permit these transactions and if so whether to impose any restrictions or remedies. However, these inexorable trends as to how consumers access content of various media will continue and companies will continue to try to determine how best to respond to these trends.

On a separate note, four of the 10 largest transactions announced in the first three quarters of 2014 were structured as 'tax inversions'. In these transactions a US-incorporated company merges with a non-US incorporated company and the resulting parent of the newly combined company is the non-US entity. Prominent and sizeable transactions structured in this manner include Valeant's offer to acquire Allergan, AbbieVie's acquisition of Shire, Medtronic's merger with Covidien, Actavis's acquisition of Forest Laboratories and Chiquita's combination with Fyffes. There was tremendous public focus brought on the tax effects of these deals.

GTDT: In your experience, what consideration do shareholders in a target tend to prefer? Are mergers and acquisitions in your country primarily cash or share transactions? Are shareholders generally willing to accept shares issued by a foreign acquirer?

AMK: Transactions in the US can take place using either cash or stock, or a combination of the two, depending on the nature of the transaction. One aspect of the current M&A market in the US is that large public corporations are willing to do transformational transactions. Because of the record levels of the stock market, using stock as a currency to make an acquisition is more viable than it was during the years immediately following the stock market collapse in 2008 and there is increased desire to receive stock as part of a transaction. At the same time, interest rates remain historically low and many public companies have large reservoirs of cash available on their balance sheets, so they are very open to the idea of using cash for transactions that will be accretive to their earnings.

In many instances, part of the appeal of engaging in a merger is to obtain significant expense synergies. As a result, shareholders of the target company will expect to be paid for the benefits of those synergies which the buyer will be obtaining. Using shares as some or all of the consideration in such a transaction enables the selling shareholders to see some of the future benefit of those synergies. Alternatively, they would expect to pay some portion of the present value of those synergies in cash. This presents a choice to be made by buyers as to whether to give away an interest in the combined company by issuing stock to the sellers or to use cash in the deal. Using cash means potentially incurring debt or using their available cash and not having it accessible for other investment opportunities.

Shares of foreign acquirers have not been commonly used as consideration in transactions in the US. However, this has changed in connection with the tax inversions that have taken place or been announced in the past two years. In these transactions, in order to obtain the benefit of the parent company of the combination being

"Many public companies have large reservoirs of cash available on their balance sheets and are very open to the idea of using cash for transactions that will be accretive to their earnings."

incorporated outside the US, shareholders have been willing to receive shares of, in many cases, Swiss, Irish or UK entities. This is a significant change from past years, when US shareholders were often reluctant to receive shares in non-US companies.

GTDT: How has the legal and regulatory landscape for mergers and acquisitions changed during the past few years in your country?

AMK: The most noteworthy development in recent months has been the imposition of new tax rules by the US Treasury intended to limit the ability of US companies to engage in inversion transactions. US tax rules permitted these transactions so long as they followed certain guidelines. Although these transactions took place with some regularity, they increased significantly in the past two years, with a series of major transactions being announced during the first part of 2014. As these transactions took on greater prominence and visibility, a political outcry developed. The US Treasury took steps to modify the relevant rules, with the intention of making these transactions more difficult, although not impossible, to carry out. These rules came into immediate effect in the third week of September 2014 and apply to all transactions pending and not yet completed. It remains to be seen whether pending transactions will have their terms modified or be completed on their existing terms.

Another development over the past several years has been the broadening definition of what constitutes a transaction that implicates US national security in circumstances where a foreign acquiror is acquiring a US business. Under the US Exon-Florio Act, which became law over 20 years ago, the Committee on Foreign Investment in the United States, known as CFIUS, was established. This committee is made up of members from a number of different US Cabinet departments, such as Defence, Treasury, State, Homeland Security and Commerce. There is a formal process by which transactions involving national security are to be submitted for review by CFIUS. Traditionally these transactions were those in which the US business being purchased by a foreign acquiror had clear involvement in a defence-related area, such as being a contractor for the military or being a business engaged in certain sensitive areas of research or production.

In the past several years, CFIUS has broadened its remit to include acquisitions by foreign buyers in industries that would not historically have been felt to fall within national security concerns. An example is the acquisition of Smithfield, a large US pork producer, by a Chinese buyer. This transaction went through a CFIUS review and ultimately received approval. However, the fact that it was viewed as necessitating such a review was noteworthy. The result has been a degree of uncertainty as to when CFIUS approval is deemed necessary and a view that the background of the purchaser is as important as the industry of the business being acquired.

GTDT: Describe recent developments in the commercial landscape. Are buyers from outside your country common?

AMK: The single biggest development in the commercial landscape has been the return of confidence by CEOs that the market is receptive to transformational transactions that are accretive to earnings and that are viewed as being in a core area of the acquiror's business. The result has been a significant increase in transactions with a value greater than US$5 billion. In addition, the decline in volatility in the stock market has meant that it has become easier for buyers and sellers to agree on valuations. As a result of these various factors, transactions that have long been desired by CEOs, as either a seller or a buyer, can now be carried out after a long period of a relatively quiet M&A marketplace.

Buyers from outside the US are not uncommon, although relatively few in number other than in the tax inversion structure. However, the greatest limitation on foreign buyers has been the relative weakness of European economies, and the euro, compared to the US economy and the dollar, and the relative weakness of other world economies. For example, companies from the BRICS economies had become active buyers in the US prior to the financial crisis. In recent years that has not been the situation, in part because of general weakness in those economies. However, the announced sales of Sigma-Aldrich Corp and TRW, each to German buyers, and the sale of Beam Inc to a Japanese buyer, for prices ranging from US$12 billion to US$16 billion, demonstrate that US companies are willing sellers to non-US buyers.

The only real unique impediment to a foreign buyer in the US, assuming appropriate financing and the ability to satisfy any antitrust concerns in that particular industry, might be CFIUS-related issues that were described earlier. However, the situations where CFIUS is a true limitation on the ability to complete a transaction have been truly rare and unique.

GTDT: Are shareholder activists part of the corporate scene? How have they influenced M&A?

AMK: Shareholder activists have become a significant part of the US corporate scene, probably to a degree that is greater than in any other market in the world. Tremendous amounts of money have flowed into the activist funds, giving them the ability to take noteworthy stakes in virtually any company. Commentators believe that there is over

THE INSIDE TRACK

What factors make mergers and acquisitions practice in your jurisdiction unique?

The size and complexity of many transactions in the US market, together with the highly developed corporate law governing changes of control of US companies, make the M&A market here unique. Helping boards of directors properly fulfil their fiduciary obligations in connection with a sale of a company is very challenging in the litigious environment of the US. And the sheer global scale of many transactions involving US companies creates enormous challenges.

What three things should a client consider when choosing counsel for a complex transaction in your jurisdiction?

First, does the counsel listen and communicate well with the client? A deep understanding of the client's goals and needs is essential.

Secondly, does the potential counsel bring a complete team of specialists and colleagues who work together seamlessly to help the client achieve its goals? Successful significant transactions require the work of a wide range of legal skills, knowledge and experience.

Thirdly, does the counsel have deep experience with the kind of transaction under discussion? Successfully guiding complex multinational transactions is not for the novice.

What is the most interesting or unusual matter you have recently worked on, and why?

Assisting Microsoft in its acquisition of Nokia's phone business is among the most interesting transactions I have recently worked on. Multiple disciplines at my firm worked with counsel around the world to help implement transfers of approximately 50 entities in over 40 different countries. Negotiation of the definitive agreements and then the execution of the transactions took close to a year.

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US$110 billion currently under management by the shareholder activist funds. Activist funds regularly demand board representation from companies of all sizes and in virtually any industry and regularly receive such representation.

Shareholder activists now regularly intervene in announced M&A transactions and also try to influence whether or not companies engage in acquisitions or put themselves up for sale. There have been a number of high-profile examples in the past several years where activists have either previously had a position in a company that has agreed to be sold or where activists take a position in a company that has announced a sale and the activists then agitate for a higher price. Some examples of this have been Dell's sale to a group including its founder and several investors and the take-private of Clearwire by its controlling shareholder, Sprint. In each of these situations, the buyers ultimately had to agree to increase their purchase price due to activists intervening.

An additional technique that shareholder activists use to obtain a higher price for themselves in an announced transaction is to make use of appraisal rights under the state law of incorporation of the target company. US corporations are incorporated under the laws of a particular state. Each state has its own set of corporation laws. Delaware's state corporation laws are the best known of such laws, for a variety of historical reasons, and more than half of all corporations in the US are incorporated in Delaware. Under Delaware's laws, only a simple majority of the shareholders need to vote in favour of a merger for it to be effective. The shares of shareholders who vote against a merger are cancelled and are only entitled to receive the merger consideration. However, if a shareholder who either votes against a merger or refrains from voting believes they should have received a higher price than that offered in the merger, they can submit to a court proceeding to determine if the merger consideration was a fair price or not. If the court determines that the price was inadequate, then they can receive the price the court determines is fair plus interest from the merger date. If the court determines that the original price is fair, then that is all the complaining shareholder receives. Historically, this appraisal right has only rarely been exercised. However, there are now shareholder activist funds that are more regularly exercising this right, with some success. This creates uncertainty as to the ultimate cost of a transaction and can be a distraction to the buyers of a company. The degree to which this trend of activists exercising their appraisal rights in connection with a merger will expand remains to be seen.

GTDT: Take us through the typical stages of a transaction in your jurisdiction.

AMK: First contact regarding a possible transaction can either take place between intermediaries or from CEO to CEO. Who makes the initial approach really depends on the particular situation, the nature of the industry and whether there is a pre-existing relationship between executives of the two companies involved. Diligence of non-public information is permissible if a confidentiality agreement is entered into between the parties. Under US law, no disclosure of discussions regarding a possible transaction needs to be made until a definitive agreement with respect to a transaction is executed by the parties, so long as the parties have maintained a position of not making any public comment about a possible transaction while negotiations were taking place.

One issue that typically arises at the stage of entering into a confidentiality agreement is whether the potential seller will agree to grant to a prospective buyer the exclusive right to negotiate with that prospective buyer for some period of time. Legally, US sellers have the right to grant a period of exclusive negotiations. However, as a legal matter, the board of directors of a public company being sold must also show that they obtained the highest price available for that company. Some kind of check of the market by the prospective seller is necessary in order to truly fulfil that duty. Thus there is a tension between granting an exclusive right of negotiation and being able to fully assess the market for potential purchasers.

Any potential purchaser needs to be aware that lawsuits are filed in connection with well over 90 per cent of acquisitions of US public companies, alleging that the target company's board has violated their fiduciary duties in connection with agreeing to a sale of the company. The overwhelming majority of these are nuisance suits, with no factual basis for these assertions. They are a seemingly inevitable part of the current landscape of US public company acquisitions, however.

GTDT: Are there any legal or commercial changes anticipated in the near future that will materially affect practice or activity in your country?

AMK: There are no specific legal or commercial changes currently anticipated in the US market. The full impact has yet to be felt of the new US Treasury rules regarding inversions. There may be transactions that are delayed or eliminated due to these rules and inversions were an important element of many significant transactions in the first three quarters of 2014.

GTDT: What does the future hold? What activity levels do you expect for the next year? Which sectors will be the most active?

AMK: M&A activity in the US has thrived over the past 18 months despite a number of macroeconomic and geopolitical areas which might cause uncertainty and instability in the markets. Assuming no new areas of concern arise and cause a loss of confidence in the steady growth of the US economy, it seems reasonable to expect that current levels of M&A activity will continue. Many industries have reasons to consolidate. There may be a movement away from some of the industries that have led the current crop of transactions to industries that have not yet felt the pressure to engage in transformational transactions, but there remains room for the continued pace of current activity. In addition, mid-market sized transactions have not increased in number materially. The current level of activity in that sector of the market certainly seems sustainable.

"M&A activity in the US has thrived over the past 18 months despite a number of macroeconomic and geopolitical areas which might cause uncertainty and instability in the markets."

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