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GETTING THE DEAL THROUGH

market intelligence

M&A

2017 – the year of boom and bust?

Global interview panel led by Alan Klein

Sector focus • Keynote deals • Shareholder activism • 2018 outlook
Europe • The Americas • Asia-Pacific • Africa

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market intelligence

Welcome to *GTDT: Market Intelligence*.

This is the fourth annual issue focusing on 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.

Market Intelligence is available in print and online at www.gettingthedealthrough.com/intelligence

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In this issue

Alan M Klein is a partner at 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 assisted Microsoft in its US$24.6 billion acquisition of LinkedIn, ChemChina in its US$46.6 billion acquisition of Syngenta, Tyco in its US$27.7 billion merger with Johnson Controls, Inc and The ADT Corporation in its US$12.3 billion sale to Apollo Group Management. In addition to the LinkedIn transaction, 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 is co-head of the firm's mergers and acquisitions practice.

Global Trends

ALAN M KLEIN OF SIMPSON THACHER & BARTLETT LLP

The first nine months of 2017 have been a boon to some areas of mergers and acquisitions activity and have been verging on a bust for other areas. Different analysts apply a variety of different methods of measurement, but overall they agree that global deal volume for the first three quarters of 2017 was essentially flat to slightly down from the same period in 2016, with approximately US$2.3 trillion of activity through the end of September. However, the 2017 third quarter had a marked decline in global activity from the 2016 third quarter and a decline from the second quarter of 2017. By some measures, the third quarter of 2017 was the slowest in four years, by both deal value and by the number of deals. In looking at the year overall to date, a slower first quarter and a robust second quarter, together with a notably slow third quarter globally, only tell part of the story, however. The total number of worldwide deals this year to date has remained flat, pushing up the average deal value. At the same time, there has been a significant decline in transactions with a value of over US$10 billion compared to 2016 and 2015. Some sectors such as energy, utilities and infrastructure have boomed while others, such as technology, have had steep declines in activity from 2016. Financial sponsors had their most active nine months since 2007, both in total deal value, with over US$940 billion of transactions entered into, and comprising over 20 per cent of the total deal market year to date, the highest proportion of the global M&A market since 2007.

Several areas that slipped dramatically in 2017 from record high levels of activity in 2016 were outbound activity from China, activity in the materials sector and activity in the technology sector. For example, in the third quarter of 2017, there were only 29 acquisitions by Chinese companies into the US and Europe for a total of US$15 billion, which was the lowest number of deals and the lowest dollar value since the first quarter of 2015. Total Chinese outbound M&A activity globally for the first nine months of 2017 was US$121 billion, a decline of 27 per cent from the same period last year. Several factors account for the steep decline in Chinese-led activity. First, the Chinese government has clearly discouraged Chinese companies from making certain kinds of acquisitions outside of China, particularly

acquisitions that may appear to be outside of the core business of a company. Secondly, there has been heightened regulatory reviews of acquisitions by Chinese companies in a number of jurisdictions. A recent example of this has been the blocking by the US government of the attempted US$1.2 billion purchase of the Lattice Semiconductor Corporation by a Chinese buyer. This heightened degree of regulatory oversight may be impeding or discouraging potential Chinese buyers, or dissuading potential sellers from entering into agreements with prospective Chinese buyers.

The decline in activity in the materials and technology sectors in the first two-thirds of 2017 was striking. In the first three quarters of 2016, the technology industry led global M&A activity, representing approximately 14 per cent of total deals, the first time that the techonology industry was the leading sector of activity. The materials sector was not far behind, with 13 per cent of global activity. Deals in the materials sector were down for the first nine months of 2017 by 46 per cent from the same period in 2016, and deal activity in the technology sector was down by 28 per cent for the same period from that period in 2016. Declines globally in the pricing of materials was no doubt responsible for the decline in activity in that sector. The decline in technology deals is less easily explainable, other than that last year represented an all-time high, which probably wasn't sustainable. There are certainly large companies with significant amounts of cash in the sector and opportunities for consolidation or making acquisitions in adjacent areas of expertise, so it is reasonable to suspect that activity will regain strength in the technology space. It is also possible that transactions such as Amazon's purchase of Whole Foods, where a technology company moves outside of the purely technology sector, may be a template for future transactions by technology sector companies. Conversely, manufacturing and retail companies may increasingly acquire technology companies, as the convergence of traditional businesses and technology continues at an ever-increasing rate.

US targets as a percentage of overall global deal activity in the first nine months of the year fell by almost 20 per cent, making up only 38 per cent of total global deal volume. This was the lowest level since 2010. More typically, US targets comprise closer to 50 per cent of deal volume. A significant reason for the decline in the proportion of global deals involving US targets was the reduction in acquisitions into the US by non-US buyers. Non-US buyers acquiring US businesses made up only 8 per cent of total global transactions, compared to a more typical 15 per cent of total deal volume. The decline in mega-deals generally, with only four transactions over US$20 billion dollars compared to eight in the prior year, and the decline in non-US interest in US targets can both probably be traced to significant political uncertainty concerning the US. Potential non-US buyers, as well as CEOs and boards of large US corporations, may have been hesitant to pursue transactions at a time when US government policies in areas such as taxes, antitrust enforcement and healthcare have remained uncertain and unsettled.

"Activity in the eurozone picked up markedly in the first three quarters of 2017"

By contrast, activity in the eurozone picked up markedly in the first three quarters of 2017 in contrast to 2016. European deals accounted for over 25 per cent of global deal volume, an increase of over a third from the prior year. The biggest jump in activity levels took place in the first quarter, and there was some cooling off that occurred over the next two quarters. But even so, activity levels in Europe in each quarter to date in 2017 remained ahead of the prior year. In contrast with the US, there appeared to be a sense of greater political and economic stability in Europe, perhaps in part due to the aftershocks of the surprise approval of Brexit in June 2016 wearing off and the economic recovery having finally taken firm hold in the region.

Asian activity in the first three quarters declined by over 10 per cent in both value and number of deals. Chinese outbound activity declined significantly, even for targets in the region, although real estate transactions increased significantly, as did private equity transactions. Activity by Japanese companies declined as well, with deal values a third lower than in 2016 for the same period, although there was a spike in the third quarter with the sale of Toshiba's chip business. The various political headwinds previously described with respect to China had a material impact, as did some degree of economic and political uncertainty in Japan.

Overall, the global deal economy for the first nine months of 2017 was a picture of areas of strength offsetting areas of weakness. Strength in various industrial sectors offset weakness in others and strengths in various regions, Europe in particular, offset declines in regions such as the US and Asia. Private equity activity picked up, to some degree cushioning the decline in the kinds of 'bet the company' transactions by major corporations seen in 2015 and 2016. As a result of these pluses and minuses, overall deal volume and numbers of transactions were essentially slightly down to flat year-to-date versus 2016. How mergers and acquisitions activity finishes the year remains to be seen, but the crystal ball for 2018 remains quite clouded. Dealmakers are eager to do transactions, but the concerns holding them back from increasing levels of activity may not sufficiently dissipate for them to increase the levels of activity we have seen so far in 2017.

M&A IN AFRICA
A REGIONAL OVERVIEW

Gavin Davies, Rudolph du Plessis and Hubert Segain are partners and Richard Woods is a senior associate at Herbert Smith Freehills, a firm that has advised on matters in each of Africa's jurisdictions.

Gavin Davies has over 20 years' experience of a wide range of cross-border deals and advisory work. He acts for corporates and financial buyers in Europe and Asia, as well as 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 as a leading lawyer in *The Legal 500*.

Based in Johannesburg, Rudolph du Plessis is a well-established and respected practitioner in the South African M&A market. The past 10 years of his practice has seen a split between domestic work for South African clients, work for multinationals investing in South Africa and sub-Saharan work for domestic and multinational clients. Rudolph advises a number of JSE-listed companies on corporate governance and the South African Companies Act. He also has particular expertise in cross-border M&A transactions and regularly advises foreign companies on investment in South Africa. In this regard Rudolph has acted for various multinationals in transactions in South Africa and elsewhere in Africa. Rudolph is ranked by *Chambers Global* as a leading lawyer for corporate and M&A in South Africa.

Hubert Segain is head of Herbert Smith Freehills' corporate group in Paris. 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 and financial investors on their M&A operations. He also represents issuers, managers and financial institutions in enforcement procedures launched by the Financial Markets Authority. Hubert has published more than 30 papers on M&A and financial markets regulation. He is regularly consulted by regulatory bodies and other professional organisations on matters affecting corporate and financial regulations. Hubert is a member of the Paris and New York State Bars. *Chambers Global*, the *Legal 500*, *Who's Who Legal* and *IFLR1000* list him as a leading corporate lawyer.

Richard Woods is based in the London office of Herbert Smith Freehills, and has previously worked in its corporate teams in Dubai and Moscow. He advises strategic and financial buyers on public and private M&A transactions and joint ventures, and is part of the firm's Africa group. In 2013, he was seconded to the government of Sierra Leone to advise on inbound investment opportunities. In 2015, he spent six months seconded to Goldman Sachs' European Special Situations Group, one of GS' private capital businesses.

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

Gavin Davies, Rudolph du Plessis, Hubert Segain & Richard Woods: The slowdown in M&A activity across African markets, which became apparent in 2016, has continued into this year with a 48 per cent drop in the number of inbound M&A deals, and an 83 per cent drop in deal value, compared to the equivalent period last year.

This slowdown is attributable to the interaction of a number of factors operating on a global and regional level. On a macroeconomic level, investor confidence has been significantly shaken by changes to the global political landscape, following the outcome of the US presidential election and the UK's decision to leave the European Union. This uncertainty has been compounded by challenges closer to home, particularly those affecting the economies of regional hubs. South Africa, for example, has entered recession resulting in part from a period of heightened political uncertainty. This, combined with widespread perceptions of corruption, increased currency volatility and a downgrading of its credit rating by a number of rating agencies, has served to cool investor appetite for doing deals in South Africa, seen as a key gateway jurisdiction for M&A in sub-Saharan Africa. Political uncertainty in relation to the current election in Kenya and a rebalancing of Nigeria's economy, following the drop in commodity prices, is also exerting downward pressure on M&A activity on the continent.

The response to such challenges has been a perceptible movement in investment patterns with deal flows shifting noticeably from west to east Africa. The more diversified economies of Kenya and Uganda, with less dependence on high oil prices and more stable currencies, are being viewed as increasingly favourable investment destinations, notwithstanding the relatively smaller markets that they offer when compared with their western counterparts.

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

GD, RDP, HS & RW: In keeping with previous trends, the first half of 2017 has been dominated by activity in the energy and mining sectors – with deal value amounting to US$6.29 billion.

However, other sectors such as consumer goods, financial services and healthcare have been unusually quiet – with cumulative deal value amounting to US$550 million. This drop off in deal flow is attributable to a combination of factors mentioned above, a number of which create significant uncertainty in the short term.

"The more diversified economies of Kenya and Uganda, with less dependence on high oil prices and more stable currencies, are being viewed as increasingly favourable investment destinations."

Notably, levels of outbound M&A activity have been more stable with only a 12 per cent dip as against last year. Developments in the telecoms and financial services sector remain the engines of this outbound activity, which has resulted in domestic companies making significant investments in technology.

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

GD, RDP, HS & RW: Recent keynote deals by value have included various acquisitions in the energy and mining sectors. These include Exxon Mobil Corporation's recent US$2.8 billion acquisition of a 25 per cent stake in gas fields from Eni SpA, Chevron's sale of a 75 per cent stake in various assets in South Africa for US$900 million, and Total's acquisition from Tullow of various exploration assets in Uganda. In the private equity space, Carlyle Group's Assala Energy agreed to acquire Shell's onshore assets in Gabon for US$587 million. In other sectors, a notable deal was Vodacom's US$2.5 billion acquisition of Vodafone Kenya, continuing the trend for major telecoms M&A in Africa.

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

GD, RDP, HS & RW: Although it is difficult to generalise across a region of 54 jurisdictions, we have seen shareholders prefer cash consideration where available, particularly in relatively stable overseas currencies such as the US dollar. As in all jurisdictions, shareholders accepting equity consideration will need to be diligent about the acquiring vehicle, and investors will need to plan to take shareholders through legal structures that may be unfamiliar to them. Where the acquirer is itself a local entity, local counsel will need to advise on any formalities required for the issuance or transfer of the equity consideration.


Gavin Davies


Rudolph du Plessis

In a number of African jurisdictions, exchange controls will apply to inbound and outbound currency flows, so it is important to check for any approval requirements at an early stage and plan for these as part of the deal timetable. Exchange controls may not be familiar to advisers with a focus on US and European M&A (where controls may not have applied for a generation), so this is an area for early attention.

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

GD, RDP, HS & RW: An ongoing trend in the past few years has been the increasing harmonisation of commercial law across the region. The efforts of the Organisation for the Harmonisation of Business Law in Africa (OHADA) have been of key importance in driving this forward. Since its establishment, the organisation has taken important steps to attract investment by helping to standardise business laws and implementing institutions across the continent. Perhaps the most notable of these efforts have been the moves to establish market norms for local security issues, dispute resolution procedures and most recently, the reliability and flexibility of structuring investments within the region.

Another key development, in keeping with the trend for increasing convergence in commercial law across Africa, has been the establishment of the COMESA Competition Commission (CCC). The CCC is a supranational body covering 19 countries across eastern and southern Africa that works to improve the integration of merger control regimes in the region. Steps have recently been taken to enhance such integration further by concluding memorandums of understanding, containing commitments to improve information exchange, increase opportunities for consultation between regulators and boost cooperation in the development of training programmes, with a number of domestic regulators.

The CCC has also recently introduced changes to reduce the breadth of its notification requirement and to introduce a cap on the filing fee. When combined with previous changes to clarify its jurisdictional test and to introduce the possibility of obtaining a comfort letter, we expect that the revised regime will provide even greater certainty for investors going forward.

In contrast, navigating the regimes of increasingly interventionist domestic competition authorities may prove more difficult. Kenya, for example, recently passed the Competition Amendment Act, which expanded the authority's enforcement capacity further still. Concerns of interventionism are also particularly relevant in other jurisdictions such as Botswana, Namibia, South Africa, Zambia and Zimbabwe, where the public interest impact of a merger forms parts of the assessment.

Alongside the regional and national competition authorities, the central government may be another party taking a close interest in the deal, particularly where the state is involved as a commercial partner. Even where the state is not directly a partner in the deal, governments will be focused on tax revenues available to the state, either as a result of the deal itself, or from the target entity following the transaction – this should be considered at an early stage in the transaction.


Hubert Segain


Richard Woods

Understanding the drivers for individual ministries or regulatory bodies and individuals within them will be all the more important in this context.

In assessing the legal and regulatory landscape, it is critically important to recognise that Africa is a continent that comprises 54 jurisdictions. Notwithstanding some regionalisation, integration or alignment between legal systems remains limited. Investors should assess the political, economic, legislative and security landscape for the relevant country before proceeding with a deal.

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

GD, RDP, HS & RW: China continues to be the largest trading partner for the continent, even as it broadens its investment appetite to other regions such as Europe. Chinese investment for the first half of 2017 totalled more than US$85.3 billion. Chinese imports from the continent during the same period almost doubled, increasing by approximately 46 per cent compared to the same period last year. Further investment is expected in connection with China's ambitious One Belt One Road policy, particularly in the infrastructure sector, the longer term consequences of which will be a further opening up of African markets. In line with the trends identified above, the key beneficiaries of such investments are likely to be eastern countries such as Kenya, Tanzania and Ethiopia.

The engagement of Japan and India in Africa also continues to be significant. While the two nations were previously vying for increased presence in African markets, the implementation of the Asia Africa Growth Corridor will see the two cooperating to capitalise on the opportunities offered by the region. The Asia Africa Growth Corridor Vision Document highlights a number of priority areas, including development projects, quality infrastructure, institutional connectivity, skills development and capacity building, which are consistent with the strategy adopted by both Japan and India in the continent to date.

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

GD, RDP, HS & RW: Again, it is important not to generalise about Africa as a whole: the role of activists differs across its many jurisdictions.

Shareholder activism can only be prevalent in jurisdictions with meaningful numbers of listed companies, and capital markets that are sufficiently well developed to allow activism to occur. As such, in those countries with the most developed and liquid capital markets (eg, South Africa, Kenya and Nigeria), activism is possible, albeit as a relatively new phenomenon compared to, for example, Western Europe or the US. However, investors are familiar with the standards of governance and transparency that are required of firms listed on the world's major exchanges, and with the constant attempts to improve and refine these regimes.

Armed with this familiarity, there are signs of an increasing willingness to challenge boards and senior management, in annual general meetings and in other public forums, and to seek to hold to account governance and remuneration practices, as well as the performance of the company generally. In jurisdictions with only very small

THE INSIDE TRACK

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

M&A transactions in Africa can involve a larger number of stakeholders when compared with other regions, particularly in the extractive sectors and the other sectors of national interest. The concerns of these stakeholders, such as government ministries who need to approve the transaction and local partners required to comply with indigenisation requirements, may also need to be factored into the structure and execution strategy for a deal. This can be a challenging, although ultimately rewarding, balancing exercise.

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

The first is to consider the experience that local counsel has of advising on complex M&A transactions that may not be a usual feature of that M&A landscape. While this may prove to be less of an issue in jurisdictions with more mature M&A markets, it can be managed in less developed markets by appointing lead counsel with the experience to structure and manage the deal alongside local counsel.

Managing and mitigating the legal and reputational risks associated with doing business in Africa should be another factor that guides client choice. Doing business in Africa can involve practices that risk falling foul of Western anti-bribery and corruption legislation so it is important to choose local counsel familiar with these regimes.

Experience of navigating Africa's increasingly complex merger control regimes, in which domestic legislation is often layered over by supranational regimes, should also be factored into the decision-making process.

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

In the summer of 2017, our London funds team advised Solon Capital Partners on the launch of its sub-Saharan Africa investment platform, Solon Capital Holdings.

Solon Capital Holdings is a newly formed Mauritius company that is seeking to raise US$80 million for making debt and equity investments in businesses in Sierra Leone, Liberia, Ivory Coast and Guinea. CDC Group plc, a development finance institution owned by the UK government, has committed capital as a cornerstone investor.

In view of the relative investment illiquidity in the west African markets, Solon Capital Partners has sought to move away from the traditional, fixed-life fund model in favour of a permanent capital model that reflects the investment and liquidity needs of the portfolio. Our team worked with Solon Capital Partners to develop a bespoke fund structure that suited the commercial requirements.

This was an extremely complex fund formation exercise, as the structure involved elements of a traditional closed-ended fund as well as mechanics that seek to offer flexibility to bring new investment in over time, provide liquidity to investors where possible and at the same time keep the manager's and investors' interests fully aligned.

The Herbert Smith Freehills team was led by funds partner Stephen Newby, and Africa M&A partner Gavin Davies.

Alongside our transactional work, we have been advising the government of Sierra Leone, since 2010, on inbound international investment issues, on a pro bono basis. Sitting on the government's side of the table has given us some strong insights into the concerns of African governments in this sphere. In 2015, the government called on us for support and advice on the impact of the Ebola outbreak, on the country's contractual position with international counterparties and on producing the Sierra Leone Investor's Guide, along with Standard Chartered and Prudential pic. The Guide was launched by President Koroma at the UN at the July 2015 International Ebola Recovery conference (www.herbertsmithfreehills.com/latest-thinking/investing-in-sierra-leone).

Gavin Davies, Rudolph du Plessis, Hubert Segain and Richard Woods
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capital markets, and very few listed companies, shareholder activism is not yet a meaningful feature of the M&A landscape.

Although there have not yet been many examples of activists succeeding in changing the board of a target company, we expect investors to become increasingly assertive and important players in M&A transactions in the region.

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

GD, RDP, HS & RW: Along with the target revenues, management and potential for growth, one of the factors that is usually key to a client's selection of a market and a sector is the target's ability to demonstrate compliance with local laws, and potentially preparedness for a 'compliance uplift' whereby overseas standards in relation to transparency and anti-corruption can be satisfied. This largely stems from reputational concerns and the desire to find a reliable local 'partner' with relevant expertise.

A common model for the provision of legal advice on an inbound deal into Africa, particularly on multi-jurisdictional deals, is for lead counsel to be based in the investor's home jurisdiction, to assist with deal structuring, to project manage the process and to negotiate the acquisition documents under an internationally recognised legal framework (eg, English law or New York law). The lead counsel would then work closely with

"The rebalancing required following global events such as lower commodity prices, political uncertainty in Europe, and the more insular and protectionist policies expected from the US, will continue to undermine investor confidence in the short term."

local counsel to complete due diligence, design a transaction structure that is appropriate under applicable local laws and to identify any conditions that will need to be satisfied as a prerequisite to the deal (eg, merger control consents, foreign ownership approvals or exchange control consents).

In many African jurisdictions there are sector-specific foreign ownership restrictions, and we have seen this create obstacles during the deal structuring phase. In particular, restrictions can arise where clients are seeking to obtain a level of control over the target, not only for consolidation purposes, but also to ensure that it has the ability to lead the company in key decision-making. Requirements for this kind of regulatory approval can be difficult to identify and to anticipate: in some jurisdictions, legislation is not available online and precedents for particular types of transactions may be limited. Once again, early engagement with experienced local lawyers and with government or regulators is key to identifying and addressing issues early in the process.

Formal or 'soft' local content requirements can give rise to similar questions: these take many forms across the continent, but typically require a minimum proportion of local staff to be employed by the target, along with staff training and welfare requirements.

All aspects of the deal process may, at some point, be impacted by practical considerations. A good example is document distribution. Lawyers will be familiar with uploading and managing large volumes of documents via online data rooms, but this will not always be possible in African transactions where documents may be held in paper form only. Indeed, we have seen creative uses of storage facilities like Dropbox being relied on in African transactions where a target's existing technological capabilities may not be able to deliver what is usually expected.

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

GD, RDP, HS & RW: Key changes that could impact practice in certain sectors significantly are those that would result from enforcement of the South African Mining Charter. If implemented, the Charter would require mining companies operating in South Africa to permanently increase the stakes held by black shareholders, potentially forcing companies to dilute existing shareholdings. Such changes are particularly significant when viewed in the context of similar movements across the continent to enhance protection afforded to 'native' interests. Tanzania, for example, has also recently enacted laws to increase taxes on mining exports, require larger government stakes in some mining operations and prescribe mining companies to take measures to add value to the extracted substances prior to export.

GTDT: What does the future hold? What activity levels do you expect for the next year? Which sectors will be the most active? Do you foresee any particular geopolitical or macroeconomic developments that will affect deal sizes and activity?

GD, RDP, HS & RW: Notwithstanding the cool-down in investor appetite that has resulted in flagging deal flow in the continent, the outlook remains positive for those taking a medium- to long-term view. Despite challenges in a number of the larger economies, it remains the case that projections for the growth of middle income economies are positive, with corresponding growth in the proportion of their population with capacity for discretionary spending on consumer goods. The demands placed by steady urbanisation and demographic growth, on sectors such as infrastructure, telecommunications and healthcare, also continue to offer opportunities to investors.

However, the rebalancing required following global events such as lower commodity prices, political uncertainty in Europe, and the more insular and protectionist policies expected from the US, will continue to undermine investor confidence in the short term.

M&A IN ARGENTINA

María Shakespear is a partner at Estudio Beccar Varela who specialises in M&A and corporate law. She recently advised Unilever in the sale of La Farmaco, a cosmetics company, and Banco de Galicia y Buenos Aires in the sale of Efectivo Si, a local financial insititution.

Ramón Ignacio Moyano is a partner and a member of Estudio Beccar Varela's executive committee. He specialises in giving general advice, which includes M&A, to companies 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.

Roberto Horacio Crouzel is a partner and a member of the firm's 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 in Argentina.

Milagros Quintana is an associate who specialises in M&A transactions. Milagros joined the firm in 2015 and is part of the corporate department. Milagros has been part of many M&A transactions carried out at Beccar Varela, gaining experience in that field.

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

María Shakespear: 2017 has been a particularly active year in the M&A field, especially taking into account the little activity during the past 10 years. We have perceived a great advance in the amount and value of the transactions, for example. One of the main reasons for this improvement is the much more business-friendly approach of the new administration's policies, and the opening to the international markets. In the legal field, the adoption of more liberal policies and the lifting of various barriers made Argentina an option for several eager investors. The most attractive fields nowadays are related to the natural resources, agribusiness, banking and technology fields.

Judging by the number of M&A transactions it can be said, from a business standpoint, that Argentina is definitely taking the right path. Although we know Argentina still has many aspects to improve upon, we are confident about the strategic role we are playing in the Latin American market.

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

Ramón Ignacio Moyano: One of the sectors that has been particularly active during 2017 is the energy sector. In that regard, local energy demand has grown significantly due to the population growth and due to an increase in economic activity after the lack of investment of the past years. Accordingly, the industry has reacted positively, answering to the needs of the market. In particular, the renewable energy sector has been especially active, mainly as a consequence of applicable regulations, which require that at least a percentage (that is gradually increased) of the energy consumption is from renewable sources.

A series of public bids known as the RenovAr Program for the construction of power plants based on various sources of renewable energy (wind, solar, biomass) took place in 2016. Under the RenovAr Program, a total of 170 projects were offered in two bid rounds for a total 8,829 MW of capacity. Finally 44 Power Purchase Agreements (PPAs) were awarded to local and foreign investors. A new tender for a total capacity of 1,000 MW was announced by the government for mid-August. The RenovAr Program together with tariff adjustments account for the attractiveness of the energy sector.

On another note, the discovery of Vaca Muerta shale oil and gas field in Neuquén, south of Argentina (estimated to be one of the largest shale oil reserves of the world), will attract local and foreign investments. Although numerous investors from the oil industry are already working on its exploitation, there is still much to be done, so Vaca Muerta is definitely in the spotlight.

Roberto Horacio Crouzel: The financial field has also been notably active. Although this industry still has much room to grow, Argentina is a part of the financial revolution that is taking place around the world. We perceive that current players are interested in expanding their businesses. In the same vein, foreign players that are not in the market or that left Argentina during the last crisis are looking for investment opportunities. One of the most important deals of recent years took place during 2016, when Citibank sold its retail business in Argentina to the Spanish group Santander.

With respect to the agribusiness sector, apart from the traditional development potential of the Argentine natural resources, the progressive reduction of withholdings applicable to strategic sectors benefited this field, making it more profitable to trade goods and services, which in turn makes it an even more attractive area for investments. Agribusiness is still a trend in the local market and there have been numerous investments that demonstrate this. Argentina, a traditional player in this field, seems to be one of the more competitive and convenient options for investors and the future expectations are even higher.

MS: Another sector that is being explored is technology. As is happening around the world, the technology market is constantly changing and demands sophisticated players. Doubtless, Argentina is recognised for being a pioneer of the region in the implementation of new technologies, having a well-prepared workforce in order to be up to date with the global trends. In this regard, local companies such as Despegar, Mercado Libre and Globant are well known for their constant vanguard and improvements on this matter.

On the contrary, a sector that has been quite stagnant but is becoming more active is the infrastructure sector. There have been improvements in the applicable regulations, and we believe is an interesting landscape that should be taken into account. In this regard, the national government is working on the development and investment of several roads and highways, as well as in urban mobility. This could also be related to the recent enactment of Law No. 27,328 (on private-public agreements), which has the main aim of fostering infrastructure investments as it provides for more certainty to agreements for private-public investments. This Law regulates the public-private investment regime and presents an alternative for alliances in invest in infrastructure that neither the private nor public sector might undertake by itself. We believe

"Argentina's government has adopted several regulations and lifted many barriers in order to open Argentina to the world and to the markets."

this is a great starting point as both public and private entities can take advantage of each other, producing great developments.

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

RIM: One of the most relevant deals of this year was the sale of IECSA, one of the biggest construction corporations of Argentina, to the local economic group Pampa Energía. This was a complex transaction due to the amount involved and the ongoing matters that were being conducted by the transferred company.

This year, the Central Bank of Argentina approved the sale of the retail bank Citibank to Santander Río, a deal that has been hitting the main headlines since last year. The sale of the Deutsche Bank was also approved.

In a more innovative approach, the approval by the regulatory authority of the first fully digital bank can be considered a keynote transaction.

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

RHC: M&A operations in Argentina are, in most cases, primarily cash transactions. On a general basis, we would say that shareholders are willing to accept shares issued by a foreign acquirer but that they are not often used to doing so. This may appear in sophisticated transactions and require sophisticated shareholders willing to invest simultaneously in Argentina and abroad.

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 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.

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

MS: Argentina's government has adopted several regulations and lifted many barriers in order to open Argentina to the world and to the markets. For instance, the regulatory landscape was improved, as many of the previous foreign exchange limitations – payment of dividends and royalties abroad, among others – that were part of the local policies were removed, generating positive incentives for local and foreign investors. Additionally, the inflation ranks are being controlled by the government, making the investment scenario more attractive for M&A transactions. In practice, the government is constantly reviewing processes and administrative barriers in order to facilitate business development – to make them less bureaucratic and speed up different procedures (eg, allowing the incorporation of a company in one day, speeding up the process of approval of transfer of properties subject to rural land laws, making available to the public the information registered with the inspection of corporations, among others). All these measures are providing positive incentives in the country and result in less bureaucratic M&A deals, and provide a higher level of certainty in the closing of M&A transactions. Also, there is a bill of law proposing an interesting reform to the antitrust and merger control law.

RHC: We feel very positive about this new wave of M&A deals, a feeling that is confirmed by the increase in the workload we are currently experiencing.

Left to right: Roberto Horacio Crouzel, María Shakespear, Milagros Quintana and Ramón Ignacio Moyano

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

RIM: Foreign buyers are very common in Argentina at present, though it is also very common to see local buyers. Throughout the first half of 2017, there been a considerable number of reports that state that potential investments have been put on hold pending the results of the October 2017 midterm legislative elections.

One of the most important improvements is related to the boost of small and medium-sized enterprises (SMEs). In that regard, an attractive tax regime applies to SMEs such as income tax deduction under the Entrepreneurial Capital Encouragement Law, which helped many new local investors to take a chance in creating their own businesses.

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

MS: On a general basis, shareholder activists are not relevant in the M&A scene as Argentinian companies tend to have only a few shareholders per company (usually the majority of shareholdings are concentrated in one or two groups). In addition, there are not many listed companies in Argentina.

Argentine capital markets are regulated by Law No. 26,831 (the CNV Law) and a set of rules issued by the Argentine Stock Exchange Commission (CNV). Regarding minority shareholders there are several corporate governance provisions that account for recognition of minority shareholders' rights including the possibility of such to actively participate in the companies they have a stake in. For example, minority shareholders can challenge the purchase price of their shares in a public offering. There are guidelines for determining if an equitable purchase price has been settled, and the control of the company cannot be acquired without giving notice to minority shareholders (so they are given the opportunity to sell their shares at the same price). The control of the CNV in listed companies has increased under the CNV 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: A transaction in Argentina can start in different ways according to the needs and characteristics of the particular case and client. There is no mandatory proceeding to be followed although the path is more regulated when the target company is a listed company or belongs to a highly regulated market (ie, financial institutions).

In general, the selling party prepares the target company for the sale in order to be in the best possible situation that will allow it to obtain a good value. To that aim, sellers usually hire an adviser to prepare a valuation of the company, define the strategy of the transaction and assist the seller throughout the deal in order to protect its interests.

Once the valuation of the company is completed, depending on the structure of the deal prospect buyers are contacted – a one-to-

"In the corporate field, there have been valuable improvements that aim to simplify starting a business in Argentina."

one approach should be made so as not to be considered as a public offering of the shares – usually through the advisers hired.

Afterwards, the parties enter into a confidentiality agreement in order 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 'book' of the target company is sent to prospective buyers in order to provide information about its history, a chart with its shareholders, offered products and services, brands, financial statements, projections, and any other relevant information.

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 the seller provides sell-side due diligence to provide an overview.

Once the preliminary agreement is executed, the parties agree on the extension and scope of the due diligence to be performed by the interested buyer (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 or tax 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 accountant 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). Insurance coverage to cover contingencies and reps and warranties is also increasingly being requested in the region. Subject to the characteristics of the transaction, a filing requesting antitrust authorities' approval (or other regulatory approvals as applicable, for example if the target is a financial entity) may be mandatory. In addition, post-closing tasks contemplated in the transaction documents are carried out.

As explained, the typical transaction requires a high level of organisation as it takes several months until both parties reach an agreement.

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

Milagros Quintana: In the corporate field, there have been valuable improvements that aim to simplify starting a business in Argentina. These kinds of advancements are especially appreciated by foreign players that do not want to deal with local bureaucracy. The main example is the implementation of a fast-track procedure that allows incorporating limited liability companies in 24 hours. This fast-track procedure includes

the sealing of corporate books and the issuance of a Tax Identification Number – all necessary requirements to start operating as an entity in Argentina. This new procedure has been very well received by the business community and we believe that it is a great initial kick-start for operating through a local business in Argentina.

There have also been changes for entrepreneurs: a simplified stock company has been included as a part of the variety of legal entities that can be incorporated in Argentina. This type of company was created with the aim to support entrepreneurship as it simplifies the traditional steps that are usually followed for those who decide to incorporate the classical limited liability corporations. This simplified stock company is ideal for new investors that do not have extensive experience in incorporating traditional corporations, and it implies limited liability for its shareholders.

Another improvement related to entrepreneurship is the enactment of the Entrepreneurial Capital Encouragement Law No. 27,349, which is pending regulation by decree to actually implement some provisions. The aim of this Law is to support the entrepreneurial activity of the country and its international expansion, as well as the boost of the entrepreneurial capital in Argentina. Through this law, tax benefits and funding alternatives are made available to foster the development of new business.

These regulations are proof of the advancement of our legal system in current relevant issues, as the new generation of investors are demanding a more inclusive environment, and we are hopeful that there will be many more to come.

The mentioned regulatory changes provide new commercial opportunities and will be embedded in new legal agreements.

GTDT: What does the future hold? What activity levels do you expect for the next year? Which sectors will be the most active? Do you foresee any particular geopolitical or macroeconomic developments that will affect deal sizes and activity?

RHC, RIM, MS & MQ: Apart from what we have mentioned in the previous questions, fintech is taking centre stage in the local business scenario. This is interesting from a regulatory standpoint and also from a commercial standpoint, as there are a number of new commercial relationships that need to be revisited. Many commercial businesses and especially banks have perceived this market's need and, consequently, are exploring the opportunity to develop their own businesses. Regulatory authorities are following these trends. In that regard, the Central Bank of Argentina granted a banking licence to the first fully digital bank (Wanap) Argentina, created in response to the needs of consumers demanding

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THE INSIDE TRACK

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

Compared to similar businesses in the rest of Latin America, prices in Argentina are still significantly cheaper. We believe that this is one of the main reasons that foreign investors lean towards Argentina. However, we believe that this situation will probably remain only in the short term, as the change of circumstances will produce a positive impact on the value of local companies. In that regard, as a result of growing financial opportunities, it is expected that Argentine assets will gain profitability and be more competitive, making the situation equal with other South American players such as Chile and Brazil.

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

First, a counsel should inspire clients' confidence and trust, in order to make them feel supported, especially if their clients are from foreign jurisdictions. Moreover, clients must look for high standards of ethics in addition to a high level of professionalism, since the business environment is particularly challenging. Lastly, the lawyer should have a fully integrated team with the ability to cover different legal areas required in such a complex transaction, in order to cover all of the possible contingencies and sensitive areas in the best possible way.

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

At Beccar Varela, we advised Despegar in its initial public offering (IPO) on the New York Stock Exchange. Despegar is the most important online travel agency of the country, and a pioneer of the local market in this industry. Despegar was created as a response to the needs of the customers when planning a trip, as it provides a comprehensive service that includes airplane tickets, hotels and car rentals, in only one website. Despegar's IPO was one of the most relevant of the year, making the headlines of the all the local newspapers. Despegar's public offer raised interest in many investors, and it became a strategic player in the international market. It is worth mentioning that there are only a few Argentinian companies that are listed on the New York Stock Exchange, so we are glad to be part of this deal that will generate greater opportunities in the near future.

We have also advised Banco Galicia, one of the most important financial entities of the country, in the sale of Compañía Financiera Argentina, owner of the credit network known locally as Efectivo Sí. Efectivo Si is the largest financing company in Argentina, and it is famous for looking after the needs of the non-banking sector of the population. This transaction was especially challenging for its magnitude and value, and for the special procedures that need to be followed when selling a financial entity that is regulated by the Central Bank of Argentina. This transaction was definitively one of the most high-profile deals carried out in Argentina within this year, which had a positive impact in the media and in the business world in general.

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more flexible mechanisms within the banking sector. We believe this is definitely one of the upcoming trends in the investments field and we should all keep an eye on it.

Furthermore, sustainable corporations and investments are still a trend in the local market. Mainly due to the influence of new generations that seek to obtain general benefits through the normal course of business, many new companies are created under this structure. What is more, large global companies are also adopting some of the same principles as B corporations and are starting to request their own providers to comply with certain standards that are core to B corporations (eg, mindful environmental policies, diversity of employees, etc). In that sense, many well-known companies that are already installed in the market, such as Natura or Patagonia, evolved into B corporations. The need of having conscious decision-making processes is becoming a global trend, and big companies do not want to lag behind. We support this change, and we are sure that this is only the beginning of greater future trends.

All in all, we are taking every opportunity that is made available to us, hoping that the best is yet to come.

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M&A IN CANADA

Emmanuel Pressman is a partner, chair of the corporate department and former head of the M&A group at Osler, Hoskin & Harcourt LLP. He represents public and private companies, private equity sponsors, special committees, boards and financial advisers in takeover bids, proxy contests, joint ventures, negotiated and contested mergers and acquisitions, and a range of corporate transactions. His clients have included Magna International, Fairfax Financial, KingSett Capital, Walter Energy, The ADT Corporation, Blackstone and Vector Capital. He is repeatedly recognised as a leading M&A practitioner, including by *Who's Who Legal*; *Chambers Global: The World's Leading Lawyers for Business*; *The Lexpert/AmLaw Guide to the Leading 500 Lawyers in Canada*; *The Legal 500*; *IFLR*; *The Best Lawyers in Canada*; and *The Canadian Legal Lexpert Directory*. Emmanuel Pressman is a frequent speaker at conferences relating to M&A; he has guest lectured at the IBA Mergers & Acquisitions Conference in New York, the McGill University Faculty of Law and the University of Toronto Faculty of Law; and is the co-author of the Canada chapter of the *International Mergers & Acquisitions Review* for the past 10 years. Among his community involvement, he serves on the board of directors of the Holland Bloorview Kids Rehabilitation Hospital Foundation.

"A noteworthy trend has been the continuing dominance of Canadian pension funds in leading and sponsoring material domestic and global transactions."

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

Emmanuel Pressman: Canadian M&A activity in 2016 was steady and relatively flat compared to 2015. There were approximately 1,500 M&A transactions involving Canadian targets representing approximately C$80 billion in total transaction value. H1 2017 has seen considerable improvement to date. During that period, there were approximately 850 M&A transactions involving Canadian targets representing approximately C$63 billion in total transaction value – a figure already on pace to surpass 2016 deal volume.

Compared with the proliferation of foreign outbound M&A by Canadian strategic acquirers seen in 2015–2016, thus far 2017 YTD has been relatively subdued. Nevertheless, there were significant outbound transactions including Hydro One's C$7 billion acquisition of Avista; SNC Lavalin's C$3.5 billion acquisition of WS Atkins; Macdonald Dettwiler's C$2.5 billion acquisition of DigitalGlobe; and OpenText's C$2.1 billion acquisition of Dell EMC's enterprise content division. Overall, about 40 per cent of all transactions in 2016 involved a foreign target or buyer with Canadian outbound acquisitions outnumbering foreign inbound acquisitions by a ratio of 1.5:1.

Purely domestic transactions involving Canadian buyers and Canadian target companies have predominantly taken place in the mid-market – a traditional area of strength for Canadian M&A and a cornerstone of the Canadian deal landscape. In 2016, transaction volume for deals under C$250 million represented roughly 90 per cent of all transactions. In H1 2017, this trend continued with the mid-market similarly representing approximately 89 per cent of all transactions.

A noteworthy trend has been the continuing dominance of Canadian pension funds in leading and sponsoring material domestic and global transactions. For example, Ontario Teachers' Pension Plan (OTPP) acquired the Canadian wine business of Constellation Brands for approximately C$1.03 billion; the Canada Pension Plan Investment Board partnered with Blackstone to acquire Ascend Learning from OTPP and Providence Equity Partners; British Columbia Investment Management Corporation participated in Macquarie Infrastructure's consortium bid to acquire Endeavour Energy for approximately C$11.8 billion; and Caisse de dépôt et placement du Québec and SUEZ announced their proposed acquisition of General Electric's water and process technologies business for approximately C$4.4 billion.

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

EP: The energy sector witnessed marked improvement in dealmaking following two years of lacklustre performance and despite weak oil prices, as global energy giants implemented strategic divestitures in furtherance of reallocations of capital to global portfolios. Deals included Royal Dutch Shell's C$11 billion sale of its Canadian oil sands businesses to Canadian Natural Resources; ConocoPhillips' C$18 billion sale of its Canadian oil and gas assets to Cenovus Energy; Apache's C$500 million sale of Apache Canada to Paramount Resources; Chevron's C$1.5 billion sale of its downstream fuel business to Parkland Fuel; and Statoil's C$830 million sale of its Canadian oil sands interests to Athabaska Oil.

The technology sector was also very active across a broad range of micro-cap and emerging companies and mid- and large-cap enterprises, as US-based private equity sponsors and strategic acquirers alike made material inbound investments in the Canadian tech sector. Deals included Microsoft's acquisition of Maluuba; Airbnb's acquisition of Luxury Retreats; Chan Zuckerberg Initiative's acquisition of Meta; Stryker's acquisition of NOVADAQ; Vector Capital's acquisition of Halogen Software; and Fransisco Partners' acquisition of Sandvine.

In addition to energy and technology, the real estate, mining and diversified sectors also contributed to Canadian M&A activity in 2016 and 2017 to date.

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

EP: The largest transaction involving a Canadian acquirer so far in 2017 so far is Cenovus Energy's C$18 billion acquisition of ConocoPhillips' Canadian oil and gas portfolio, which transformed Cenovus into one of the three largest oil sands producers in Canada. The deal represents a theme of global energy giants making strategic divestitures with Canadian industrial

counterparties. In addition to the industrial logic behind these M&A transactions, many of the deal structures saw the foreign sell-side party accept share consideration of the Canadian buy-side party, with the result that material investments have been made by global majors in the Canadian energy sector.

The largest announced and pending domestic transaction in 2016–2017 is the all-stock merger of equals between Agrium and Potash (to be renamed 'Nutirem'), which would create the third-largest natural resources company in Canada with a C$45 billion enterprise value, continuing a trend of global consolidation in the agriculture and chemicals sectors.

In addition to these strategic transactions, Vista Equity Partners' C$4.8 billion acquisition of DH Corporation; Rhône Capital's C$2.3 billion acquisition of Garda World Security from Apax Partners; OTPP's C$1.03 billion acquisition of Constellation Brands' Canadian wine business; and Vector Capital's C$300 million acquisition of Halogen Software are representative of private equity's significant role in the Canadian M&A market across a range of sectors and sizes.

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

EP: In Canada, consideration is typically comprised of cash or shares or a mixture of the two. The type of consideration is necessarily dependent on a number of factors including the size, structure and rationale of the transaction and the nature of the buyer. A financial buyer will typically acquire a company in a leveraged buyout using exclusively cash consideration, whereas a strategic buyer will be able to offer its shares as acquisition currency. On the one hand, the certainty of value makes cash highly desirable. On the other hand, there has been considerable investor receptivity in recent years to strategic, synergistic deals that allow shareholders to participate in the future upside of a combined company following completion of a transaction.

Canadian shareholders are generally willing to accept shares issued by a foreign acquirer. Depending on its jurisdiction of incorporation, the liquidity of its shares and the degree of familiarity with its home country's corporate laws and corporate governance practices, a 'foreign discount' may or may not be ascribed to the value of the shares used as acquisition currency.

It is also noteworthy that where foreign acquirers propose to use shares as acquisition currency, advisers will typically consider whether to adopt an exchangeable share structure. The primary benefit of such a structure is it allows Canadian shareholders to achieve a deferral


Emmanuel Pressman

of Canadian taxes on capital gains that would otherwise be payable when a foreign company acquires a Canadian company in exchange for the acquirer's own shares. An exchangeable share structure is designed to achieve the same substantive and economic benefits as a share-for-share exchange involving two Canadian companies, which would allow for tax rollover treatment. A recent example is the C$1.4 billion cash and share acquisition of Whistler Blackcomb by Vail Resorts. In that deal, the Canadian shareholders of Whistler Blackcomb could elect to receive shares in a Canadian subsidiary of Vail Resorts, instead of the Vail Resorts shares to which they would otherwise be entitled.

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

EP: In May 2016, the Canadian Securities Administrators introduced a new takeover bid regime that has now been adopted by all Canadian provinces. Under the new regime, all non-exempt takeover bids are subject to the following requirements: bids are subject to a mandatory, non-waivable minimum tender requirement of more than 50 per cent of the outstanding securities subject to the bid (excluding securities owned by the bidder and its joint actors); following the

"The federal government has the right to review and prohibit, or impose conditions on, a wide range of investments by non-Canadians on national security grounds."

satisfaction of the minimum tender requirement and all other bid conditions, bids will be required to be extended for an additional 10-day period; and bids will be required to remain open for a minimum of 105 days, subject to two exceptions. First, the target company's board of directors may issue a news release in respect of a proposed or commenced bid, providing for a bid period that is shorter than 105 days but not less than 35 days. If so, any other outstanding or subsequent bids will also be entitled to the shorter deposit period. Second, if a target company issues a news release that it has entered into a friendly change of control transaction that is not a bid, such as an arrangement, then any other outstanding or subsequent bids will be entitled to a minimum 35-day deposit period.

The 105-day deposit period in particular is designed to shift the balance of power between bidders and boards by giving directors of a target company more time to respond to, and consider alternatives to, an unsolicited or hostile takeover bid. Under the pre-existing bid regime, which provided a 35-day minimum deposit period, companies made use of shareholder rights plans or 'poison pills' to effectively extend the duration of a hostile bid. Rights plans were historically 'cease-traded' by securities regulators within 50 to 75 days of commencement of a bid. Since the 105-day period ensures that boards will have at least 105 days to react to a hostile bid, with some exceptions, we expect that target companies will conclude they now have adequate time to respond to a hostile bid without adopting a tactical poison pill in the wake of an unfolding bid.

Foreign investment review and approval of acquisitions of control of Canadian companies by foreign companies has also been a 'hot button' issue in recent years. Ministerial approval is required under Canada's foreign investment review legislation, the Investment Canada Act (ICA), for certain large transactions that confer control over Canadian businesses to non-Canadians to ensure they are of 'net benefit' to Canada.

In June 2017, new thresholds for determining whether foreign investment review is required under the ICA took effect. The threshold for World Trade Organization (WTO) private sector direct investment in Canada is C$1 billion based on 'enterprise value', adjusted on annual basis to reflect a GDP-based index. The increase in the threshold for ICA review is consistent with Canada's approach to welcoming foreign investment and, in general, Canada has exercised restraint in disapproving foreign investment.

The review thresholds for state-owned enterprise acquisitions (C$379 million), non-WTO acquisitions (C$5 million), and acquisitions of cultural businesses (C$5 million) continue to be based on 'book value' without any changes to previously applicable thresholds.

In addition to the ICA regime, the federal government has the right to review and prohibit, or impose conditions on, a wide range of investments by non-Canadians on national security grounds. In December 2016, the government issued new Guidelines on the National Security Review of Investments with a view to increasing review transparency and fostering foreign investment. The Guidelines seek to provide information to investors about the administration of the ICA's national security review process and include factors that the government will consider when assessing whether an investment poses a national security risk.

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

EP: Buyers from outside Canada are not uncommon, and inbound cross-border M&A, particularly from the US, has traditionally been a significant source of M&A activity. This far, 2017 has seen considerable improvement relative to 2016 in that regard. In 2017, the most significant inbound transactions has been Vista Equity Partners' C$4.8 billion acquisition of DH Corporation; Starwood Capital's C$4 billion acquisition of Milestone Apartment REIT; The Washington Companies' C$1.7 billion acquisition of Dominion Diamonds; Rayonier Advanced Materials' C$1.1 billion acquisition of Tembec; and Stryker's C$925 million acquisition of NOVADAQ Technologies.

"In addition to shareholder activism, Canadian companies should be mindful of 'deal activism' and the possibility that, after a deal is announced, activists may seek a higher price"

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

EP: Most certainly. Although Canada has had its modest share of large-cap proxy contests led by US shareholder activists (most notably, *Icahn/Lionsgate, Pershing Square/Canadian Pacific*, *JANA/Agrium* and *Mason/TELUS*), the overwhelming majority of activist campaigns occur in the mid- and micro-cap markets. This can be explained by the fact that Canada is predominantly a mid-market corporate economy. Moreover, the micro-cap market often sees the highest incidents of concentrated share ownership, corporate governance deficiencies, board and management entrenchment and related party transactions – all of which makes these types of situations especially vulnerable to activist agendas. Recent examples include the proxy contests for control of the boards of Eco Oro Minerals and Liquor Stores NA.

In addition to shareholder activism, Canadian companies should be mindful of 'deal activism' and the possibility that, after a deal is announced, activists may seek a higher price, encourage a topping bid or even try to bust up a deal. Recent examples of deal activism seeking to interfere with strategic M&A include Mulacek's attempt to thwart Exxon Mobil's C$2.5 billion acquisition of Interoil; Catalyst Capital's attempt to thwart Corus' C$2.6 billion acquisition of Shaw Media; and Smoothwater Capital's attempt to thwart Alberta Oilsands' merger with Marquee Energy.

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

EP: Everything depends on the circumstances and the situation. Generally speaking, if a company is undertaking a sale process or an auction, financial advisers will typically canvass the market by identifying the potential buyers and making first contact with management of those buyers. If a company is seeking to acquire another company, the CEO might approach the other CEO, management could take the temperature of a significant shareholder of the target company or, if very aggressive and determined, management might even explore whether to make a public 'bear hug' overture or launch a hostile bid by extending an offer directly to the target's shareholders.

If a buyer wants to undertake due diligence of a target company, including access to non-public or commercially sensitive information, and engage in a 'friendly', negotiated acquisition, the parties will first enter into a confidentiality agreement. If the target is a publicly traded company, the negotiation of a 'standstill' clause and an 'exclusivity' clause will be among the most intense negotiations. A standstill prevents a potential buyer from going hostile or making a public offer without the board's prior approval, and exclusivity prevents the target

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THE INSIDE TRACK

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

Canadian public markets are characterised by a large number of companies with controlling or significant shareholders and dual-class voting structures, and a large number of small-cap and mid-cap companies with concentrated and institutional share ownership. Our securities regulators have adopted rules-based regimes in the context of insider bids, issuer bids, business combinations and related-party transactions, with a focus on neutralising the conflicts of interest inherent in these transactions. More generally, our securities regulators are the principal arbiters of contests for control of public companies.

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

First, experience. You need to be creative, flexible, fast-moving and able to draw on prior experience. Second, team player. In addition to leading a team of technicians and specialists from within my own firm, I coexist with multiple deal advisers, dealmakers and market participants. Goodwill and relations are built over time and there is no one person that can get it done without the proper team. Third, judgement. M&A is more than legal compliance and technical skill. It involves strategic thinking, tactical decision-making, and professional and commercial judgements being made on a regular and timely basis.

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

Advising Constellation Brands in the sale of its Canadian wine business to OTPP was the culmination of a carefully designed process that explored a range of strategic exit alternatives. Against a backdrop of competitive auction dynamics involving a mix of strategic and private equity buyers, OTPP ultimately prevailed as the winning bidder. In the final analysis, we successfully completed a complex carve-out transaction and significant M&A deal in relatively short order – and just before Christmas!

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company from negotiating with, or soliciting offers from, any other party for a specified period of time.

The formation of a special committee of independent directors to supervise the process and review and evaluate a transaction is required in certain prescribed circumstances and, in particular, where there is a conflict of interest such as an acquisition of control by an insider or a related party of the target company. Outside of conflict transactions, Canadian boards will often consider whether it would still be appropriate to strike an independent committee as a matter of convenience or good corporate governance.

It is almost universally the case that a target board of directors will obtain and rely upon the advice of independent financial advisers in the discharge of its duties. It is standard operating procedure in Canada, and recommended, that the board obtain a disclosable fairness opinion from its financial advisers in any change of control transaction that must be approved by shareholders.

In parallel with, or following completion of, due diligence, the parties will negotiate the definitive acquisition agreement that governs the conduct of the parties between signing and closing. During that interim period, the parties will seek and obtain regulatory approvals, shareholder approvals, stock exchange approvals, committed debt financing, third-party consents, and do any and all such other things that are required under the terms of the agreement to satisfy the conditions to closing.

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

EP: No. There are no such changes anticipated 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?

EP: It should be anticipated that the balance of 2017 and 2018 will continue to witness more M&A transactions, especially in furtherance of private equity transactions, industrial consolidation and the achievement of strategic growth objectives.

In that regard, 2017 has witnessed a high volume of M&A activity relative to 2016. While the outbound dealmaking that drove M&A activity and mega-deals in 2015–2016 slowed down in 2017, cross-border inbound M&A flows improved considerably. We should expect that trend to continue in light of the continuing availability of credit, the low interest rate environment, and the currency advantage in favour of US and European buyers relative to a weaker Canadian dollar.

M&A IN FRANCE

Hubert Segain is a partner and head of Herbert Smith Freehills' corporate group in Paris. 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 and financial investors on their M&A operations. He also represents issuers, managers and financial institutions in enforcement procedures launched by the Financial Markets Authority.

Hubert has published more than 30 papers on M&A and financial markets regulation. He is frequently consulted by regulatory bodies and other professional organisations on matters affecting corporate and financial regulations. Hubert is a member of the Paris and New York State Bars. *Chambers Global*, the *Legal 500*, *Who's Who Legal* and *IFLR1000* list him as a leading corporate lawyer.

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"Generally speaking, 2017 so far has been very active despite the uncertainties related to the consequences of the Brexit vote, the upcoming measures of Donald Trump's administration and the French and German elections."


Hubert Segain

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

Hubert Segain, Christopher Theris & Noémie Laurin: In the first quarter of 2017, Europe reached a record of the past 10 years in terms of value for announced M&A deals, France ranking first – representing 26 per cent in terms of deal value.

Acquisitions of French companies made by foreign groups reached €58.4 billion over the first six months of 2017 – representing twice the aggregate value of completed deals as compared to the same period in 2016. Acquisitions made by French companies abroad increased by 30 per cent as compared with the same period in 2016 to reach €30.6 billion, although in both cases the acquisition in the number of deal decreased by 12 per cent (which is the effect of a number of large size deals that took place in 2017).

Over the same six-month period, we can observe a similar trend for domestic French M&A activity, which more than doubled in value to reach €15.3 billion – although the number of deals decreased by 15 per cent compared to the first semester of 2016. Major groups continue to refocus their activity by gaining market shares at international level and looking for synergies with complementary activities, but also by selling subsidiaries with a non-core activity.

Overall, M&A activity is buoyed by favourable conditions for external growth.

Several factors can explain this trend. First, financing conditions remain favourable to companies, which can either borrow money at low interest rates or pay the acquisition fully or partially with their own available cash. Moreover, corporate leaders are gradually regaining confidence in the market and are keener to invest reserves stocked-pilled since the global economic crisis.

Companies are seeking to become leaders at a regional or global level – as, for example, illustrated by the pending merger between Essilor and Luxottica, which would become the global leader in the fast-growing eyewear industry, and the recently announced 'merger of equals' between Alstom and Siemens' mobility business, creating the second worldwide leader in rails behind the Chinese CRRC.

Generally speaking, 2017 so far has been very active despite the uncertainties related to the consequences of the Brexit vote, the upcoming measures of Donald Trump's administration and the French and German elections.

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

HS, CT & NL: This year some of the larger deals have been in the industrial sector with the acquisition of Vauxhall by PSA from General Motors, the merger of Alstom and Siemens or the acquisition of Zodiac Aerospace by Safran.

The food and beverage sector has also been active, especially in French outbound M&A, with the acquisition of the US organic milk product producer Whitewave by Danone (US$12.5 billion) or the acquisition by Bonduelle of the US-based individual salad portion leader Ready Pac Foods (US$409 million). This is also true of the pharma sector in particular with the acquisition


Christopher Theris


Noémie Laurin

by Ipsen of the global oncology assets of US-based Merrimack Pharmaceuticals (US$960 million) or the acquisition by l'Oreal of the Cerave skincare assets from the Canadian-based Valeant Pharmaceuticals (US$1.3 billion).

There has also been a resurgence of mega-deals involving French companies in 2017 compared to 2016, with the announcement of five deals over €5 billion and three deals over €10 billion during the first semester of 2017 as well as the recently announced merger between Alstom and Siemens.

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

HS, CT & NL: One of the largest deals of this year is the merger between French-based Essilor and Italian-based Luxottica and for an overall deal value of €24 billion. Following the merger, Mr Del Vecchio, founder of Luxottica, will become the largest single shareholder in the merged group – with a stake between 31 per cent and 38 per cent – though voting rights will be capped at 31 per cent. The Del Vecchio family holding company that controls Luxottica will exchange its 62 per cent stake in the Italian company for newly issued Essilor shares. The transaction is still pending competition clearance from the European Commission, which opened a phase two investigation at the end of September 2017.

One of the keynote deals of this year was the acquisition by Danone of the US organic milk product leader WhiteWave. The purchase price of US$12.5 billion was largely financed through external debt. Danone has been required to carry out certain divestments to obtain the necessary competition clearances, and in particular, the divestment of its American subsidiary, Stonyfield, that specialises in organic milk products. This transaction will considerably impact Danone's global footprint and market position, particularly in the United States – where it is now one of the top 15 food and beverage companies.

The acquisition of Opel and Vauxhall by PSA from General Motors for an agreed amount of €1.3 billion, which will make the French company the second-largest carmaker in Europe behind Volkswagen, is another example of an important French cross-border deal carried out by a French company in 2017. This deal is also important because it reveals the turnaround of PSA after it came close to bankruptcy some years ago.

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

HS, CT & NL: Bidders may offer cash, securities or a combination of both as consideration to the target's shareholders. Even if French shareholders tend to prefer cash as consideration, equity and mixed consideration are increasingly used in practice. Consideration in the form of shares of a foreign company is sometimes proposed. In cases where the French company is listed, there will be pressure on the foreign company proposing consideration in the form of its shares, to dual list its shares in France so as to ensure that the French investors can continue to trade shares on the French stock market.

Determining what type of consideration the shareholders will view as most attractive is essential to a successful bid and is an important part of the work of the financial advisers of the offerer.

The acquisition by Safran of Zodiac Aerospace is an interesting case study in relation to cash versus equity consideration and the more complex structures that can be proposed. Originally the transaction as announced in January 2017 had a very complex two-step structure involving a cash offer for the general shareholders followed by a merger, during which the Zodiac Aerospace family shareholders would receive shares in Safran (this structure was designed essentially for tax purposes to limit the application of wealth tax on the Zodiac Aerospace family shareholders). A number of Zodiac Aerospace shareholders complained that they were not given the option to benefit from the consideration in the form of shares of Safran. In March, following shareholder activism in particular by TCI and further profit warnings from Zodiac Aerospace, a new deal was presented by Safran and Zodiac Aerospace. This revised deal involved a more customary structure, whereby all shareholders of Zodiac Aerospace benefited from a primary cash offer on 100 per cent of the shares of Zodiac Aerospace and a secondary offer open to all shareholders to obtain preference shares in Safran (capped at 31 per cent of the offer, the requests from shareholders being reduced proportionately in case of oversubscription of the secondary offer for consideration in kind).

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

HS, CT & NL: The Sapin II Law relating to transparency, anti-corruption and the modernisation of the economy, which entered into force on 11 December 2016, imposes the obligation on large corporate groups (with at least 500 employees and with an annual turnover in excess of €100 million) to implement compliance programmes. This law requires companies to set up measures and procedures such as a code of good conduct, an internal system of alerts designed to enable employees to report any violations of the law and the code of good conduct, a risk-mapping process and client assessment programmes.

The French legislature also introduced, on 27 March 2017, a duty of vigilance applying to parent companies and subcontracting companies with respect to the activity of subsidiaries and service providers, in particular in the context of their manufacturing process and supply chain in France and abroad. This bill was initialled following the tragic collapse of the Rana Plaza building in Bangladesh in 2013 in order to prevent

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such tragedies and to ensure compliance and relief in the event of breaches of human rights and environmental protection laws. French groups with more than 5,000 employees in France or more than 10,000 employees in France or abroad are within the scope of these obligations.

These new regulations are symptomatic of a general trend towards a greater focus on compliance-related issues in France. This has a strong impact on M&A practice. In this context, compliance and protection against compliance-related risks has become an increasing area of focus not, only at the due diligence phase but also at the phase of negotiation of the deal documentation in the context of M&A transactions.

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

HS, CT & NL: European targets have found favour with investors in the first half of 2017 with a 33 per cent increase compared to the level of activity seen during the first semester 2016, while US M&A fell 16 per cent over the same period.

For the first six months of 2017, acquisitions of French companies made by foreign groups doubled in value (to reach €58.4 billion) compared to the same period in 2016, although the number of completed M&A deals decreased.

During the first half year of 2017, US buyers were the biggest purchasers of French companies – both in terms of number of deals and of the aggregate value of transactions. The two other biggest categories of buyers of French companies were the buyers based in the UK and Germany over the same period.

China continues to be seen as a frequent investor in the French market and there are currently discussions in France and at the European commission level to further regulate foreign investments in an attempt, in particular, to require reciprocity for countries like China – which are seen as aggressively acquiring abroad while protecting their own domestic market. In reality, the explosion of outbound investment from Chinese buyers observed during the first six months of 2016 has fallen during the second semester of 2016, and has remained stable in the first semester of 2017. This trend can be explained by the increased regulatory and political scrutiny of China towards the investments of Chinese companies abroad.

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

HS, CT & NL: Analysts have observed that since 2006, more than 8 per cent of the M&A deals announced by S&P 500's French groups were subject to attacks from activist investors attempting to derail the transaction. There has been a general rise in shareholder activism over the past few years in France and this trend is continuing in 2017 where a few noteworthy activist campaigns have taken place.

The ongoing merger between Safran and Zodiac Aerospace is a good example. TCI, an activist hedge fund holding approximatively 4 per cent of Safran's share capital, has not only challenged the price of the deal but also called into question the merger itself by pointing out a preferred treatment benefiting Zodiac shareholders as compared to Safran's shareholders, and by questioning the creation of synergies between the two companies. This activist campaign (along with profit warnings issued by Zodiac Aerospace) led to a significant modification in the structure of the consideration and a reduction in the initial offer of Safran – representing a 15 per cent decrease in the valuation of Zodiac Aerospace as compared to the original offer.

Activist investors do not hesitate to file complaints in the courts in the context of their campaigns. This was the case, for example, this year for CIAM, a Paris-based activist, who filed a legal complaint against Altice on the basis that Altice had forced its French subsidiary, SFR Group, (acquired in 2016) to take actions that were detrimental to the minority shareholders.

Not only have the traditional activist actors been active in France in 2017, institutional investors are also increasingly willing to support and to get more directly involved in shareholder activism. This evolution in shareholder behaviour forces managers to have a better vision of their key shareholders, especially before launching a transaction or important operation.

French companies are increasingly aware of activist strategies, but still remain underprepared to deal with activist investors when a conflict arises.

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

HS, CT & NL: 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. Using channels of communication between legal counsel 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. Contrary to the situation in common law, 'legal privilege' does not exist in France for in-house lawyers and the protection of correspondence can only be guaranteed by virtue of lawyers' professional secrecy. Because of rules applying to

professional secrecy, lawyers are required to keep communications with other lawyers confidential and the courts and other public authorities cannot force lawyers to disclose the content of these exchanges. Breach of the professional secrecy is subject to criminal and disciplinary sanctions.

Advisers are mandatory in the context of certain transactions. For example, in a public takeover context, the bidder must appoint a presenting bank that presents the project to the French Financial Markets Regulator (the AMF), guarantees the bidders' undertakings and generally structures the transaction.

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 organise a data room for the disclosure of documents on the business of the target to the potential purchaser. This process is now almost always carried out through a virtual data room, though this can be accompanied by a physical data room for particularly sensitive documents (which may in some cases only be accessible by the purchaser's legal counsel). There can be two stages in releasing documents in the data room, meaning the most sensitive and confidential documents are made available for viewing only to bidders qualifying for the second stage of the process.

The information obtained will be used to confirm interest in the transaction, value the target company, gauge the risks related to the transaction and negotiate the price.

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 the French Civil Code. As a consequence of this duty of good faith (which cannot be contracted out of), even if the parties remain free to terminate negotiations, they can be held liable to the other party in the event of abusive and abrupt termination of negotiations (essentially for costs incurred by the other party in preparing the transaction and in the course of the negotiations). Decisions to break off negotiations therefore have to be carefully managed.

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 an offer letter with the AMF describing the terms and conditions of the offer, as well as a draft prospectus that provides a significant amount of information. The target will be required to issue a note in response to the offer and the decision of its board to approve or disapprove the offer and otherwise comply with specific disclosure obligations.

The parties to a transaction will generally be advised by lawyers, accountants, financial advisers and public relations agencies. All these specialists are required to work together as a team 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 of the parties involved and the target prior to the signing of any definitive acquisition agreement, as well as the requirement to propose the employees to make an offer for the business or company in the context of the sale (for smaller targets), 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 jurisdiction?

HS, CT & NL: One of Emmanuel Macron's key campaign promises was the reform of labour laws seeking to help French companies respond in a more flexible manner to the challenges they are facing and increase their competitiveness in the global market. By way of ordinances published in September 2017, which are pending ratification by the French parliament, the French government introduced a number of important measures modifying labour laws – including the capping of damages due to employees being made redundant, measures simplifying collective redundancy exercises and the consolidation of employee representative bodies to create a unique body (instead of three in charge of representing the employees today). This consolidation of employee representative bodies should facilitate the consultation process of employees in the context of M&A transactions. Decrees are still to be enacted in order to fully implement these measures. There is some hope that these implementation decrees will reduce the maximum periods for consultation of the unique employee representative body and accelerate the implementation of M&A deals in France.

The French government is also preparing the finance bill for 2018, which will include measures reducing tax applicable to companies in France. The headline measure is the progressive decrease of corporation tax from 33.33 per cent to 25 per cent by 2022. The new bill would also remove the much-disputed 3 per cent additional tax on distributions (including dividends) made by any company subject to corporation tax.

Generally speaking, the measures announced by the French government should enhance the attractiveness of France and encourage inbound M&A activity for the remainder of 2017.

It is also noteworthy that there are currently discussions on the modification of thresholds applying to merger control regulations. In October 2016, the European Commission launched a public consultation on certain procedural and jurisdictional aspects of merger control regulations following a debate on the effectiveness of the jurisdictional thresholds (which today are purely turnover-based) and their ability to capture all transactions that can potentially have an impact on the EU internal market – particularly in certain sectors, such as the digital economy and the biotech sectors, where target companies may have a low turnover but potentially an important value. Similar reflections are currently carried out at national level in European countries including in France.

GTDT: What does the future hold? What activity levels do you expect for the next year? Which sectors will be the most active? Do you foresee any particular geopolitical or macroeconomic developments that will affect deal sizes and activity?

HS, CT & NL: M&A activity has been strong in Europe in general, and in France in particular, in 2017 so far and this trend is expected to continue. This is, in particular, due to the fact that not only private equity players but also corporates continue to have a high level of 'dry powder', and are increasingly willing to use it on external growth (in opposition to share buy-backs and distributions). Interest rates continue to be historically low, and, although they are expected to rise slowly over the next few years, this will continue to provide cheap funding of M&A activity in Europe.

M&A in Europe should also benefit from the general recovery of the European markets, in particular in the context of a managed Brexit. Some market analyses even predict that Brexit should, in any case, generate an increase in M&A activity for both UK buyers seeking opportunities for growth and diversification of risk in Europe, or foreign buyers seeking to take advantage of the opportunity to acquire high-quality assets at competitive prices given the weakness of the pound sterling. In that context, M&A activity should also continue to be strong in France due to all of these factors and the political-business, friendly environment under Macron.

From a sectorial perspective, it is expected that, after a slowdown in 2016, the pharma and healthcare industries will see strong M&A activity over the next few years, particularly due to ageing populations in advanced economies and the proliferation of innovative companies in the

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THE INSIDE TRACK

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

Labour law considerations have to be carefully reviewed. Over the past few years legislation has tended towards increasing involvement of the employees' representatives in the M&A process (including the requirement to first give the employees the opportunity to make an offer on the company before selling it to third parties under the 'Loi Hamon' law).

Foreign investment issues also need to be carefully managed. It is necessary to assess whether the target is active in one of a number of (sometimes widely defined) industries that require prior foreign investment approval from the French Ministry for the Economy. Generally speaking, the sometimes wary attitude of officials to foreign investments requires M&A players to be very attentive to the preparation stage and communication made around such projects.

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 expectations. 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 given, in particular, the increasing cross-border nature of M&A transactions.

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

We recently worked on the acquisition of Banque Leonardo France by UBS France and subsequent reorganisation of the UBS France business. This was an interesting deal for many reasons, namely as it involved a number of regulatory issues (both the acquirer and the target were active in private banking and asset management) and challenges relating to the sequencing of operations, given that the ultimate goal is to set up a joint venture between UBS France and La Maison to operate the asset management branch of the business.

Hubert Segain, Christopher Theris and Noémie Laurin
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biotech and medtech sectors, which will require consolidation.

The finance sector should also see consolidation over the next few years given, in particular, the fragmented banking system in Europe. But this will depend in part on whether regulatory issues and national protectionism can be overcome. The Fintech industry should also drive M&A activity in this sector as consolidation in the industry accelerates and as bigger players continue to acquire innovative players to benefit from or protect themselves against disruptive technologies. Consolidation is also expected in the insurance sector.

M&A in technology and telecoms has been extremely robust over the past few years and this trend is expected to continue.

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M&A IN GERMANY

Alexander Schwarz is a corporate/M&A partner in Gleiss Lutz' Düsseldorf office. He advises clients in M&A transactions on all corporate law issues as well as in the area of private equity. In recent years, he has worked on numerous cross-border transactions, which included advising Magna on its bid for Opel/Vauxhall, E.ON on the divestiture of its Italian power generation business, Borletti Group on the planned acquisition of Karstadt, Alpiq on the sale of its energy supply technology division to VINCI, Boehringer Ingelheim on collaboration with ViraTherapeutics, and Bertelsmann on various M&A transactions. Alexander has been co-managing partner of the firm since 2016.

Martin Viciano Gofferje is a corporate/M&A partner in Gleiss Lutz' Berlin office. He specialises in international M&A transactions with a particular focus on advising private equity and venture capital investors. He co-heads the Gleiss Lutz focus groups healthcare and life sciences, venture capital, and is also the country relationship partner for the Iberian peninsula and Latin America. In recent years, Martin has advised a large number of well-known corporations including Gruner + Jahr, Valeo, Boehringer Ingelheim, Roche, Leo Pharma, eBay, STIHL and Bosch on complex national and cross-border transactions and joint ventures. His recent work includes advising Blackstone on the acquisition of the Armacell Group from Charterhouse and Baillie Gifford on acquisition of stake in CureVac.


Alexander Schwarz

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

Alexander Schwarz & Martin Viciano Gofferje: The year 2016 was successful for M&A both worldwide and in Germany. Despite a series of influential political changes such as the Brexit decision and election of the President Trump, 2016 was the third strongest year for M&A activities worldwide after the record year of 2007. That said, worldwide the number of transactions reported and deal volume were lower than in 2015.

The deal volume and number of transactions in Europe also failed to reach 2015 levels. But these developments made no impression on the German M&A market, where – according to statistics – 846 deals were reported with a value of more than US$80 billion. This is an increase of just under 30 per cent compared to 2015.

The German M&A market was primarily shaped by outbound transactions, particularly by those involving companies in the US and parts of Asia. With a volume in excess of US$60 billion, the planned takeover of Monsanto by Bayer deserves a mention as Germany's largest transaction of 2016.

Looking at inbound activities, we see that Chinese investors took centre stage in a large number of deals, including the €4 billion takeover of the German robotics manufacturer Kuka by the Chinese Midea Group. Nonetheless, the acquisition of the systems manufacturer Aixtron by the Chinese company Fujian Grand Chip Investment was blocked due to US government concerns. It remains to be seen what effect this will have on Chinese investors for future acquisitions. At any rate, in Germany, the number and volume of transactions involving Chinese groups dropped considerably during the first half of 2017 compared to the same period in the previous year.

But this statistic is not representative of the general M&A trend in Germany, where 2017 is also shaping up to be a very good year for transactions. The economy is doing well, helped along not only by the low interest rate policy in Europe and wage and fiscal policies, but also by low oil prices. These factors have led to a disproportionate rise in the number of private equity deals. The private equity sector is booming and is being inundated by money from major investors lacking alternative options. They can borrow capital on terms that are more favourable than ever before, but there simply aren't enough investment opportunities. And that's what iss driving valuations.

There are several reasons why M&A will continue to be a hot topic in Germany in the future. On the one hand, the market should continue to benefit from favourable financing conditions. On the other, there are a number of companies with large cash reserves. This means not only that takeovers are possible, but that the management is also under pressure to invest. We will have to wait and see what kind of role activist shareholders will play in these situations in future, but one thing is certain: their importance will only increase.

Companies are not being put off by the difficult political situation in Europe and elsewhere. In talking to our clients, we have not encountered any increased reluctance to enter into M&A transactions because of political uncertainty. The M&A market is still in very good shape and the outlook for the rest of 2017 remains promising. In our entire careers, we have never seen the transaction market boom the way it is in Germany at the moment. This makes us somewhat cautious, as it can't last forever. Sooner or later, there has to be some kind of correction.

We have already seen one trend in our practice over the past few months – namely that M&A transactions, especially public takeovers, are becoming more difficult. The reason for the increasing complexity is that the procedural rules have changed significantly. Where previously we had bilateral negotiations conducted by management boards and managing directors, we now have a process requiring all stakeholders to be involved and motivated – investors, employees, customers, the public and politicians. A deal is only successful if the interests of all of these groups are taken into account at an early stage. Added to this is the fact that the new regulatory procedures are much lengthier and more prone to disruption, especially when it comes to cross-border transactions.

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

AS & MVG: The industrial and chemicals sectors were especially popular with investors in 2016 and were the strongest sectors based on deal volume. This trend was spurred on by the planned, but not yet completed, billion-dollar takeover of Monsanto by Bayer, in particular, as well as by the planned merger of equals between Linde and Praxair.

The number of takeovers in the technology industry is rising dramatically. The largest tech deal in 2016 was the Dutch ASML Group's acquisition of a stake in the Carl Zeiss subsidiary SMT for an amount of €1 billion. Digital technologies such as the internet of things, the cloud and big data are prompting more and more companies to tap the potential of innovation-driven growth via M&A deals as well.

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

AS & MVG: The biggest deals involving German companies in the past 12 months were the planned takeover of Monsanto by Bayer and the envisaged merger of Linde and Praxair. Both transactions have an expected volume of more than US$60 billion and have not yet been completed. The planned merger between Deutsche Börse and the London Stock Exchange – the companies' third attempt to combine – failed this year when the EU Commission refused to grant clearance. Other deals made by leading German companies outside Germany include the acquisition of Spanish hospital operator Quirónsalud by Fresenius for €5.76 billion, the business combination agreement between Hapag Lloyd and United Arab Shipping Company (UASC) with a value of US$5.4 billion, the US$4.5 billion acquisition of Mentor Graphics by Siemens, the takeover of Air Products and Chemicals by Evonik Industries with a volume of €4.2 billion and the acquisition of The Sun Products Corporation by Henkel. The largest M&A transactions in Germany in the past 12 months include the €6.2 billion acquisition of ista by Sarvana, the€5.4 billion takeover of STADA by the financial investors Bain Capital and Cinven, and the acquisition of the WIRTGEN Group by Deere & Company for , €4.6 billion euros.

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

AS & MVG: It's not just a tendency that can be observed: shareholders definitely prefer cash over shares. Hence, cash transactions prevail both in


Martin Viciano Gofferje

public and private M&A transactions in Germany. With regards to public takeovers, a foreign bidder offering shares as consideration will have to have such shares listed on a regulated market within the European Economic Area. US or Swiss bidders, for instance, are therefore often compelled to offer cash to shareholders.

The selling shareholders' general preference for cash does not suggest, especially in private transactions, that offering shares to the buyer may never be an attractive opportunity for both sides. We often see share transactions in venture capital undertakings where strategic planning and a prognosis of increasing share prices are involved. Shares in a non-listed company as consideration are certainly more interesting to sellers when accompanied with involvement in the management, exit rights or other mechanisms to compensate the uncertainty of share valuation. This applies regardless of whether those shares are issued by a foreign acquirer.

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

AS & MVG: Most of the legal framework for M&A in Germany has been quite stable in past years, but the introduction of the ninth amendment to the Foreign Trade and Payments Ordinance in July 2017 has brought key changes to the process of cross-border transactions. Foreign investments in German companies will be under tighter review by the

"German targets are of great interest for potential acquisitions, cross-border or not. The market is well recognised for its stability, product integrity and offerings in leading technologies."

Federal Ministry for Economic Affairs and Energy than before.

In principle, there are two types of foreign investment review. First, investors whose registered offices are neither in the EU nor a state in the European Free Trade Association, and who directly or indirectly acquire a minimum of 25 per cent of voting rights in a German company, are subject to a cross-sector investment review irrespective of the relevant industry. Clearance is not a legal closing condition for these investments, but the deal is subject to potential unwinding later. Second, for particularly sensitive areas, such as the development of war weapons, there is a sector-specific investment review that also applies to EU-based investors outside of Germany. The Ministry must always be notified of these investments, as they cannot be closed without its clearance.

The amendment now includes specific examples of when investments may be prohibited or restricted in a cross-sector review, with a focus on civil sectors with security relevance. This list includes targets that operate critical infrastructure, are active in telecommunications surveillance or render cloud computing services. There is a new statutory duty to report investments in these civil sectors to the Ministry comparable to a sector-specific investment review.

Besides broadening the scope of both cross-sector and sector-specific investment review on several points, the time periods for reviewing foreign investments by the Ministry have been noticeably lengthened. Most discussed is the fact that, previously, the period the Ministry had to review cross-sector investments began when the acquisition agreement was signed. After three months the possibility to open review procedures expired. This period will now only begin once the Ministry has obtained knowledge thereof. As a consequence, the uncertainty of an acquisition being banned after completion has risen significantly. According to the law, such an event can only be ruled out five years after any regulatory restrictions are signed. It is likely that voluntary applications for a certificate of non-objection will now become common in order to initiate the cross-sector investment review and keep better control over the timeline.

We have yet to experience how the new rules will affect the practice and investors' choices. The time frames under antitrust and foreign trade law will no longer run in parallel. This change might require additional efforts in planning a transaction. However, as foreign investment law is critically dependent upon European law, the German government was mostly limited to amending procedural matters. The procedure of investment review might take longer and be more complicated under the new law, but the authority of the Ministry to actually stop or restrict investments stays the same as before.

We will have to wait and see how this trend towards increasingly strict reviews of foreign investments will develop. Chinese investments have launched public discussion on stricter investment control, in particular regarding state-owned investors. Most prominently discussed is the successful takeover of German robot manufacturer KUKA by Chinese investor Midea even after remarkable political intervention efforts, whereas concerns about national security in the United States have ultimately led to the acquisition of Aixtron in the semiconductors industry falling through. The German government needs to adhere to European standards, but has clearly set a tougher tone towards foreign investments.

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

AS & MVG: German targets are of great interest for potential acquisitions, cross-border or not. The market is well recognised for its stability, product integrity and offerings in leading technologies. In concurrence with the observation that many midium sized and family-owned businesses are increasingly facing difficulties in finding suitable successors among their relatives after many decades of internal management, natural opportunities arise for new business owners

"The German corporate scene has steadily become a target for shareholder activists."

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to benefit from existing core competencies in technology, supply chain or otherwise.

The current financing conditions additionally provide great incentives for buyers to invest now, resulting in a high demand for German quality assets that exceeds the supply of eligible targets significantly. The rising number of foreign buyers adds to the continuous shift of the market situation in favour of German sellers. Share purchase agreements are increasingly negotiated on the seller's terms and, along with purchase prices, are becoming even more seller-friendly. Nevertheless, foreign investments in Germany have not lost their popularity.

Additionally, warranty and indemnity insurance has gradually become an integral part of share purchase agreement negotiations and this specific insurance market has begun to establish itself in Germany. There has not yet been a large, publicly-known damage case on which to judge the capabilities of such insurances. It is to be expected that the current rather 'soft' terms and prices of this insurance will adapt in the near future, as the frequency of actual insurance claims has already risen in the past year.

Investing in Germany has proven to be a smooth choice for foreign buyers, even for those with a common-law background. Generally speaking, M&A agreements in Germany are set up quite similarly to US or UK agreements. Furthermore, the whole process is commonly conducted in English. In terms of deal value, US and Chinese investors are most interested in German targets, with Chinese interest growing at an immense rate. It has yet to be seen how the German government's new regulatory measures, will affect foreign investments in Germany.

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

AS & MVG: The German corporate scene has steadily become a target for shareholder activists. FTI Consulting has counted 16 attacks on German companies in 2016, which constitutes a record high.

Corporate strategy, operational performance and financial structure are current topics, or rather issues, under scrutiny. The method is to obtain representation on the supervisory board and thereby put pressure on the management. Influence on day-to-day business, however, remains less significant than in the US, where the phenomenon originated. This is due to a more rigid legal framework in regulating shareholder actions in Germany. Apart from these general topics, an important focus for shareholder activists remains on squeeze-outs and M&A situations.

Besides the infamous attempt by Active Ownership Capital to dismiss and replace all

shareholder representatives on the supervisory board of pharmaceutical company Stada and the activities of hedge fund Elliott Management, the unsuccessful advance of Bosnian entrepreneurial family Hastor on car parts supplier Grammer has recently gained public attention. The Hastor family acquired around 23 per cent of the shares and wanted to achieve fundamental changes within the management. This is unusual as attacks mainly come from financial investors whereas the Hastors apparently have strategic interests as well since they own the car part supply company Prevent. Their previous controversies with Volkswagen have already garnered significant criticism and their most recent attack was opposed by political, economic and labour representatives alike. This certainly explains the unusually high attendance of over 60 per cent at the critical general meeting this year.

For M&A transactions this development demands a higher awareness while preparing a transaction, but also contributes to higher overall M&A activity.

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

AS & MVG: The process is usually initiated by the CEOs who first meet among themselves to discuss the key parameters of the deal. Sometimes bankers become involved rather early on, especially when there are many potential buyers to talk to. After the parties have decided to move forward, non-disclosure agreements and, ultimately, a letter of intent are signed. In most cases, this stage is directly followed by the kick-off-meeting for due diligence proceedings. After the due diligence has been conducted, the first draft of the share purchase agreement will be based upon those findings. Negotiations and numerous new drafts will follow until signing finally takes place. Closing is achieved after the conditions are met, in particular regulatory requirements (eg, merger control and foreign investment control).

Those are the typical stages for the acquisition of private companies that are not privy to the situation in Germany. If there is a sales auction involved, there will be additional steps to consider and potentially several due diligences to fit into the timeline. The element of competition makes these transactions slightly different since parallel operations need to be managed, but the legal requirements do not deviate from the standard process.

In contrast thereto, as regards publicly listed companies, German laws provide a detailed regime on how the process should be structured. Once a public takeover has been announced, the requirements under the German Takeover Act need to be met in addition to the standard steps of a transaction. This notably includes the involvement of the Federal Financial Supervisory Authority, specific time frames and many more details that must be taken into account. Since public takeovers are already highly regulated, due diligence is often comparatively limited in these cases.

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

AS & MVG: Private equity investments continue to be strong in 2017 and Germany has proven to be a core market after the Brexit referendum. However, the enhanced reputation has attracted uncommon participants such as pension funds or insurance companies to the private equity model, which intensifies the already palpable competitive pressure. Whether these developments will have a lasting effect on M&A practice in Germany remains to be seen.

As regards regulatory aspects, besides the stricter foreign investment control described above, changes within the German legal framework initiated by European legislation certainly continue to materially affect corporate and M&A practice. The new General Data Protection Regulation will be an important topic in the coming months, even for non-EU companies. The EU regulation was adopted on 27 April 2016 and will become enforceable from 25 May 2018 after a two-year transition period during which compliance with the strict data protection regime should be achieved. The scope of the EU data protection law is extended to all foreign companies processing data of EU residents. It is to be expected that data protection compliance will take up a bigger role during due diligence inspections than before.

In the healthcare sector, the Medical Device Regulation that came into force on 25 May 2017 has led to increased consolidation pressure and thus higher M&A activity. Manufacturers of currently approved medical devices will have a transition time of three years until 26 May 2020 to meet the requirements of the new EU regulation.

GTDT: What does the future hold? What activity levels do you expect for the next year? Which sectors will be the most active? Do you foresee any particular geopolitical or macroeconomic developments that will affect deal sizes and activity?

AS & MVG: We are confident that the German M&A market will remain very active despite the political uncertainty around the globe. Financial resources and good financing conditions remain high, as does investment pressure on investors. There is a great desire for businesses to keep on growing, but organic growth is very slow. This condition facilitates continued M&A activity, especially where cross-border transactions are concerned.

THE INSIDE TRACK

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

German M&A transactions mostly follow an internationally established process. Thus, the steps to take, as well as the sale purchase agreement itself, should look quite familiar to investors from anywhere in the world. Peculiarities of German law certainly need to be addressed in the due diligence, but what really stands out compared to other jurisdictions are the notarisation requirements at the notary that must be carefully observed. The worst case would be that agreements, share transfers or shareholders' resolutions turn out to be non-binding after all because of formal deficiencies.

Apart from legal characteristics, soft features of the German practice become especially apparent during negotiations. German parties tend to be more consensus-oriented and are in principle more willing and eager to find a compromise. However, once a solution has been settled upon, it is viewed as a steady agreement and it is unlikely that those issues will be renegotiated. Agreed upon time periods are treated in a similarly serious way.

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

A client's team for you should have experience and insight into the specific industry for which counsel is required, but should also have proven itself to be efficient and responsive.

There should be experts on the team from the very beginning that are responsible for niche areas as excellent M&A lawyers alone cannot support the whole transaction. When facing complicated issues in employment, IP, regulatory, tax and other legal areas, specific experts are vital.

This client should ensure that the partners in charge actually work on the case, and try to get to know them beforehand. It is advisable to choose lawyers who understand the subtleties of German business discussions and who can adapt well to the prevailing consensus-oriented mindset.

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

The surge in technological progress has been very fascinating in the past months. New endeavours within the autonomous driving sector were favourites of ours. We advised several joint ventures in this field and both the products and the challenge of bringing up to four different parties together was really interesting. With new technologies you definitely need to look to the future and imagine all kinds of different scenarios that could be of legal relevance. Digital innovation will make our work more diversified in terms of business models and potential partners need to realise these projects.

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As mentioned before, the healthcare sector will continue to be very active. The recent scope of expansion for the prescription of medical cannabis and the establishment of the so-called Cannabis Agency by the German government in March 2017 has led to frequent inquiries on assistance in the process of obtaining a public commission for cultivation of cannabis in Germany and establishing (cross-border) joint ventures. This political decision has opened up a whole new market and companies are eager to participate.

The upcoming Brexit and tensions in the Far East do carry unpredictable political risks, but currently we do not see direct negative impact on our practice. Our firm has specifically set up a task force for Brexit matters that keeps close track on the developments in the UK. Regulatory uncertainties within Germany are of much greater concern, although, of course, these, also, stem from political contemplations such as the German policy towards Chinese investors. With the elections this year, investors might be reluctant to move forward until the situation in Germany has settled. Nevertheless, we expect Chinese investments to continue to be of great importance for the German M&A market as well as a rebound interest of German investments in China.

Technological progress in general pushes many players worldwide and across all industries to act at an even faster pace. Therefore, we are optimistic that the current boom in M&A activity will not subside in the near future.

M&A IN JAPAN

Kenichi Sekiguchi is a partner at Mori Hamada & Matsumoto and practises in mergers and acquisitions and general corporate matters, including corporate litigation regarding M&A transactions. He has particular experience in transactions involving conflicts of interests such as management buyouts and in cross-border M&A transactions, for which he advises both international and domestic clients. His clients include various international companies and private equity funds.

He was admitted to the bar in Japan in 2005 and in New York in 2011. He is recognised as one of the leading M&A lawyers in *Who's Who Legal: Japan* 2017.

Akira Matsushita is a partner at Mori Hamada & Matsumoto. He focuses on, and has extensive experience in, inbound and outbound cross-border and domestic M&A transactions (involving listed and private companies); matters involving corporate governance, shareholder activism, proxy fights, unsolicited takeovers and takeover defence; and general corporate and securities law matters.

He was admitted to the Japanese Bar in 2006 and the New York Bar in 2013. He received his LLB from Keio University in 2005 and his LLM from Cornell Law School in 2012. He also worked at Kirkland & Ellis LLP, Chicago, from 2012 to 2013. He has published *Comprehensive Analysis of M&A Laws of Japan*, *TOBs in Japan – Systems and Demonstrations*, *Shareholders' Proposal and Proxy Fight* and the Japan chapter in *The Shareholder Rights and Activism Review*.

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

Kenichi Sekiguchi & Akira Matsushita: M&A practitioners in Japan were quite busy in 2016 and into 2017. In particular, outbound transactions by Japanese companies hit a record high in 2016 both in terms of the number of transactions and the transaction value. As to domestic M&A transactions between Japanese companies, we saw a steady deal flow in 2016 into the first half of 2017. There were many divestment transactions by Japanese conglomerates as they continued to implement their strategies of focusing on their core competencies, while Toshiba was forced to divest many of its subsidiaries and other assets because of financial problems.

Private equity in Japan has been quite active as some major Japanese private equity firms successfully launched new funds and obtained additional funding from a variety of investors. Also, there were a few major recent inbound transactions including Foxconn's acquisition of Sharp in 2016 and KKR's takeover in 2017 of Calsonic Kansei, a tier 1 auto parts supplier that was a subsidiary of Nissan Motors. However, inbound transactions represented around 10 per cent of all M&A activities in Japan in 2016. The government has been implementing various policies, such as tax incentives and issuance of work permits, with more loosened requirements to facilitate foreign direct investment in Japan, but the effect remains to be seen.

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

KS & AM: For outbound M&A transactions, the most active sectors are technology, media and telecommunications (TMT), life and non-life insurance, consumer and pharmaceutical. Softbank's acquisition of ARM Holdings in 2016 at US$31.8 billion broke the record for the deal size of outbound M&A transactions by Japanese companies. Softbank has continued its deal-making and recently announced the establishment of the Softbank Vision Fund, which has major investors such as the Saudi government and has US$100 billion of committed capital. Softbank is aiming to become the world leader in the high-tech industry.

In the insurance sector, we've seen a series of sizeable transactions in recent years. Since 2015, there have been eight M&A transactions by Japanese companies exceeding US$10 billion, seven of which were outbound transactions. In the non-life insurance sector, Sompo Holdings acquired Endurance at US$6.3 billion in 2016, while its rival MS&AD Insurance Group Holdings acquired Amlin in 2015 at US$5.3billion and recently announced the acquisition of First Capital, a Singapore-based non-life insurance company, at US$1.6 billion. Life insurance companies have also been active in recent years, as shown by Nippon Life's acquisition of MLC at US$2.2 billion, which was completed in October 2016. The Japanese insurance market is already mature, and in light of Japan's ageing and shrinking population, room for domestic growth is quite limited. Therefore, going abroad for growth is an inevitable trend for insurance companies.

Likewise, the consumer sector remains active in outbound M&A transactions for the same reasons. Two outbound transactions by Asahi Group Holdings were ranked among the top five outbound transactions by deal value in 2016.

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

KS & AM: The acquisition of Sharp in early 2016 by Taiwan-based Hon Hai Precision Industry (also known as Foxconn) was a notable transaction as it may affect the historical hesitance of the Japanese government or management of Japanese companies in accepting foreign capital.

In April 2016, Sharp, a major Japanese electronics company going through financial difficulties, agreed to accept approximately ¥388 billion in the form of equity from Foxconn, making Foxconn the controlling shareholder of Sharp. According to the public disclosure of Sharp, Sharp had been discussing the transaction with the Innovation Network Corporation of Japan (INCJ), a Japanese public-private partnership aimed at promoting innovation and enhancing the value of businesses in Japan. Many M&A practitioners thought Sharp would choose INCJ to avoid the leak of its technology from Japan to overseas and to avoid potential culture clashes with Foxconn's more aggressive management style. Needless to say, many were surprised Sharp ultimately chose Foxconn as its partner.

There have been some cases in recent years in which major Japanese companies were put up for sale but, because of the de facto influence of the government mixed with the fear of the Japanese companies being managed in a westernised way, foreign companies were not successful in

> *"Outbound transactions by Japanese companies hit a record high in 2016 both in terms of the number of transactions and the transaction value."*


Kenichi Sekiguchi


Akira Matsushita

acquiring these Japanese companies. Sometimes unsuccessful foreign strategic bidders criticised the Japanese market for not being sufficiently fair and transparent. Since the investment by Foxconn, however, Sharp has been doing quite well and its decision is generally recognised among Japanese companies' management as the right decision.

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

KS & AM: While cash is more commonly used as consideration in acquisitions, the type of consideration varies depending on the nature and structure of the acquisition. In a share purchase or business transfer, the consideration is predominantly cash only. An exchange offer through which the acquirer offers its own securities as consideration in a tender offer is legally permitted but the use of exchange offers has not developed in practice in Japan because capital gain taxes may not be deferred in the case of an exchange offer.

In a statutory business combination, such as a merger, share exchange or company split involving a listed company, stock is more commonly used as consideration, although cash or other consideration is legally permitted and is often seen in the case of a company split.

Considerations comprising a mix of cash and stock is not common in Japan, although such a mix is legally permissible. However, a cash tender offer followed by a second-step stock-for-stock merger or share exchange is often seen, and this structure effectively provides the shareholders with both cash and stock.

Japanese shareholders are not generally willing to accept shares issued by a foreign acquirer because access to information about the foreign acquirer would likely be limited for most domestic shareholders. If shares of a foreign acquirer are issued to shareholders of a listed company, the foreign acquirer must file a security registration statement in Japan.

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

KS & AM: Amendments to the Companies Act were made in May 2015, which introduced a squeeze-out right for a 'special controlling shareholder', which is a shareholder who holds at least 90 per cent of the voting rights of a company. A special controlling shareholder has the right to force the other shareholders in the company to sell their shares to the special controlling shareholder. As a result, if a buyer becomes a shareholder holding 90 per cent or more of the voting rights of a target through a first-step tender offer, the buyer no longer needs to cause the target to hold an extraordinary shareholders meeting to consummate the squeeze-out of the minority shareholders.

Important tax reforms also have been made in 2017. Prior to the tax reform, cash-out mergers or share exchanges were rarely used for squeeze-out transactions in Japan because assets of targets may be subject to capital gains taxation. As a result of the 2017 tax reform, a tax qualified treatment is now available for a cash-out merger or share

exchange if the surviving company or parent company holds at least two-thirds of the total outstanding shares of the disappearing company or subsidiary company and other requirements are met. Thus, cash-out mergers or share exchanges may become feasible options for conducting a squeeze-out of minority shareholders.

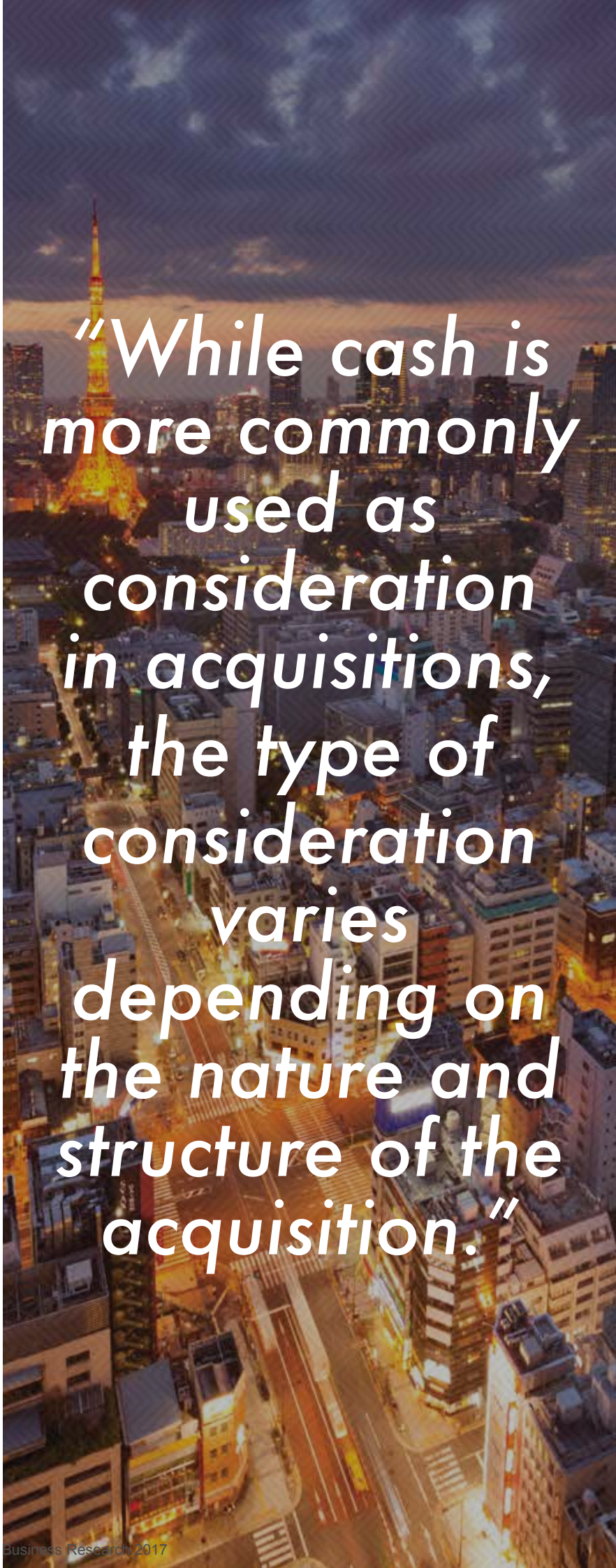
Also, prior to the 2017 tax reform, if a company that adopts the consolidated taxation system had made a target a wholly owned subsidiary through a squeeze-out transaction, assets of the target would have generally been subject to taxation, and net operating loss carry forward of the target could not be used in the consolidated taxation. As a result of the 2017 tax reform, if a squeeze-out transaction meets the requirements of the tax qualified treatment, such taxation on assets of the target can be avoided and net operating loss carry forward of the target can be used in the consolidated taxation. Consequently, the number of squeeze-out transactions conducted by companies adopting the consolidated taxation system may increase.

Furthermore, the 2017 tax reform now permits deferral of taxation arising from certain spin-off transactions in which a part of a company's business, or its wholly owned subsidiary, is carved out and shares in such business or wholly owned subsidiary are distributed to the company's shareholders through a dividend in kind. This tax reform may increase the options available for a company to structure a carve-out of a part of its business.

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

KS & AM: Although there are many more outbound M&A transactions in Japan, inbound M&A transactions are not uncommon. During 2016 into 2017 especially, the number and volume of M&A transactions in which Chinese companies acted as buyers or investors of Japanese companies increased substantively. Chinese companies have also been acquiring the operations and Chinese subsidiaries of some Japanese companies that have recently pulled out of China or decreased their operations in China pursuant to company restructurings. While M&A transactions by Chinese companies with Japanese companies may at times be affected adversely by diplomatic relations between Japan and China, such M&A transactions are expected to continue to increase in the near future.

Also, foreign private equity funds, such as KKR and Bain Capital and other US- or UK-based funds, were actively engaged in M&A activity in Japan during 2016 into 2017. For example, in 2017, KKR acquired Calsonic Kansei, an automotive parts manufacturer and supplier, in the largest acquisition of a Japanese company by a private equity fund in Japanese M&A history.



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THE INSIDE TRACK

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

Typical M&A practices and M&A processes in Japan are generally not so different from those of the US and Europe. The main transaction agreements in M&A transactions, such as stock purchase agreements and shareholder agreements, including with respect to the scope and content of their provisions, are generally similar to the agreements utilised in M&A transactions in the US and Europe. Of course, as with all jurisdictions, parties conducting transactions in Japan should take note of some local rules particular to Japan, such as with respect to certain restrictions on lay-offs under the labour laws and the company governance requirements under the Companies Act.

One noteworthy thing is that few hostile takeovers have been successfully completed in Japan, partly because the identity of shareholders in listed companies has been quite stable and public opinion in Japan has been generally against hostile takeovers. Also, counter proposals against a disclosed transaction have rarely been made by third-party bidders in Japan. However, in the event cross shareholdings in Japanese companies dramatically decrease in the future due to the new corporate governance rules, more cases of hostile takeovers or counter bids could potentially occur.

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

First, a law firm should be able to set up a suitable team composed of a variety of relevant specialists, because a complex transaction usually requires a wide range of expertise. Since prompt attention and support are necessary in such transactions, and due to the volume of work such as in due diligence and the preparation of transaction documents, the size and resources of the firm are also important considerations.

Second, it is important for a client that a counsel is not only competent in ability and experience; the counsel should have the right mentality and business judgement to seek the true understanding of the needs and goals of the client in order to provide the best solution and advice for the client.

Third, a client should confirm which lawyers in the transaction team will actually handle or serve as the point persons for the transaction. To successfully complete a complex transaction, reliable lawyers must be heavily involved in the transaction including maintaining good and regular communications with the client.

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

We represented Jupiter Telecommunication (JCOM), the largest Japanese cable TV operator, in its going-private transaction by KDDI and Sumitomo Corporation. The transaction was a two-step going-private transaction involving a tender offer and a subsequent statutory squeeze-out process. The transaction was announced in October 2012 and the tender offer was commenced in February 2013 because it took a few months for the buyers to complete merger filings in China. The squeeze-out became effective in early August 2013. During this period, because of a series of new economic policies implemented by the then newly inaugurated Prime Minister Shinzō Abe, the Japanese stock market recorded a significant raise. Foreign institutional shareholders claimed that the tender offer price was too low considering the general changes of the market condition and initiated appraisal proceedings in the court. After lengthy proceedings through the district court and the High Court, we were able to successfully obtain a decision from the Supreme Court clarifying that the court's review in appraisal proceedings should focus on procedural fairness. The transaction and subsequent appraisal proceedings were interesting because they include various implications that may affect the practice of going-private transactions in Japan including how the parties should manage conflict of interest issues.

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

KS & AM: The environment surrounding shareholder activism in Japan has been changing over the past few years. Japan's Stewardship Code was introduced in 2014 and Japan's Corporate Governance Code was introduced in 2015. Reform of the practices under these codes has led to the decrease of unquestioning supportive votes by cross-shareholding shareholders or institutional investors for the management of listed companies. In fact, at annual shareholders' meetings held in 2016 and 2017, the ratio of votes against agendas proposed by management with respect to the appointment of directors, especially CEOs, has noticeably increased. Moreover, at the annual shareholders' meeting of Kuroda Electric in June 2017, a shareholder proposal made by an activist fund to elect an outside director designated by the activist fund was approved. This case reflects the trend of shareholders in Japan becoming more comfortable with, and supportive of, shareholder activism.

The number of M&A transactions involving shareholder activism has been increasing, especially in transactions involving conflicts of interests between an acquirer and minority shareholders, such as in management buyouts and

"Due diligence procedures have become more efficient and streamlined in recent years, such that the time required by parties to complete due diligence has become shorter than in the past."

transactions involving squeeze-outs of minority shareholders in listed subsidiaries by parent companies. Some shareholder activists have expressed their views regarding such transactions through public campaigns or in private dialogue, and have stated that the transaction considerations are lower than fair value, and demand that the buyers or companies increase such considerations. Thus far there are only a few precedents in which a transaction proposed by management was not approved at a shareholders' meeting as a result of a proxy fight conducted by a shareholder activist. However, given recent trends, management of listed companies should appropriately take into account potential reactions and actions of shareholder activists when conducting M&A transactions. Shareholder activists may exercise, and some have exercised, their appraisal rights as dissenting shareholders to file a petition to the court for a determination of the fair price of the relevant shares after the completion of a certain M&A transaction.

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

KS & AM: M&A transactions are typically initiated either by discussions between managements of a seller and buyer or contact by a financial adviser to a potential seller or buyer depending on the particulars of the transactions, such as transaction value, relationships between the parties or the industries and businesses of the target companies. Sellers often implement an auction process to find a buyer as such process often results in a higher purchase price. Negotiating with more than one potential buyer in an auction process may also give a seller a bargaining advantage to negotiate more favourable terms and conditions for the seller in the definitive transaction agreements.

A seller and potential buyers usually execute non-disclosure agreements, after which the seller provides the potential buyers with fundamental information regarding the target. A seller and a buyer sometimes enter into a memorandum of understanding that is often legally non-binding before proceeding to the due diligence phase. An auction process typically has two stages. In the first stage, potential buyers are usually provided with an information package prepared by the seller. After the potential buyers review the information and perhaps after conducting preliminary due diligence, they submit bid letters stating their preliminary offer prices to the seller. The seller then selects a few preferred potential buyers to proceed to the second stage in which further due diligence is conducted and the parties negotiate the transaction agreements.

A buyer often requests that a seller or target give the buyer exclusivity in the negotiation of a transaction before due diligence because the buyer wants to avoid spending unnecessary costs and resources for due diligence and evaluation of the transaction. With respect to the duties of directors of a target in Japan, there is no court precedent expressly requiring directors of a target to conduct market checks to seek the best available purchase price. However, the Tokyo High Court held with respect to a management buyout that directors owe a duty to ensure that the fair corporate value of a target is transferred among the shareholders.

In many large cases, documents for the due diligence are provided to potential buyers through a virtual data room. It is also common for potential buyers and their advisers to hold some interview sessions with the target during the course of their due diligence of the target. Due diligence procedures have become more efficient and streamlined in recent years, such that the time required by parties to complete due diligence has become shorter than in the past.

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

KS & AM: As mentioned earlier, shares of a listed company may be used as consideration in a tender offer, but the use of shares as consideration has not been used for tax reasons. There is an anticipated amendment to the tax laws in early 2018 that will likely allow the deferral of capital gain taxes in share-for-share tender offer transactions. If such amendments pass, it will enable an additional structuring option to Japanese listed companies when they consider M&A transactions.

The amendment to the Civil Law was promulgated on 2 June 2017 and will be effective within three years after the promulgation.

However, this amendment is not expected to materially affect M&A practices in Japan, although legal practitioners should take it into account when advising their clients.

GTDT: What does the future hold? What activity levels do you expect for the next year? Which sectors will be the most active? Do you foresee any particular geopolitical or macroeconomic developments that will affect deal sizes and activity?

When considering an acquisition, management is always concerned about possible goodwill impairment. Such sentiment was fuelled by the recent announcement of Japan Post Holdings that it will have goodwill impairment arising from its acquisition of Toll Holdings in the amount of US$3.6 billion. Toshiba also disclosed huge goodwill impairment related to its US nuclear power plant construction business, CB&I Stone W Webster, which was acquired for US$229 million in late 2015 by Toshiba's subsidiary, Westinghouse.

Nevertheless, faced with an ageing population and a shrinking domestic market, Japanese companies will have no choice but to look into foreign markets for growth. Therefore, we expect that the trend of increasing outbound M&A transactions will continue. As mentioned earlier, the TMT, insurance, consumer and pharmaceutical sectors will continue to be the main areas for M&A growth.

Domestic M&A transactions will also likely continue to increase toward the activity levels that existed before the financial crisis. The Japanese government has been trying to improve the corporate governance of Japanese companies and, although still far from the activity level in the US, shareholder activism is becoming less unusual and is becoming a factor in facilitating M&A transactions in Japan because activist funds often demand divestment of non-core businesses.

The financial environment in Japan is also supportive for M&A activities regardless of whether the transaction is outbound or domestic. The Bank of Japan has implemented a number of monetary easing policies and the current interest rates on Japanese government bonds are close to zero. Japanese companies can benefit from the close-to-zero interest rates to finance their outbound M&A transactions. Regarding the contemplated tax reform of the carry forward of capital gains tax in the context of share-for-share tender offer transactions, if this reform is enacted, Japanese listed companies, which are said to hold more than US$ 200 billion of treasury shares, will have another viable option to finance their acquisitions.

In addition, government-owned financial institutions such as the Development Bank of Japan and the Bank for International Cooperation are ready to provide additional financing support. Also, INCJ is continuing equity investments in various Japanese companies or in foreign companies jointly with Japanese companies.

We are therefore quite optimistic about the long-term future of the Japanese M&A market.

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MALTA

Rachel Vella Baldacchino joined WH Partners in 2014 as a trainee lawyer, taking up the post of associate in 2016. Her main practice areas are corporate law, M&A, corporate finance and capital markets.

Rachel graduated from the University of Cambridge with the degree of Master of Corporate Law with first-class honours in 2017, where she is a member of Pembroke College.

Rachel read law for six years at the University of Malta, graduating with a Bachelor of Laws with European studies in 2013 and a Doctor of Laws in 2016. Her doctoral thesis critically revisited securitisation laws in a post-financial crisis world. As part of her studies, Rachel spent a semester at the University of Bologna, where she studied IT law, comparative law with a focus on East Asia, and the law of capital markets.

Rachel is a lover of languages and cultures, and has a good working knowledge of Italian, German and French in addition to her mother tongues, English and Maltese.

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"Malta continues to gain momentum as a centre of excellence for doing business and for persons seeking an efficient entry point to Europe through international asset-holding structures and an efficient tax base."

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

Rachel Vella Baldacchino: Malta's economic climate has witnessed seven years of consistent growth and steady recovery since the onset of the financial crisis, and the Maltese market for mergers and acquisitions is presently by no means insignificant. Corporations actively seek external funding and sources of growth, reflecting an increasing trend towards cross-border mergers and acquisitions involving Maltese companies. This is also reflected by statistics published by Malta's National Statistics Office, which show that foreign direct investment in Malta at the end 2016 stood at €161.4 billion, marking an increase of €9.5 billion over the corresponding period for the previous year, with 98 per cent of this figure being attributable to the financial services and insurance business sectors.

In May 2017 the European Commission (the Commission) reported that Malta's real gross domestic product (GDP) growth exceeded expectations in 2016, coming in at 5 per cent as a result of large-scale exports in the services sector, primarily in the gaming and professional services industries, coupled with strong private consumption expenditure. It is in this context that M&A activity has significantly picked up over less than a decade, progressing from a situation where M&A activity was minimal, to one that reflects the buoyant state of the Maltese economy, in particular that of the services sector.

Most M&A activity goes unreported where it relates to private companies, but an insight into the extent of M&A activity can be found through the Malta Financial Services Authority's annual figures, which report that 214 company mergers were carried out in 2016.

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

RVB: Malta continues to gain momentum as a centre of excellence for doing business and for persons seeking an efficient entry point to Europe through international asset-holding structures and an efficient tax base. Sectors that have experienced considerable activity in recent years involve businesses engaged in activities such as banking, payment processing, electronic money issuing, software, gaming and gambling, insurance, aviation and yachting. The dynamism driving the ICT lying at the foundations of the online gambling industry has prompted significant M&A activity in Maltese technology-focused companies. Clear and forward-looking regulatory frameworks for remote gaming operators, which safeguard both the interests of players and businesses alike, are coupled with stable regulation in the financial services sector, allowing for the offering of a range of payment gateway services and fintech products. Typical transaction sizes are not always publicised and figures do vary widely across sectors and businesses, however some recent transactions in the online gaming sector have reached values beyond the €1 billion mark.

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

RVB: The transactions involving Maltese companies, buyers or sellers that receive highest press coverage relate to the remote gaming and banking industries, as some of Malta's most flourishing business sectors.

Significant gaming industry M&A has been focused on snapping up operators with strength in specific markets. The most significant deal by value over the past few quarters has probably been that the acquisition of a majority stake in the Tipico Group, an international provider of sports betting and casino games, by CVC Capital Partners, a private equity firm, for a sum to the tune of €1.4 billion. The increased interest of private equity firms in the gambling industry is very noticeable. Due to Malta being a centre of excellence for remote gambling, it is inevitable that there would be a fair share of private equity deals relating to the gambling industry. The recently completed acquisition of a Malta-licensed online gaming and gambling

operator, ComeOn Malta Limited, by Swedish gaming group Cherry AB, for a total consideration of €280 million could arguably be said to have cemented Malta's instrumental position in the European market for M&A in the online gaming sector, evidenced by the continual trend for multinational operators flocking to acquire local or locally focused businesses operating in the regulated online gaming space.

Malta also has a sizeable banking sector, estimated to be around eight times larger than its GDP according to figures published by the news agency *Reuters*. There were at least three recent notable transactions in the local banking sector. One of these was the sale of the Maltese subsidiary of Reiffeisen Bank to Banasino Investments Limited and Hillwood Insurance Co Ltd, part of Kronospan, a global player in the manufacture and distribution of wood-based panels. The second was the acquisition by Mediterranean Bank plc, a Malta grown and licensed credit institution, of 100 per cent of the issued share capital of Volksbank Malta, for a cash price of €35.3 million. More recently, MFC Industrial Ltd, a Canadian company listed on the New York Stock Exchange, successfully concluded its acquisition of Maltese bank Bawag Malta Bank Ltd for a sum to the tune of €91 million.

The hotel industry also saw notable M&A activity in 2015 with International Hotel Investments plc (IHI), the largest Maltese hotel group which announced in January 2016 the acquisition of Island Hotels Group Holdings plc, which brought with it a number of hotels in Malta, as well the target's catering business and a 50 per cent shareholding in the company that runs the Costa Coffee franchise in Malta and Spain. M&A activity with a Malta connection in the hotel and catering sector remains primarily driven by IHI, which, after acquiring a landmark property in London and developing it into a luxury hotel launched in 2013, has shown that it has more appetite for growth through acquisitions when it announced in May 2016 that it had completed the acquisition of a prominent hotel on Rue Royale in Brussels.

Another recent keynote deal of 2016 was the acquisition by Tunisian telecommunications company Tunisie Telecom, through its Malta-incorporated subsidiary TT ML Limited, of a 65.4 per cent share in GO plc, a major Maltese quadruple play telecoms provider.

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

RVB: Generally, the consideration preferred in mergers and acquisitions in Malta consists of a combination of share transfers or allotment and

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cash considerations. At times, the consideration may be variable and depend on earn-out clauses and key performance indicators reached by the target company. The final consideration structure and breakdown is largely dependent on the outcome of deal discussions and detailed valuations of the company's balance sheet, profitability and potential growth, and there is no one formula for a preferred shareholder consideration.

Furthermore, the Listing Rules applicable to public companies whose securities are listed on the Malta Stock Exchange, bidders in public offerings may offer securities, cash or a combination of both, provided that a cash consideration must be offered as an alternative in all cases. The principal difference between offering cash and non-cash considerations lies in the nature and scope of the information that the bidder will need to provide to the shareholders in the offer document. In this context, shareholders are often willing to accept allotments or issues of shares in a foreign acquirer.

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

RVB: There is an important interplay between a number of key pieces of local legislation that an M&A practitioner must keep in mind when advising on a transaction under Maltese law, some of which have been shaped by EU law, others that are centuries old. Many laws are shaped by traditional civil law principles, while others borrow heavily from statutes of common law jurisdictions, primarily those of England and Wales, and other statutes are the result of the local transposition of EU law. Malta's Companies Act governs the formation and functioning of companies and is the central piece of legislation with respect to corporate governance and mergers, acquisitions, taking security over shares, dissolution and consequential winding

up of companies formed under Maltese law. Together with other subsidiary legislation enacted under the Companies Act and laws regulating commercial activities, taxation and other sector-specific regulated activities may be periodically referred to by an M&A practitioner. There have been a number of recent changes to Maltese company law that are intended to make Malta more attractive as a financial centre in Europe and some of which are the result of EU harmonisation efforts. Malta's growing network of double tax treaties, all 70 plus of them currently in force, also very often play an important part in the structuring of an M&A transaction.

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

RVB: The principal source of funding for M&A transactions with a Malta connection is private equity. Local banks typically impose strict requirements when it comes to financing M&A. In general, local banks tend to seek to limit their exposure to sectors that they know well, primarily local real estate. A certain degree of reluctance by risk-averse banks to lend funds to businesses on favourable terms has driven Malta's commercial and financial services landscape to experience considerable growth in its alternative financing sector. Several recent legislative initiatives aimed at facilitating access to finance for business growth and investment have supported its emergence as a growing financial hub. Foreign investors and businesses seeking alternative sources to finance find that their projects are bolstered by Malta's modern and originator-friendly framework for securitisation transactions and its unique statutory solutions, such as the domestic creation of a statutory position of insolvency remoteness of the securitisation vehicle, and the possibility of creating individual cells with separate, ring-fenced patrimonies within such vehicles. 2017 saw the first admissions to listing on the Malta Stock Exchange's multilateral trading facility 'Prospects', launched earlier in 2016, to appeal to small and medium sized enterprises seeking alternative sources of finance (small- and medium-sized companies are those that employ fewer than 250 persons and that have an annual turnover not exceeding €50 million, or an annual balance sheet total not exceeding €43 million).

The majority of deals by volume and value see foreign involvement in some way, whether on the buy or sell side. Often, the target business has been structured through Maltese entities due to the favourable local business environment. Other times, Maltese structures are used as acquisition special purpose vehicles and in this sense several acquisitions have been made by Maltese companies over the past years.

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

RVB: Shareholder activism is viewed as important part of the democratisation of corporate processes, and is prevalent in the context of the largest Maltese listed companies in Malta. In fact, the recent acquisition of the majority stake in Go plc was temporarily stalled by the refusal by a majority of individual private shareholders to sell their shares at the offer made by TT ML Ltd of €2.87 per share. This shareholder rejection reflects a strong willingness by local shareholders to keep their shares openly tradeable on the Malta Stock Exchange and evidences public confidence in the growth prospects of Maltese companies.

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

RVB: A merger or an acquisition based on Maltese law may be quite a complex transaction, predominantly accomplished through a number of stages. Although no one corporate deal is analogous to the next, the typical stages of an M&A transaction typically commence with the identification of potential targets, whether these are the buyers or sellers, and a subsequent solicitation or indication of interest in doing a deal. There are no mandatory rules on how to approach a takeover target, and both friendly and hostile public takeovers are possible under Maltese law. Recently, we have seen an increase in vendor-led acquisition processes, reflecting a strong market for potential targets seeking to maximise price upon exit. Confidentiality agreements to restrict disclosure of deal discussions and documentation made available to potential buyers are typically entered into between the target and the potential buy and sell side. Such non-disclosure agreements become particularly relevant once parties proceed to the due diligence phase, when the potential buyers examine the books and records of the target company both to assess the veracity of information claimed about the position of the target as well as to identify potential risks or 'red flags' associated with the deal.

Following a positive due diligence process, the submission of a letter of intent would be expected from the prospective buyer to the prospective seller. At this point, legal advisers acting for the parties proceed to draft the purchase agreement that will reflect the deal price and payment mechanisms, and that may include a wide range of warranties and representations to be made by either party to the other. After all prerequisites for the completion of the deal are fulfilled, the transaction agreement is completed and the deal is 'closed'. After the deal closing, several post-closing adjustments may need to be handled by the target and the new owners, such as the integration of the company operations and the entering into

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

Malta's fiscal regime is at once attractive, unique and ingenious, and coupled with Malta's stable political climate and positive economic outlook, Malta boasts an attractive base for international business investors and a thriving hub for mergers and acquisitions. Malta's corporate taxation system incentivises shareholder investment in businesses due to its adoption of a full imputation system. This means that while the corporate tax rate is 35 per cent by default, the application of a participation exemption, a full imputation system and a refund system result in an effective Malta tax rate ranging between zero per cent and five per cent.

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

First and foremost, a client should identify corporate counsel that has a keen eye for practical solutions that take into full account the time-sensitive nature of such transactions and the inherent complexity that arises in the context of transnational corporate deals. An essential step in selecting outside counsel is to seek law firms that have demonstrable practical experience and that have garnered a strong reputation for their knowledge of the in the business landscape. A third consideration that is closely tied to strong knowledge and experience is cost-effectiveness and efficiency, which usually lie at the foundation of the best corporate counsel's stellar reputations.

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

We recently encountered a particularly interesting security arrangement in the context of an acquisition of an online gaming operator. The security package for the deal was structured through multiple pledges on shares issued in the target company, with more than one pledge being constituted over the same issued shares. Each pledge secured different obligations, owed towards multiple pledgees. Since a pledge at civil law is a traditional form of security completed by the delivery of the subject matter or of a document that constitutes title to the said subject matter, this multiple-party arrangement lent a new slant to a traditional form of guarantee.

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of post-closing obligations such as regulatory filings and reporting requirements. Additionally, the acquisition of a public listed company entails several additional compliance requirements in terms of the Listing Rules, including prompt public company announcements and the compilation of offering memoranda and prospectuses.

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

RVB: Malta's gaming industry is on the brink of an overhaul in the coming months. The material changes that the industry can expect from the new Gaming Act are forecast to foster innovation and embrace the convergence of technologies, which should continue to drive both organic and inorganic growth in this sector. Malta's stable political and economic climate lends itself well to ensuring that no disruptive changes in the legal and regulatory landscape are anticipated in the near future. The broad scope of the forthcoming update to the EU data protection regime, becoming applicable in May 2018, could, however, impact the due diligence process undertaken with respect to employee and customer databases, although its practical impact will only be seen after this date.

GTDT: What does the future hold? What activity levels do you expect for the next year? Which sectors will be the most active? Do you foresee any particular geopolitical or macroeconomic developments that will affect deal sizes and activity?

RVB: M&A activity in Europe is expected to continue to rise beyond 2017, and it is anticipated that the current level of transactional activity in Malta will follow the same growing trend, especially in the sectors referred to above. A lot of this activity is driven by the desire to consolidate and achieve economies of scale and a geographic reach that spans beyond Europe. Another factor is the restructuring of businesses with increased focus on regulatory and tax efficiency with respect to operations in Europe. Furthermore, the ongoing uncertainty in post-Brexit trade talks and the vast macroeconomic repercussions of Brexit expected in early 2018, ranging from a strong devaluation in the pound and increased uncertainty in the future of applicable laws, has led to indications of increased demand in M&A involving Maltese targets due to their favourable EU location in an English-speaking jurisdiction.

M&A IN THE NETHERLANDS

Tim Stevens is a partner at Allen & Overy. He 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 Ahold on its merger with Delhaize and Refresco on its acquisition of Cott's bottling activities.

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

Tim Stevens: 2017 is on track to beat the Dutch M&A record. Across industry, practices' deal activity is very high, fuelled by cheap credit and rising stock prices. Investors in continental Europe also seem relatively relaxed about the political uncertainties that still abound. Most seem to have priced Brexit into their transaction strategies, despite initial nervousness, and election results in the Netherlands appear to have further calmed nerves. Although the populist party PVV (led by Mr Wilders) lost out, the mainstream political parties were fragmented, putting the Netherlands on course for a historic four-party coalition government. The fundamentals that drove transactions to record levels in 2016 remain in place. Companies and funds still have plenty of cash available and ready access to affordable finance in a low-interest-rate environment. Deal pipelines continue to be strong.

This surge in M&A has provoked a reaction. The Dutch Minister for Economic Affairs has come out against hostile takeovers in a number of cases. A draft bill requiring a permit for taking over telecommunications companies was put up for consultation. The minister has touted a proposal to subject every takeover to a one-year standstill period, although that proposal didn't go anywhere. He has also given interviews and made public statements opposing takeovers, which in the Netherlands is not something that officials would normally do.

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 activity was high across all sectors. That said, the Netherlands is not such a huge market that every sector has lots of targets. We did see more caution from Chinese buyers after the Chinese government urged restraint on foreign ventures, although there is still a lot of interest. In energy, there is government-owned Eneco that may be privatised later this year. The other energy deals were in renewables mostly. In consumer goods, we have seen the aborted attempt from Kraft and 3G to buy Unilever. In TMT, the notable move was Belgium's mail operator bpost's attempt to buy its Dutch counterpart PostNL. Also *The Telegraaf*, the largest Dutch daily newspaper, was sold in a hotly contested bidding match. In financial services, the insurer NN Group bought Delta Lloyd, Voogd & Voogd insurance intermediaries were sold to private equity and the government sold its remaining stake in a.s.r. through a series of accelerated bookbuilds.

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

TS: This year, the most notable deals were the ones that didn't happen. Kraft/3G didn't buy Unilever, bpost didn't buy PostNL, and PPG didn't buy AkzoNobel. It is difficult to pinpoint a common cause for the failures. However, what struck me was the Dutch government's role, or rather that they took a role. Unless the government happens to hold shares in the company they should not have a role in M&A. The Dutch government used to actively promote foreign investment into the Netherlands – now, driven by a political fear of 'losing out', or 'hurting the Dutch economy', the Minister for Economic Affairs actively voiced his opposition. He went so far as to launch an initiative to include a one-year 'waiting period' for takeovers, in which period target management would look for alternatives. This was quickly shelved once the bids fell through, and the Minister was also undercut by his own party. All the same, this is not common policy for a country that prides itself on open borders and international commerce.

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

TS: Cash is always preferred, and Dutch investors may be expected to offload any foreign shares back into the home market. That said, around 80 per cent of shareholders in the AEX, the main Dutch listed companies, are foreign. The offers now are mostly cash. This may also be caused by the fact that bidders are cash-rich, even though investors are still looking for equity investment opportunities.

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

TS: The Netherlands is an attractive place for setting up holding companies resulting for an international merger. It has a flexible company law, it is a neutral jurisdiction, it boasts a strong tax and legal infrastructure. The German/Dutch/British steel tie-up between ThyssenKrupp and Tata Steel will be headquartered in the Netherlands.

Corporate activities are increasingly being influenced and checked on a 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

Tim Stevens

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.

As mentioned before, there was the initiative in the Netherlands to regulate takeovers of Dutch listed companies, notably requiring a one-year waiting period. While I don't expect this to become law, it does show that takeovers can become politically sensitive these days.

Also, the government started a consultation on the regulation of M&A in the telecoms space.

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

TS: Holland is a small country; any large deal will always have some international angle to it. It is common for foreign companies to invest in large transactions in the Netherlands. The Dutch government has historically prized itself on allowing and promoting foreign investment. Also, because the country is so small, any large deal will invariably have a cross-border dimension. Examples this year were the politically sensitive ones I mentioned before, and the more successful deals were Qualcomm buying NXP and Van Gansewinkel's merger with Shanks.

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

TS: Activists certainly play their role. Elliott has been pushing AkzoNobel to follow up on PPG's overtures. The same Elliott is now attacking the Qualcomm bid for NXP on value. Elliott went so far as to take AkzoNobel to court. The rulings made clear that Dutch targets have no legal obligation to engage with a bidder, even if shareholders support it. They also made clear that under Dutch corporate governance, it's the boards that decide on strategy, not the shareholders' meeting. Calling an extraordinary general meeting (EGM) and tabling strategic resolutions (such as 'let's merge with so-and-so') are a non-starter. Things will become less clear if the resolution concerns a clear shareholder's right, such as appointment and dismissal of board members, but the resolution nevertheless intends to bring about a change in strategy. In *Akzo*, the court found that Elliott's motives to dismiss the chairman of the supervisory board were in fact strategic, and thus denied Elliott an EGM on the topic. That said, both Akzo and Unilever have adopted changes in response to the attempted bids, and Akzo is now undertaking a sale of its specialty chemicals division. So, in summary: activists succeed in bringing about change, but they get nowhere in Dutch courts.

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

TS: Usually CEOs meet directly and mull over possibilities together. Sometimes bankers float ideas. Other times analysts or shareholders may push for action. Having made first contact, 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 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, thereby 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 an approach has 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, effectively drawing the bidder into a process and limiting its flexibility.

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

The Netherlands is run on the basis of consensus. This is also apparent in how M&A transactions get done in this country. Hostile deals are rare and frowned upon, being exemplified by the protective preference share foundation that blocked América Móvil's cash offer to extend its participation in the share capital of the largest Dutch telecoms company KPN. The aforementioned preference share foundation, among other things, argued that reasons of 'vital public interests' would be at stake if América Móvil extended its stake.

Furthermore, employees have a say in M&A in the Netherlands. The employee's works council, the Social and Economic Council (an advisory and consultative body of employers' representatives), union representatives and independent experts 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, research and development expenses, environmental aspects and other items, ensuring that the buyer will be a good owner. Enforcing this is a different matter, although in practice some hefty mechanisms for implementation have been agreed.

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

(1) It is crucial 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. Likewise, Dutch authorities show a certain degree of openness towards informal negotiating and settling issues, needless to say in compliance with the law, but also according to market standards. So look for local experience.

(2) Holland grew rich on international trade, and prides itself on being pragmatic. Thus, 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. A benefit of this familiarity among lawyers is that, in general, there is quite a developed willingness to overcome conflicts by settlement without the need for involving battlesome judicial authorities. Once more, the benefit of having local experience manifests itself.

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

The PPG approach for Akzo Nobel was the most interesting, not only because it occupied the newspapers and public discussions, but also because it will define how deals get done in future. The most unusual matter was Refresco's bid for Cott's bottling activities in the US, while being itself the subject of takeover speculation. The interplay between the two transactions made that one particularly interesting to navigate.

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

TS: The legal changes to watch out for will come out of the new government that is being formed right now. It will be a four-party coalition government, headed by the pro-business VVD party. This combination is, however, a bit of a novelty and the VVD have never before teamed up with these parties, so time will tell what the policy agenda will look like.

GTDT: What does the future hold? What activity levels do you expect for the next year? Which sectors will be the most active? Do you foresee any particular geopolitical or macroeconomic developments that will affect deal sizes and activity?

TS: M&A is booming right now. How long it will continue is anyone's guess. While interest rates remain low, and share prices remain high, we may see a lot more action in the near future. We also see a lot of interest from US and Chinese buyers, in fact recent numbers indicate that Western Europe is currently the most active M&A scene in the world. The Netherlands, clearly, is no exception.

M&A IN NORWAY

Ole K Aabø-Evensen is one of the founding partners of Aabø-Evensen & Co Advokatfirma, 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 experience from 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*. Both in 2012, 2013 and 2017 edition of this survey, the *Norwegian Financial Daily* named Mr 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 jurisdiction during the past year or so?

Ole K Aabø-Evensen: Entering 2017, the Norwegian M&A market increased by 17.5 per cent in the first quarter, compared with the first quarter of 2016. This trend continued throughout the first half of 2017 even if the market seemed slightly softer in the second quarter. As a result, M&A volume in H1 2017 was up approximately 13 per cent compared to the same period in 2016. The trend is also consistent with the market statistics for the 12-month period ending 30 June 2017, showing 285 deals per the end of June 2017, compared with 249 deals for the 12-month period ended 30 June 2016. The aggregate reported value of the Norway M&A market for the same period was €22.5 billion, which is also a substantial increase compared with the €13.2 billion for the preceding 12-month period. The reported average deal sizes also increased substantially from €154 million for H2 2016 to €275 million for H1 2017.

So far into the third quarter, we've seen a slight reduction in the number of announced transactions compared with the same period in 2016. It remains to be seen whether this simply reflects the normal ebb and flow of deal activity. The outlook for the Norwegian economy seems currently quite stable for the months to come, and I expect that the trend will continue at least on a short-term basis.

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: Sectors with the highest level of activity in the first eight months of 2017 were TMT, services and consumer. These three sectors together represented 51.7 per cent of deal volume in this period. The industrial and manufacturing sector was also quite active, particularly during the first eight months of 2017.

The TMT sector has emerged as the most popular sector for M&A over the past 12 months. This can be explained by Norway's highly developed infrastructure (energy, technology and transport), and by digital disruption continuing to put pressure on technology players to acquire new technology for seizing new routes to growth. Within this sector there also seems to be an increasing drive towards creating larger global footprints in order to maintain margins. Geographical expansion to secure supply chains and increase customer reach also seems to have accelerated the cross-border deal activity.

Another reason for the increased deal activity is that the majority of executives currently seem rather bullish about the global economy. Generally speaking, you may say that improved economic conditions underpin Norwegian deal activity.

> *"In terms of deal size, the Norwegian M&A market is dominated by small and medium-sized transactions."*

In terms of deal size, the Norwegian M&A market is dominated by small and medium-sized transactions. For the first half of 2016, 66 per cent of deals did not disclose the deal size, 46 per cent of deals had a reported deal value of less than €20 million and 26 per cent of deals had a value of between €20 million and €199 million. However, only 56 per cent of deals had a deal value exceeding €1 billion and 22 per cent were between €200 million and €1 billion.

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

OKA-E: The most notable deal announced in the Norwegian market so far in 2017 is KKR's divestment of its shares in Visma, the Norwegian IT and software company, to a group of investors including HgCapital, Cinven, GiC, Montagu and ICG for €4.7 billion in total consideration.

Another keynote deal was the €1.77 billion three-way merger between Solstad Offshore ASA, Farstad Offshore AS and Deep Sea Supply Plc. All of these companies were listed companies operating in the offshore supply vessel market. This transaction created Norway's largest OSV-company. These deals were, of course, significant due to the size of the purchase price.

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

OKA-E: The answer to that question is very simple: shareholders prefer cash. I think that if you look at MergerMarket's figures for first half of 2017, you'll find that approximately 66 per cent of the deals did not disclose what type of settlement the parties had agreed, but for 31 per cent it was cash, while only 4.7 of the deals offered equity as settlement.

In 2016, 52.6 per cent of the total public M&A deals offered a consideration of shares, or cash and shares. This was substantial increase from 2015, in which only 7 per cent of the announced public M&A transactions offered a consideration of shares or cash and shares.

The reason that sellers normally prefer cash over shares is because of difficulties evaluating


Ole K Aabø-Evensen

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 ask the seller 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 initial public offering 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 jurisdiction?

OKA-E: The most noteworthy development during the past few years has been the implementation of the new competition filing thresholds from 1 January 2014, which have substantially increased the thresholds for having to notify the Norwegian competition authorities of any M&A transaction. In many ways, this has contributed to making it easier and faster to execute and complete M&A transactions under Norwegian law, since the bulk of Norwegian M&A transactions normally fall below the new increased thresholds. It is also worth mentioning that in 2016, the Norwegian parliament resolved to abolish the former Norwegian substantive test, which was based on a substantial lessening of competition test. Instead, the parliament resolved to align the Norwegian test with the same significant impediment of effective competition test as applicable under EU rules. This means that, in future, Norway will apply the same consumer welfare standard as applied by the EU Commission, instead of the total welfare standard previously applied under the Norwegian merger control regime. Taking effect from 1 April 2017, the previous power held by the King Council to intervene in merger control cases has been abolished, and these powers are now transferred to an independent appeal board for handling merger control cases.

Another development is the rule in the Tax Act that imposes significant restrictions on the deduction of interest paid to related parties for interest expenses exceeding 5 million kroner. Additional restrictions to this rule were implemented with effect from 1 January 2016. It is important to be aware that this limitation rule may also apply, subject to certain exemptions, to loans raised from an external lender (typically a bank), where a related party to the borrowing company has issued a 'downstream' security for loans from such external lenders. This rule has made it more difficult for a buyer to offset its actual costs of financing a transaction against its income, and thereby contributing to the reducuction of the potential profitability of leveraged buyouts under Norwegian law. In particular, for sponsors, the limitation rule has made it extremely important to ensure that the security packages agreed under such sponsors' leveraged financing facilities is structured in a such way that no third-party financing is caught by the new interest limitation rule. In May 2017, the Ministry of Finance issued a consultation paper proposing that that interest payable on bank facilities and other external debt within consolidated group companies is going to become subject to the same interest deduction limitation regime as interest paid to 'related parties'. The new rule is proposed only to apply if the annual net interest expenses exceed 10 million kroner. In addition, the Ministry of Finance has proposed two complex 'escape rules' aiming to ensure that interest payments on loans from third parties do not form part of any tax evasion scheme and are still tax-deductible. It is also proposed that the existing interest deduction limitation rules shall continue to coexist with the proposed new rules. However, the scope of the old rules shall now only apply to interest paid by Norwegian enterprises to a related lender outside of the consolidated group (typically where the related lender is an individual).

It is also worth mentioning, that in October 2017 the EFTA Surveillance Authority (ESA) issued

"Bidders doing deals in the Norwegian market nowadays have a much wider variety of financing combinations available than ever."

a reasoned opinion in which it stated that the Norwegian interest limitation rules in their current form, violate the freedom of establishment and thereby violate article 31 in the EEA Agreement. In a response from January 2017, the Ministry of Finance maintained that the Norwegian rules are compatible with Norway's EEA obligations. The next step for ESA to decide is whether it will take Norway to the EFTA Court for infringing its EEA obligations.

The new Act on Alternative Investment Fund Managers should also be mentioned. The Act imposes a completely new set of disclosure obligations for sponsors acquiring control over a Norwegian target company if such 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, turnovers or 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 a period of 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 owner, which would typically 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 jurisdiction common?

OKA-E: Since the end of 2016, the oil-induced slowdown has started to loosen its grip, and activity in the Norwegian economy is on the rise. During 2017, we have also witnessed a sustained positive momentum in the stock markets, with the OBX index at all-time high levels. At the same time, since late 2014, the drop in oil prices to some extent also reformed Norwegian M&A activity by forcing smaller firms to sell non-core assets in an attempt with the downturn. Technological changes also seems to contribute to companies selling non-core and slow-growth businesses to fund investments in their core portfolios. Technological changes that reduce the competitiveness of an asset under one owner could be of value to another.

As a result of strengthening oil prices, we have also witnessed a clear bounce-back in the high-yield bond market, and bidders are once again considering high-yield bonds as a means of financing new acquisitions. At the same time, the trend with increased activity from alternative lenders and funds offering to replace or supplement traditional senior secured loans by B-term loan facilities – unitrance loans etc – seems to continue. As a result, bidders doing deals in the Norwegian market nowadays have a much wider variety of financing combinations available than ever, in particular on larger transactions.

Another notable commercial development is that the use of warranty and indemnity insurance as a tool for bridging the liability gap between sellers and buyers in connection with M&A transactions, or to provide the sellers with an opportunity for a clean exit, continues to rise. Buyers may also propose such insurance to gain a potential competitive advantage in bidding processes.

The share of cross-border transactions continues to be relatively stable; during the first half of 2017, approximately 38 per cent of the buyers in Norwegian M&A deals were foreign. If you compare these figures with the first half of 2016, you will find that foreign buyers in 2016 took a 4 per cent higher share of the total Norwegian M&A volume than for first half of 2017. This is also more or less consistent with what is found when looking at deal activity among the 500 largest Norwegian companies, in which Norwegian buyers accounted for 77 per cent of total transactions, up 3 per cent from Q1 2017. Still, even if the relative percentage of the total deal count seems to indicate less interest from foreign buyers, this is not the case, at least not in terms of the actual number of deals. In terms of number of deals, there was in fact an increase of 25 per cent for the first five months of 2017 compared with the same period in 2016.

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

OKA-E: So far, shareholder activists have not played any major part in the corporate scene in Norway. However, 'operational activism', as a reaction from shareholders against managements' methods of running listed and unlisted companies, does occur, but not as frequently as in many other jurisdictions.

A few examples of hedge funds trying to intervene against the management of Norwegian

"The trend of increased activism that many other jurisdictions are experiencing could become more prevalent in the Norwegian market during the next decade."

companies exists, but these funds have not particularly managed to influence the M&A scene. It is also not common 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 as RAK had to agree to these compromises in exchange for their support.

I also think that the trend of increased activism that many other jurisdictions are experiencing could become more prevalent in the Norwegian market during the next decade. This is because business is steadily becoming more global and because people in general have a tendency to try and copy some of the methods for earning money that are used in other 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' managements are at maintaining the profitability of the companies they're managing. The best protection against such campaigns will be good corporate governance and making sure that the business is creating returns for its shareholders that are above the relevant industry benchmark. Poor governance, a high number of related party transactions at questionable values, too lucrative remuneration packages for poor performances and an unwillingness among the management to conduct necessary turnarounds of the businesses to increase profitability will, on the other hand, increase the chances for activists' interference 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 transactions. Intermediaries could include members of the acquirer's board, or 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 the 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 grant the buyer exclusivity for a limited time period to negotiate a final sale and purchase agreement (SPA). During the due diligence, the buyer will normally want to take control of the drafting process 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 that the parties have agreed to are fulfilled prior to completion. Sometimes the parties may want to negotiate slight variations and 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 have the aim of limiting or qualifying the buyer's ability to withdraw from the transaction owing to findings in the due diligence. The seller may also insist on taking control of the drafting, even if this is still less common for this type of smaller deal.

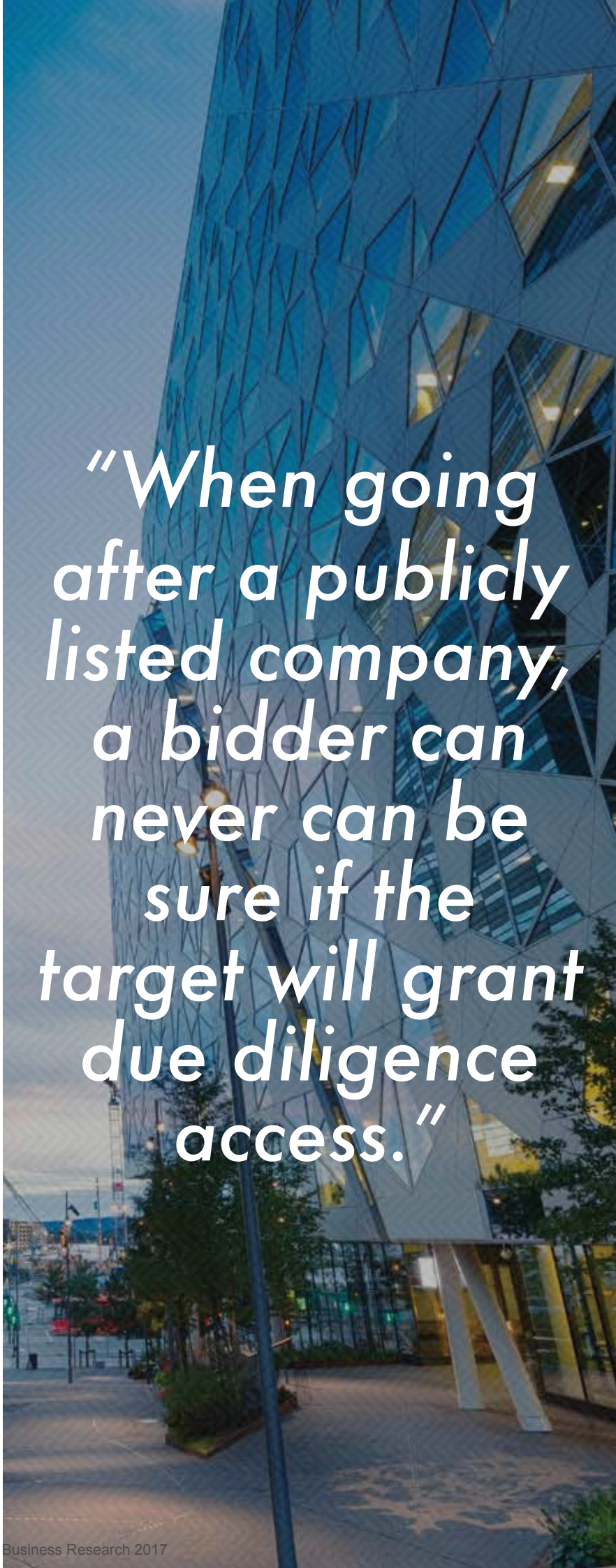
Medium-sized to large transactions involving non-listed companies are very often conducted as a structure sales process and, for these type of transactions, the sellers and their advisers tend to take more control of the process, preparing draft sales documents, etc. Such processes seem to follow a similar 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 the sale and purchase agreement and final bids. Thereafter, negotiation of legal documentation will take place, and sometimes 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 transaction agreements, 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 a transaction agreement with the target's board, the bidder will normally, following its due diligence review, 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 under Norwegian law, a mandatory offer cannot be made subject to any conditions. However, if a bidder acquires more than one-third of the votes in a Norwegian listed target, then 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 for this is that the bidder will then 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 that the bidder's legal and financial advisers will be engaged to conduct some type of pre-bid due diligence of publicly available information. If the target's board is not willing to recommend that the shareholders 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 first having obtained any support from the target.



THE INSIDE TRACK

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

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'll find in many other jurisdictions. In many cases, the Norwegian acquisition agreements will be far less detailed than in most Anglo-Saxon jurisdictions. A foreign buyer may also find that Norwegians often seem to be much more pragmatic and will often take a relaxed approach to the legal documentation, compared with sellers or buyers in Norway's neighbouring countries. The reason for this approach is that Norwegian courts have traditionally used principles 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 will 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 that is used for these type of deals today very often resembles what is used in Anglo-Saxon jurisdictions, despite the fact that they are usually not as detailed. Still, even today, you could meet a seller that insists that the acquisition agreement should not cover 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 if the counsel involved in your project are skilled negotiators 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 that 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 actually know what they are doing, and have not simply been assigned to the project to learn how to do it.
(3) Ensure that the counsel involved are able to show a mix of sound commercial acumen and in-depth knowledge of the legal and regulatory framework for such transactions, including the project management side of such transactions. Excellent project management and an understanding of how to run these types of projects are absolutely 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 recently worked on is unfortunately something that 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 for that matter the most unusual. The reason for this is 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, these transactions are often rather predictable, at least for a lawyer that has been in this game for a while. That means that normally you will be able to foresee what type of structure is going to be proposed from the other side, or what type of argument they will come up with in the negotiations, etc. However, if I was going to rate something, I think that some of the transactions that I was involved in during the credit freeze back in 2008–2009 might qualify, because they involved acquiring assets in distress, which in general 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 involved some fairly complex transitional issues. In 2016, I also assisted Aker ASA and Solstad Offshore ASA in what was considered by most commentators to be a high-profile hostile takeover/merger of Rem Offshore ASA, which was quite an interesting experience.

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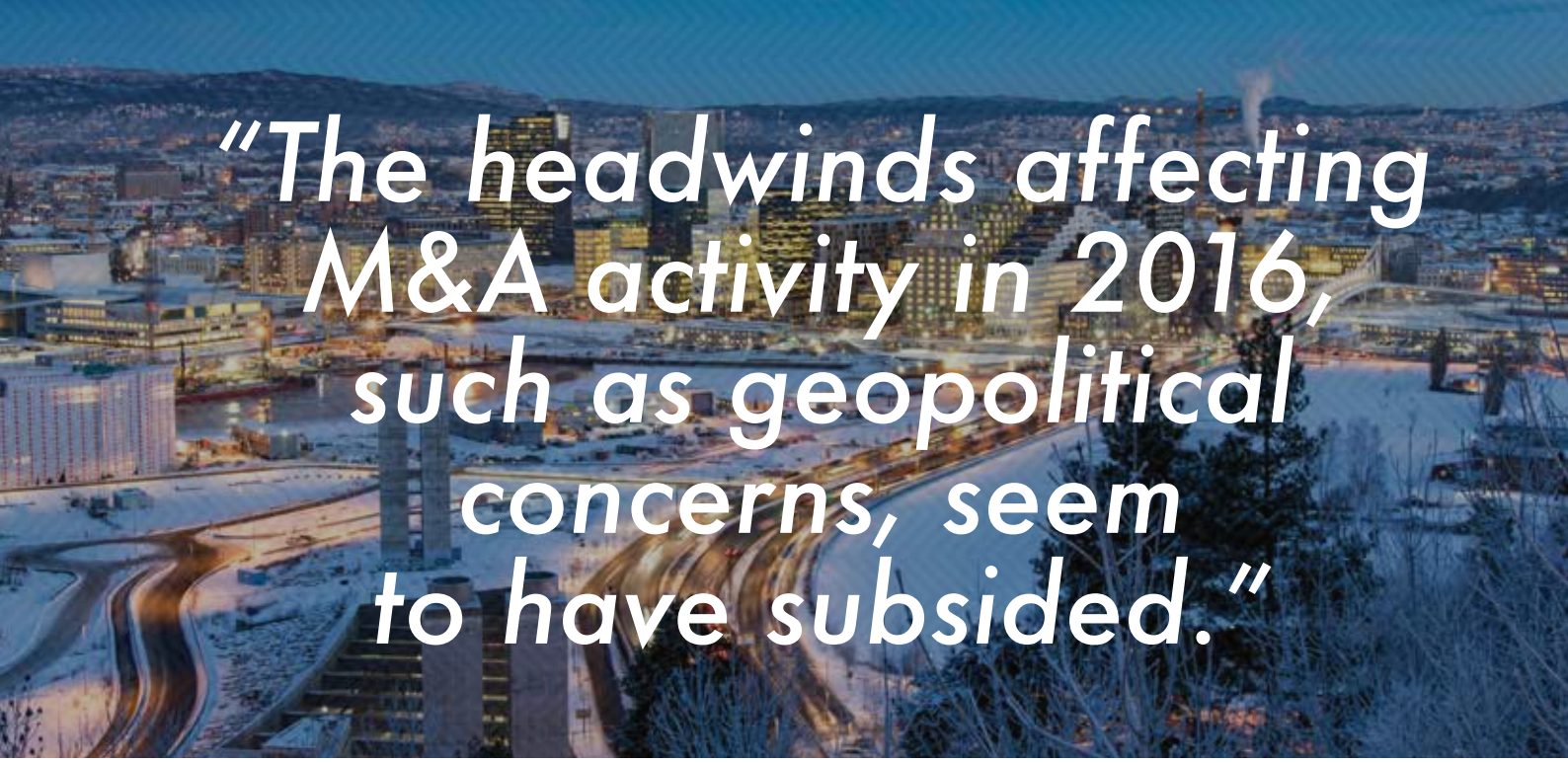
To increase its chances of success, a bidder can also seek to gradually build a stake in the target through off- or on-market share purchases outside the offer process. Lately we've also seen an increasing number of takeovers of publicly listed companies being conducted as partly structured sales processes, 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.

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, among other things: insider dealings 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



"The headwinds affecting M&A activity in 2016, such as geopolitical concerns, seem to have subsided."

offer documents; the length of the offer periods; employee consultations; and limitations on type of consideration offered.

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

OKA-E: The most imminent change that we expect is a further reduction of the general corporate tax rate to 23 per cent, which should take effect before 2018. This may further improve the attractiveness of Norway for foreign investors. In recent years, 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 traditionally tended to quickly implement EU directives into Norwegian law in accordance with EEA Agreement obligations. Following the solution in June 2016 of the constitutional obstacles that prevented the implementation of certain EU rules relating to the capital markets, considerable effort has been made to work on the implementation. Consequently, I expect most of these EU initiatives will come into effect during the next couple of years, following which the regulatory framework in Norway that relates to the capital markets will again be aligned with what applies within the EU.

It is also worth mentioning that in 2016 the Ministry of Trade, Industry and Fisheries issued a consultation paper proposing further easing of the Norwegian financial assistance prohibition rule. This proposal has not yet been adopted, but if it is, Norway will finally have a type of 'whitewash' procedure that could work also for leveraged buyout transactions.

GTDT: What does the future hold? What activity levels do you expect for the next year? Which sectors will be the most active? Do you foresee any particular geopolitical or macroeconomic developments that will affect deal sizes and activity?

OKA-E: The headwinds affecting M&A activity in 2016, like geopolitical concerns, seem to have subsided, and the cross-border deal activity remains strong. Technology and digital disruption continues to drive deal activity particularly within the TMT sector, and we further observe increased divestment activity among corporations in order to invest in new growth opportunities. Capital continues to be inexpensive and plentiful. An improved economic outlook, the presence of strong public markets, large-cap deals, improved CEO confidence and increasing transaction pipeline all indicate that the M&A market will most likely be strong in the coming months.

For the moment, the TMT sector is the most active sector for M&A in Norway, and I expect this to continue during the next 12 months. I also expect to see strong momentum for new deals within the services and consumer sectors. A lot of cash is still waiting to be invested, and despite the fact that we have seen an increasing number of private equity exits over the past two to three years, there still seems to be a continuing exit overhang in some private equity sponsor's portfolios approaching end of lifetime for the funds holding such investments. These sponsors are most likely under increasing pressure to find solutions on the situation for their investors. Provided that we don't get any unpleasant surprises with regard to oil and gas prices in the near future, I also expect that we may see a slight upswing in interest for assets within the energy sector during 2018, but this remains to be seen.

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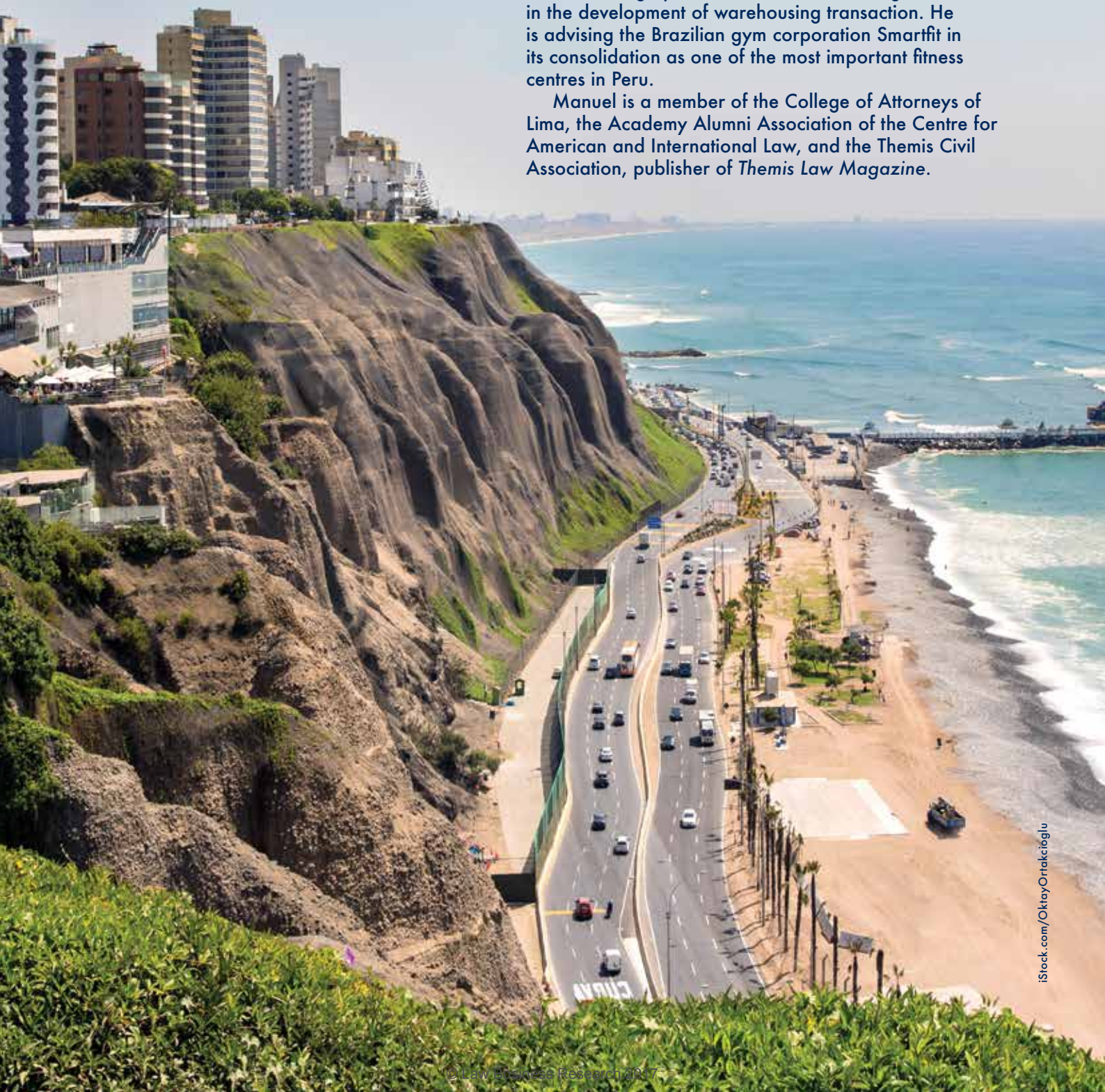
M&A IN PERU

Manuel Barrios is the managing partner at Dentons in Peru – previously Gallo Barrios Pickmann. He was previously senior associate and partner at Barrios & Fuentes. Manuel has over 20 years of experience providing legal advice to foreign and national entities in the design and execution of business projects, with special emphasis in the fields of M&A, corporate law and taxation. Recently he has directed the expansion of Wenco through the acquisition of competitors at a regional level and implementation of new manufacturing operations; and advised Megacentro in the development of warehousing transaction. He is advising the Brazilian gym corporation Smartfit in its consolidation as one of the most important fitness centres in Peru.

Manuel is a member of the College of Attorneys of Lima, the Academy Alumni Association of the Centre for American and International Law, and the Themis Civil Association, publisher of *Themis Law Magazine*.



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

Manuel Barrios: Although the M&A sector has maintained its dynamism this year compared to 2016, I believe that there has been a change in the trend of mergers and acquisitions in Peru, since the transactions have increased in quantity for medium-sized companies, and decreased in amounts overall.

Larger M&A transactions have decreased in number this past year, mainly due to certain situations that affected Peru's economy, such as the El Niño phenomenon and the Odebrecht corruption scandal in Latin America that directly affected our country. The M&A market this year has experienced a slight decrease compared to 2016, placing us at the end of the list in the region report as of this past July, according to the Transactional Track Record report. However, Peru continues to be attractive to foreign investors, and will probably reach higher transaction levels over the next year.

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

MB: The mining sector in Latin America has slowed down since 2012. For Peru, in particular, social conflicts between large mining corporations and local individuals have paralysed or suspended the development of a number of large projects. However, this sector has been recovering throughout 2017, and we anticipate that the situation will improve next year.

This year, particularly due to the Odebrecht corruption scandal, the transactions in the infrastructure sector have also been diminished. But there is a lot of optimism for the coming year, as this sector should be revitalised due to the national reconstruction plan that has been approved in order to repair the damages caused by the El Niño phenomenon.

In addition, I believe that there are opportunities in the health sector due to investment projects in the public-private partnerships initiative promoted by the government.

Finally, we are beginning to see an upsurge in venture capital operations, which I believe will increase considerably during 2018.

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

MB: In September 2017, the largest transaction in the hotel sector in Peru was disclosed. The Peruvian economic group, Breca, the main shareholder of Libertador hotels, acquired the shares of Inversiones la Rioja, which owns Marriott hotels for an amount that exceeded US$210 million. Also, in the first quarter of this year, a major transaction was carried out by Graña and Montero, consisting of the sale of 50 per cent of the San Martín Cuartel Project to the Peruvian company Urbi Propiedades, which became the sole owner of the Project.

The acquisition of Corporación Lindley by the Mexican Arca Continental at the end of 2015 was important, as Lindley is the largest manufacturer of bottled drinks in the country. It also spurred the expansion of Lindley's business into other directions, including the now-booming convenience store market in Lima through the Tambo+ brand.

"Larger M&A transactions have decreased in number this past year, mainly due to certain situations that affected Peru's economy, such as the El Niño phenomenon and the Odebrecht corruption scandal."

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

MB: In the case of M&A operations between domestic parties, cash transactions are dominant, but these are not the largest operations taking place in the country. Generally speaking, shareholders are willing to accept shares issued by a foreign acquirer as the result of an M&A operation, but certain corporate groups are very traditionalist and more interested in receiving cash. It primarily depends on whether we are talking about large public corporations with many shareholders or closed, family-owned groups.

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

MB: In terms of anti-monopoly control, Peru continues to be somewhat of an exception


Manuel Barrios

in the sense that it doesn't have a regulatory anti-monopoly bureau that pre-approves M&A transactions. This situation makes transactions relatively agile and executable within a smaller time frame.

The approval of new regulations for private contracting with the state, especially for construction work, has also made concourses faster and eliminated much of the burdensome paperwork. Even though the construction sector experienced a slowdown last year, this has bolstered investment in large infrastructure projects all over the country.

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

MB: Foreign buyers have become less common this year in comparison to 2016, and domestic transactions have dominated the M&A scene. This has led to a number of smaller deals; however, the largest deals are still being carried out by foreign investors. These types of operations are expected to become more common in Peru going forward.

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

MB: Shareholder activists are a relatively new phenomenon in Peru, as most large companies were traditionally owned by families and closed circles of investors. With the opening of the domestic market to small-stake shareholders, we have seen cases of shareholder activists putting pressure on management when it comes to the terms and conditions of M&A operations.

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

MB: There is no single way in which the first contact is made; sometimes one manager will contact the other, especially when the corporations involved are competitors. Often the attorneys of these corporations act as intermediaries and establish first contact with the purpose of closing a deal. In the real estate sector, it is especially common for brokers to act as intermediaries as well.

It is worth mentioning that, currently, there is no supervisory bureau that controls mergers and acquisitions according to Peruvian law, for which the legal requirements mainly consist of formalities and publications. The due diligence process is normally handled by large or medium sized, multidisciplinary law firms that work closely with the parties, and tend to have a historic working relationship with them.

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

MB: From 1 January 2018, companies could be investigated, prosecuted and sanctioned – in addition to the individual responsibilities that their representatives, administrators, executives or employees may have – for corruption offences and money laundering. This change in the law is causing many companies to invest in implementing a compliance area or regulatory compliance programme within their organisation in order to be able to attenuate or extinguish the liability of the legal person in the case of an investigation of this nature.

This change would mean that many investors interested in M&A transactions will pay special attention to verifying the existence of a compliance programme within the target

THE INSIDE TRACK

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

The relative simplicity of laws applicable to M&A operations is unique, as well as the way in which national and foreign investors are treated essentially equally. Furthermore, anti-monopoly laws don't expressly prohibit the creation of monopolies, nor does an M&A operation require approval from an anti-monopoly supervisory entity.

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

The most important element when moving forward with an M&A operation is the legal team that will handle all aspects of the transaction. Ideally, this should be a varied team of professionals with local and international experience.

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

We recently worked on a joint venture between a very traditional Peruvian corporation and a Chilean client for real estate development in the country. This was an interesting deal because initially there was a lack of trust between the parties, and the deal was managed by the owners of the business on one end, and by corporate managers on the other. Furthermore, structural differences within the two parties presented an interesting challenge to navigate as a team.

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organisation, an issue that may be critical for the final decision in choosing to acquire or merge with said company. Therefore, due diligence for corporations will become more prominent.

GTDT: What does the future hold? What activity levels do you expect for the next year? Which sectors will be the most active? Do you foresee any particular geopolitical or macroeconomic developments that will affect deal sizes and activity?

MB: The future looks rather optimistic; we believe that we have great potential for growth in the M&A sector in Latin America. The sectors that could be attractive to invest in next year are, without a doubt, infrastructure and the technology sectors, mass consumption/retail, real estate and industrial products, and there is hope that the mining sector will consolidate its reactivation and regain the volume of transactions that it had three years ago.

The government is still interested in focusing on and supporting investments in large-scale infrastructure and water supply projects to bolster the infrastructure and public services sector, which will become increasingly relevant in the M&A scene.

M&A IN

RUSSIA

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Justin Vaughan is a corporate of counsel at Herbert Smith Freehills, practising in Russia since 2009. He helps Russian and international clients with all aspects of their most innovative and complex investment projects in Russia and the CIS, in particular in the energy, natural resources, financial institutions, media and technology, healthcare and real estate sectors.

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

Alexei Roudiak & Justin Vaughan: Market conditions are showing signs of improvement, with foreign direct investment in Q1 2017 reaching US$7 billion, the highest since the implementation of sanctions in 2014, and almost three times the level for the same period in 2016. Despite the continuing, dampening effect of sanctions on M&A activity, investors are starting to come back to Russia having adapted to the new economic realities. There are also encouraging signs that this upwards trend may continue in the second half of 2017.

Russian M&A over the past 18 months has been characterised by two main themes.

The first is the increasing importance of investment from Asia. Relations between Russia and the US, the EU and other Western jurisdictions remain tense and, although there have been notable exceptions, a majority of investors from these jurisdictions are overlooking Russia (whether for reasons of strategy or sanctions) as a place to put their money. In contrast, business cooperation and mutual investments between Russia and Asian nations, particularly China and India, have intensified. To mention some headline deals, in Q1 2017, the Silk Road Fund (a state-owned investment fund) added to its major 2016 Russia investments by acquiring a 10 per cent equity stake in major Russian petrochemical company Sibur, and Chinese private conglomerate, CEFC China Energy, has entered into a conditional agreement to acquire an almost US$9 billion stake in Russian state-controlled oil company Rosneft.

Secondly, the Russian government accelerated its privatisation programme. The signal transaction in the privatisation agenda was the acquisition by commodity trader Glencore Plc and Qatar's sovereign wealth fund of a 19.5 per cent stake in Rosneft for €10.2 billion. This was the biggest foreign investment in Russia since the Ukraine conflict, and has been widely seen as a positive sign of Russia's ability to withstand US sanctions.

Bringing both themes together, in Q4 2016 Beijing Gas Group acquired 20 per cent of Verkhnechonskneftegaz from Rosneft, valued at circa US$1.1 billion. Verkhnechonskneftegaz is engaged in the exploration and development of the Verkhnechonskoe oil and gas condensate field, one of the largest in eastern Siberia.

Further major privatisations have also been announced. In February 2017 the government set out its plan for 2017–2019, including the privatisation of lender VTB Bank, shipping company Sovcomflot and Russia's largest commercial sea port operator Novorossiysk Commercial Sea Port.

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

AR & JV: The traditional powerhouses of the Russian economy, energy and natural resources, continued to dominate M&A activity in 2016–2017 alongside banking and agriculture (by volume).

Given the abundant oil and gas reserves in Russia, and the technological complexity and expense involved in developing these fields, energy and natural resources still account for a significant level of M&A deals. In a deal that further illustrates the Russia-China ties, CEFC China Energy entered into a conditional agreement with Glencore and the Qatar Investment Authority to acquire the major part of their stake in Rosneft for almost US$9 billion. After completion of this deal, CEFC will become the third-largest shareholder in Rosneft. In addition to the potential acquisition, CEFC and Rosneft have signed a strategic cooperation agreement regarding joint exploration and production projects in western and eastern Siberia, illustrating the integrated approach of the Chinese corporation to its cooperation with Rosneft.

The Silk Road Fund's acquisition of 10 per cent of Russian petrochemical giant Sibur from Leonid Mikhelson, chairman of Sibur's board and its major shareholder, is another example, and demonstrates how Chinese companies have become important partners for Russian companies, following the sanctions imposed against aspects of the oil and gas industry.

Chinese investors have also shown interest in the Russian mining industry. Chinese private investment group Fosun is reported to have agreed to buy a 10 per cent stake in Polyus Gold International, the largest gold miner in Russia, for US$887 million.

However, the Asian pivot has not solely been towards China and has involved activity in both directions. In August 2017, a consortium of international investors led by Russian investment group United Capital Partners and European commodities trader Trafigura acquired a 49 per cent stake in Essar Oil Limited, India's second-largest private oil refiner, and the Essar ports, refinery and retail businesses at an enterprise value of US$12.9 billion, simultaneous with the acquisition of a 49 per cent stake by Rosneft. As well as being the largest foreign direct investment in Indian history, this deal illustrates the interest that Russian companies have shown in developing relationships with Russia's new strategic partners in the outbound investment component of the 'pivot East' strategy.

Although energy and natural resources capture most of the headlines, transportation has also witnessed significant recent M&A activity. In July 2017, Uber formed a joint venture with Yandex in respect of their ridesharing, food delivery,


Alexei Roudiak

and logistics businesses in Russia and some other CIS countries. In addition, it was recently announced that Russian Direct Investment Fund and DP World, a Dubai-based ports company, are negotiating with Summa Group to acquire shares in FESCO, Russia's largest ports and rail transport operator.

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

AR & JV: As mentioned, the Russian government's turn to Asia as a result of worsening relations with the West has led to a number of significant transactions being announced, including the Silk Road Fund's acquisition of 10 per cent of Russian petrochemical giant Sibur, and CEFC China Energy's proposed acquisition of an almost US$9 billion stake in Rosneft. As previously mentioned, the 'pivot East' is neither solely focused on China, nor on inbound investment. In August 2017, Rosneft, and a consortium of international investors led by Russian investment group United Capital Partners and commodities trader Trafigura, each acquired a 49 per cent stake in Indian oil refiner Essar Oil at an enterprise value of US$12.9 billion in the largest foreign direct investment in Indian history. Such deals show that, despite the relatively low oil price, the Russian oil and gas sector continues to provide attractive opportunities for investors and has scope for expansion.

There was also significant M&A activity in the Russian transportation sector in 2017. The most notable deal is the merger by Uber, the dominant ride-hailing operator in the US, and Yandex, Russia's dominant search and other online service provider, of their respective ridesharing, food delivery, and logistics businesses in Russia, Belarus, Kazakhstan, Armenia, Azerbaijan and Georgia into a new holding company valued at US$3.725 billion. Yandex holds a 59.3 per cent stake in the joint company and has retained operational control of the business, while Uber holds 36.6 per cent. This deal is an unusual example, in the current market climate, of a US-based investor joining forces with a Russian business outside of the energy and natural resources sectors.

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

AR & JV: Now more than ever, 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. 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. The political tension between the US, the EU and other Western jurisdictions on the one hand and Russia on the other has not increased the willingness of domestic shareholders to accept foreign shares.

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

AR & JV: In recent years the Russian government has implemented a number of measures to make Russia more attractive to foreign investors, although these efforts have been hampered by EU and US sanctions.

Significant changes have been introduced to the Russian Civil Code, with a view to adapting certain legal instruments and concepts that are commonly used in Western jurisdictions (such as warranties, indemnities and option agreements)

to Russian realities, and enabling investors to implement at the onshore, Russian company level, a number of typical Western-style corporate governance and shareholder agreement arrangements. The fact that there are still only a few court decisions interpreting these new provisions, combined with newly implemented rules limiting minority shareholders' statutory rights to access corporate information, has meant that market participants remain cautious in implementing the new legislative framework. Nonetheless, there are signs of building momentum for a bigger role for Russian law in M&A transactions.

The government has also tried to address investor concern about the legal robustness of Russia as a dispute resolution forum. With effect from September 2016, Russian law expressly allows corporate disputes relating to Russian entities to be handled by arbitration institutions, provided that they have registered with Russian regulators and the place of arbitration is Russia. Although foreign arbitration institutions can in theory apply for a licence to administer Russian corporate disputes, no foreign institution has yet obtained a licence.

Alongside these changes to the Civil Code, the Russian government has implemented a 'deoffshorisation' programme aimed at stemming capital flight from Russia and encouraging the repatriation of capital previously channelled into offshore jurisdictions. The deoffshorisation campaign is now in full swing, following the introduction of controlled foreign companies (CFC) legislation and termination of the so-called tax and capital amnesty. Due to vigorous enforcement action, court practice is rapidly developing around the application of double tax treaty reliefs, which has so far been largely negative to taxpayers. The Common Reporting Standards, if launched in Russia as expected, will significantly contribute to the ability of Russian tax authorities to trace evasion schemes. We expect the years following next year's presidential elections to see a further hardening of the tax and regulatory requirements. The government's impetus for greater transparency around off shore involvement in Russia-focused transactions is also seen in the new foreign investment laws that were introduced on 30 July 2017, which apply greater scrutiny to transactions where a foreign partner acquires an asset in Russia, or a Russian investor acquires an asset in Russia through a foreign vehicle, especially if the asset is strategic in Russia.

Despite the hopes that US sanctions (and sanctions imposed by the EU and certain other Western jurisdictions) would be lifted, or at least relaxed following last year's US presidential elections, the US has further reinforced and widened sanctions against Russia in August 2017, which is likely to further complicate investment in Russia for Western companies.

Justin Vaughan

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

AR & JV: Political events, particularly the US and EU sanctions targeting key sectors of the Russian economy and major Russian entities such as Gazprom, Rosneft, Sberbank, VTB Bank and VEB, continue to have a considerable impact on the commercial landscape in Russia. Even entities that are not subject to sanctions may find it harder to attract overseas (Western) investors, as potential investors reassess the risks and challenges (perceived or otherwise) of investing in Russia. The recent further US sanctions targeting Russia's defence, intelligence, mining, shipping and railway industries and restricted dealings with the country's banks and energy companies in response to Russia's alleged interference in US internal affairs only reinforce the perception of Russia as a risky jurisdiction in which to do business.

An example of the tensions introduced by the sanctions is the recent comment from Russia's Federal Antimonopoly Service suggesting that its consent to Schlumberger's acquisition of a 51 per cent stake in Russian oil servicing company Eurasia Drilling will be conditional on the US oilfield servicing company selling its stake in EDC to a Russian investor if the US imposes additional

"The acquisition of 'control' by foreign investors of Russian companies operating in 'strategic business sectors' requires government consent."

sanctions that might adversely impact EDC. On the one hand, Russia remains open to foreign investment (and Russian assets continue to attract US and other Western investors); on the other hand, the government wants to protect the largest drilling company working on strategic Russian oil and gas fields from the impact of US sanctions after Schlumberger acquires a majority stake.

Like Schlumberger and other US companies, Russian companies also show a continued willingness to partner with their Western counterparts. For example, it has been reported that ExxonMobil's subsidiary Exxon Neftegas has recently settled a US$637 million claim against Russian tax authorities in consideration for a minority stake in a large Rosneft oil project.

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

AR & JV: There have been some examples of shareholders engaging actively in the management and governance of public listed and unlisted companies in Russia, such as the (recently settled) two-year long battle between certain minority shareholders of Eurasia Drilling and its management over the share price at which management's buyout of Eurasia Drilling after Schlumberger's initial takeover attempt failed due to lack of regulatory approval. However, the prevalence of low free floats and controlling shareholders mean that it is unlikely that the levels of activist/turnaround investment experienced in the US and the UK will become a regular feature in Russia.

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

AR & JV: While some deals are conducted through auction 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. 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, antimonopoly laws 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 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 jurisdiction?

AR & JV: It is not possible to predict at this point when existing trade restrictions may be lifted – indeed, as noted, the US recently extended the scope of its sanctions. Equally, it is not clear whether the Russian government 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, and there is evidence that this has stimulated M&A activity in the Russian food and agricultural industries.

For a variety of reasons, M&A (even with only Russian participants) has, in a significant number of cases, been structured through non-Russian acquisition and joint-venture vehicles and is 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.

In addition to the important changes to the Civil Code, the deoffshorisation and CFC programme have already started heavily influencing the choice of traditional investment structures.

The Russian CFC legislation sets out rules in four main areas of tax structuring. First, it addresses the taxation of profits received by the controlled foreign companies of Russian residents but not yet received by the Russian residents themselves. Second, it requires Russian

residents holding shares in, or controlling, foreign companies or non-corporate entities to notify the Russian tax authorities of such shareholding or control. Third, it lays down the test for determining the tax residency of legal entities. Lastly, it introduces the concept of beneficial ownership of income for the purposes of double tax treaties.

It is clear from the law and recent court practice that the Russian government aims to restrict the availability of double tax treaty benefits for recipients of Russian-source passive income, where offshore structures are deliberately established to obtain tax treaty benefits for the ultimate beneficial owners of such income. While court consideration is so far limited, the tax authorities have started gaining experience in application of these rules.

Within the same trend, interest taxation rules have been heavily amended, with specific transfer pricing regulation introduced for interest in 2016 and thin capitalisation rules revised with effect from 2017. Amendments to the thin capitalisation rules effectively codify recent court practice and restrict deductibility of interest under loans extended by foreign sister companies.

All these developments illustrate the continuing trend of Russian tax legislation becoming significantly more complex and nuanced. In tandem, Russian tax authorities are adopting an increasingly sophisticated and rigorous approach in their assessment of applications for double tax treaty relief. In the last 18 months we have seen a greater examination of the substance of ownership structures and the nature of the relationship between, and the functions of, the different entities in these structures. The risk is that where foreign companies or non-corporate entities are acting as mere conduits or agents for the 'true' beneficial owners of income, they may be disregarded for tax treaty purposes. As mentioned, court practice on the matter is developing rapidly, and most of the cases resolved are not in favour of the taxpayers.

GTDT: What does the future hold? What activity levels do you expect for the next year? Which sectors will be the most active? Do you foresee any particular geopolitical or macroeconomic developments that will affect deal sizes and activity?

AR & JV: It is likely that the trade restrictions imposed by the EU, the US and other Western jurisdictions will continue to influence market conditions, both directly and indirectly. Domestic buyers (with no significant ownership link to those 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 has hampered the ability of potential buyers to raise the finance necessary to make significant acquisitions. The widening of the US sanctions in

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THE INSIDE TRACK

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

The dominance of state-owned enterprises in 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?

We advised United Capital Partners on their consortium acquisition with commodities trader Trafigura of a 49 per cent stake in Essar Oil Limited, India's second-largest private oil refiner. This deal is significant because, together with Rosneft's simultaneous acquisition of an equivalent 49 per cent stake, it is the largest foreign direct investment in Indian history and a prime example of successful implementation of the Russian outbound 'pivot East' strategy.

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August 2017 illustrates that relief from sanctions is unlikely to come any time soon. We anticipate that, although Chinese outbound investment has dropped in the first half of 2017 compared with its record 2016 levels, Chinese funds will continue to dominate the investment sphere in the coming 12 months in line with the Chinese government's policy to focus investment along the old 'Silk Road'. We may also see some M&A activity coming from other countries that are targeted by the Russian 'pivot East' strategy, such as Saudi Arabia, whose sovereign fund PIF and oil company Saudi Aramco is expected to establish a US$1 billion energy fund together with the Russian Direct Investment Fund in order to invest in the Russian oil sector.

However, despite the political tension we still see some foreign investment from Western countries, such as the US, with numerous examples as we have discussed. Although it is hard to predict how the political and economic landscape will develop, there have been signs of improvement in the levels of foreign investment in Russia that we anticipate will continue in the coming year, especially as the wold economy is picking up, with the OECD forecasting global GDP growth at 3.5–3.6 per cent in 2017 and 2018 after what it called 'many years of weak recovery'.

For some, the low relative value of the rouble (especially now the currency appears to have stabilised) means that production costs in Russia offer significant competitive advantages to investors localising production in the country for export, and the previous economic turbulence has gone some way to reducing the valuation gaps between sellers and investors that have been so prevalent in the Russian market. We expect that the energy, natural resources and transportation sectors will continue to be active areas of the Russian economy and provide opportunities for investors in the remainder of 2017 and into 2018.

We expect that the Russian state's privatisation plans will also be a driver of 'big ticket' M&A in the coming year. As mentioned, in January 2017 Glencore Plc and Qatar's sovereign wealth fund made the largest foreign investment in Russia since 2014, acquiring a 19.5 per cent stake in Rosneft, and that consortium may already have found a potential purchaser for the lion's share of that stake, CEFC China Energy. We expect that the privatisation of lender VTB Bank, shipping company Sovcomflot and Russia's largest commercial sea port operator Novorossiysk Commercial Sea Port, if it proceeds, will attract significant international investor interest if the price is right.

Finally, Russia has reopened trade links with Iran following the UN removing its Iran sanctions. The key sectors that Russia hopes to capitalise on are energy, transport and defence. Russia has signed deals with Iran to supply military equipment, such as MI-17 helicopters and various rocket systems, improve transportation, with a US$2.5 billion deal to start up a much-needed rail wagon production operation, and Gazprom has been given a contract to develop the Farzad B gas field. Trade between the two countries has doubled over 2016 and it is expected that it will further grow to over US$10 billion in the near future. It remains to be seen whether the Iranian market opening up will spur any M&A activity in Russia.

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M&A IN SWITZERLAND

Christoph Neeracher is a partner at Bär & Karrer and co-head of the private M&A and private equity practice group. He is recognised as one of the pre-eminent private M&A and private equity attorneys at law in Switzerland and a leading lawyer in financial and corporate law by *IFLR 1000* (2011–2016), *Chambers Europe* and *Chambers Global* (2010–2016), and *The Legal 500* (2012–2016), among others.

Christoph is experienced in a broad range of domestic and international transactions, both sell-side and buy-side (including corporate auction processes). He advises clients on general corporate matters and corporate restructurings, as well as on transaction finance and general contract matters, relocation and migration projects, and all directly related areas such as employment matters for key employees (eg, employee participation and incentive agreements). In his core fields of activity he represents clients in litigation proceedings.

Philippe Seiler is an associate at Bär & Karrer. He has broad experience in M&A transactions in various industries, including healthcare, manufacturing and engineering, IT, watch, real estate, logistics and pharmaceutical and biotechnology.

Philippe not only covers large transactions and takeovers, but also focuses on small and medium-sized M&A transactions, private equity transactions, management buyouts and outsourcing projects. In addition, Philippe focuses on reorganisations and restructurings, general contract and commercial law, real estate transactions and healthcare law.

"The Swiss M&A market and, in particular, the private equity market seem to be in good shape, in spite of some geopolitical uncertainties."

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

Christoph Neeracher & Philippe Seiler: Compared to 2016, M&A activity in the first half of 2017 has shown an overall marked stability. Although transaction volume has dropped marginally on a year-on-year comparison, deal activity remains at a high level. That said, the number of transactions involving private equity investors increased, particularly in the second quarter of 2017, with 31 deals recorded. Accordingly, of the 10 largest transactions conducted in Switzerland in the first half of 2017, no fewer than three involved a private equity buyer. Thus – broadly speaking – the Swiss M&A market and, in particular, the private equity market seem to be in good shape, in spite of some geopolitical uncertainties (such as Brexit), which have emerged in the recent past. The following key factors can be identified for this continuingly positive trend. First, despite new regulations on capital outflows, the appetite of Chinese investors for investment opportunities in Switzerland has not shown signs of waning in 2017 with the acquisitions of Dufry and of Glencore's oil products and logistics business, and we estimate that Chinese buyers will increase their activity in the Swiss M&A market in the future. Secondly, the ongoing availability of transaction financing at attractive interest rates and generous borrowing conditions continue to facilitate the funding of potential acquisitions, and puts pressure on investors to invest. Private equity investors, who tend to be highly leveraged, are in particular benefiting from this environment. Thirdly, Switzerland remains attractive for investors with various investment opportunities – notably small and medium-sized enterprises, which will need to deal with succession planning in the coming years (estimated to be approximately 80,000), are particularly attractive targets for (private equity) investors.

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

CN & PS: Transactions involving industrial and consumer goods companies have been particularly frequent. Other active sectors include technology, media and telecommunications, healthcare, pharmaceuticals and life sciences and financial services.

2016 was a strong year for the commodities sector as well, with a deal value increase of 297 per cent compared to 2015, notwithstanding the fact that there was the same number of deals compared to 2015 in this sector. In the industrial market sector, stability returned to a certain extent after the Swiss National Bank's decision to remove the Swiss franc/euro minimum exchange rate at the beginning of 2015. In the industrial sector, the number of deals increased by 54 per cent, while the deal values decreased by the same number compared to 2015.

Activity in the power and utilities market has been rising by 148 per cent in deal values compared to 2015.

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

CN & PS: In February 2017, US-based Johnson & Johnson announced their takeover of the Swiss biotech company Actelion for a deal value of approximately US$30 billion. Following the acquisition of Syngenta by ChemChina in 2016, this was already the second 'blockbuster' deal on the Swiss M&A market within a year, and one of Switzerland's five largest transactions of all time. Then, in May 2017, Clariant and Huntsman announced their intention to merge, in a cross-border all-stock merger structured as a reverse triangular merger, with Clariant remaining as the parent company. The new company, which will be called ClariantHuntsman, will have an enterprise value of approximately US$20 billion. Another striking deal so far in 2017 is the acquisition of Breitling, one of the last independent Swiss luxury watch manufacturers, by CVC Capital Partners, a deal that is symbolic of the dominance of private equity players on the Swiss M&A market.

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

CN & PS: Generally speaking, consideration may either consist of cash, shares, securities or a combination thereof. Cash settlements tend to be more frequent, as share deals are usually

only accepted by the seller if the shares given as consideration are readily marketable, as is the case especially for publicly listed companies. Tax considerations also typically play an important role in determining the type of consideration that is eventually agreed upon.

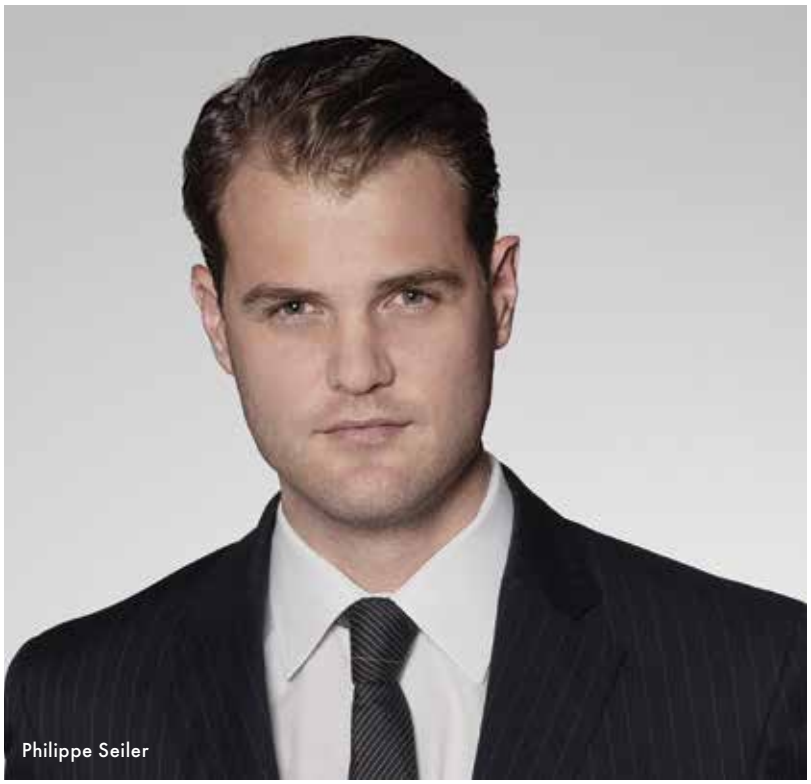
The type of consideration accepted will in each case depend largely on the shareholders involved and their intentions, as well as on the specific transaction type and process.

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

CN & PS: Over the past few years, regulation has become a central strategic aspect of M&A deals. The complexity of the regulatory environment – and thus the requirements and costs for market participants – are increasing, while the strategic scope is getting smaller. Even if Switzerland is not a member of the European Union, European directives play an important role in impacting the Swiss market. In particular, the following regulations are noteworthy: as part of a new Swiss legislation, which aims at preventing money laundering and tax evasion, any entity acquiring 25 per cent or more of a non-listed Swiss company must inform the target of the identity of the acquiring entity's beneficial owner and provide updates of any changes thereto. In standard private equity structures, the administrative burden of this new legislation can – in our view – be minimised by implementing a practical solution that is compliant with the rules. As, typically, the general partner takes the relevant decisions regarding the fund and its portfolio companies, the individuals controlling the general partner (respectively controlling the ultimate shareholder of the general partner) should be disclosed as beneficial owners in the sense of this regulation. If such individuals cannot be determined, the top executive officer (chairman or CEO) of the general partner, respectively of its ultimate shareholder, may be disclosed.

A new law approved by Swiss voters in 2013, which is intended to limit so-called 'fat-cat' salaries has been introduced for companies publically listed on a Swiss stock exchange. The law introduces a range of mandatory rules on transparency and compensation that have, in turn, increased administrative costs for companies. Violation of the law may, in extreme cases, have criminal law consequences. The law requires the articles of association to include rules on additional remuneration for the board and senior management. Furthermore, the aggregate compensation of the board of directors and the senior management must now be approved by the annual general meeting. The voting rules at the shareholders' meeting have been overhauled,


Christoph Neeracher


Philippe Seiler

"Switzerland remains highly attractive for inbound investment with plenty of opportunity – notably small and medium-sized enterprises (SMEs)."

which strengthens the role of the independent proxy advisers.

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

CN & PS: Switzerland remains highly attractive for inbound investment with plenty of opportunity – notably small and medium-sized enterprises (SMEs), which will need to deal with succession planning over the coming years, serve as particularly attractive targets for investors. According to a study prepared by Deloitte, the first half of 2017 was a steady period for Swiss SME transactions. As in past years, the majority of transactions involving Swiss SMEs were cross-border (63 per cent). The most active foreign investors in these transactions were from North America and Japan. Specific restrictions that apply to foreign buyers only are limited. One such restriction is the Federal Law on Acquisition of Real Estate in Switzerland by Non-Residents (Lex Koller), which states that a special permit is needed whenever a foreign citizen acquires, directly or indirectly (ie, by purchasing shares of a company) real property, without using said property as a permanent business establishment.

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

CN & PS: Traditionally, shareholder activism has not been a part of Switzerland's corporate scene, due to the rights of minority shareholders being quite limited.

However, in recent years there has been a growing trend towards shareholder activism in Switzerland, as reflected globally and, especially more recently, in Europe. Examples include the involvement in the ultimately rejected Monsanto bid for Syngenta, the replacement of several board members of Gategroup by RBR Capital Advisors AG or the challenge to the merger between Holcim and Lafarge.

To sum up, shareholder activism is still a rather new phenomenon in Switzerland, with numerous barriers posed by Swiss regulation. Companies at risk of becoming a target are nevertheless well advised to implement a number of structural defences.

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

CN & PS: The general procedure, as well as the different stages, vary substantially from one case to another, depending on, *inter alia*, the seller, the purchaser and the legal form of transaction envisaged (share deal, asset deal, mixed share and asset deal or statutory merger). Generally speaking, however, a typical Swiss M&A transaction consists of the following stages.

In the first stage (preparation phase), the seller and its advisers prepare the sale documentation as well as the marketing material.

In the next phase (marketing phase), the executive management or, more often, a professional financial intermediary, instigates first contact with potentially interested parties. The potential bidders are required to sign a non-disclosure agreement and receive an information memorandum containing key information. Based on this information, the bidders might decide to make a non-binding offer to the seller.

In the third phase (due diligence phase), after any questions regarding the offers have been clarified, due diligence and management visits take place and Q&A sessions are organised. The parties then finalise and negotiate the transaction agreement, which is usually drafted according to international standards, in a fourth phase (negotiation, signing and closing phase).

Upon completion of this process, the parties will sign the transaction agreement. As the closing often depends on the presence of the necessary governmental approvals or third-party consent, a certain lapse of time will normally pass between signing and closing, during which time the parties have to fulfil certain obligations and follow specific rules of conduct as set out in the agreement. The form of the closing itself varies depending on the legal form of the target business and the form of the respective transaction.

Concerning the last phase (post-closing phase), parties may have agreed on non-competes for the

THE INSIDE TRACK

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

Switzerland's stable political system, globally-orientated and liberal economy, highly skilled workforce and efficient legal environment, as well as a traditionally mild tax regime and relatively low bureaucracy, create an excellent environment, not only for private equity, but also for business in general.

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

Competence, experience and accessibility are all crucial for successfully completing complex transactions.

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

Every deal naturally raises interesting and unique questions. One of the most challenging deals that we have been working on over the past few months is the acquisition of iconic luxury watch manufacturer Breitling by CVC Capital Partners. The deal raised questions in every field of law and involved multiple jurisdictions across the globe.

Christoph Neeracher and Philippe Seiler
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seller or certain obligations, such as continuation of the business, of the purchaser.

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

CN & PS: A revision of Swiss company law is anticipated. The revision will serve to improve corporate governance for listed as well as non-listed companies, will introduce more flexibility with regards to company foundation and capital, and will adapt the rules on companies limited by shares to the new accounting legislation.

Furthermore, provisions regulating transparency of economically significant companies may be introduced.

GTDT: What does the future hold? What activity levels do you expect for the next year? Which sectors will be the most active? Do you foresee any particular geopolitical or macroeconomic developments that will affect deal sizes and activity?

CN & PS: It is expected that deal activity levels will continue to rise in the second half of 2017. The continued low interest rates on offer and the high cash levels that enable companies to improve their market position will surely impact the M&A market. Swiss SMEs may be attractive targets for such aspiring investors and buyers.

M&A IN TURKEY

Emre Akın Sait is a senior consultant at LEGAL Attorneys & Counselors in Istanbul. His practice focuses on assisting the clients in their ongoing corporate and commercial activities and general contract matters, in particular: M&A, joint ventures, private acquisitions and disposals and shareholders agreements. He has more than 20 years of extensive experience advising on all aspects of transactions both on national and international levels.

Pınar Engisor Şahin is a partner at LEGAL Attorneys & Counselors, specialising in merger control filings, and public and private tenders. She has particular expertise in horizontal and vertical inter-company relations, merger transactions held in single and multiple jurisdictions, and compliance programmes.

Can Topukçu is an associate at LEGAL Attorneys & Counselors who specialises in M&A, corporate and commercial law. He primarily handles corporate M&A matters, international investments and cross-border joint ventures.

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

Emre Akın Sait, Pınar Engisor Şahin & Can Topukçu: The year 2017 has had a stronger performance in terms of M&A activities compared to last year. Due to the attempted coup of 15 July 2016 and prolonged state of emergency, 2016 was not a particularly active year for M&A deals and Turkey significantly underperformed in 2016 with an approximate 50 per cent decrease in M&A deal value. Nevertheless, despite the retraction in 2016, M&A activity has gradually increased in 2017, although still remains below the average performance of the past decade – in particular compared to 2014, 2013, 2012 and 2010.

Despite the fact that the number of deals has remained stagnant, the value of the M&A deals made in the first six to eight months of 2017 suggest that M&A activity will reach or even exceed the performance of the past two years in terms of deal value, due to large transactions with high values. Although there have been no official publications made for 2017, according to our sources, the number of M&A deals made in the first six to eight months is around 45, reflecting a total value of US$5.6 billion. According to available sources this number was US$1.9 billion for 129 deals in 2016.

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

EAS, PEŞ & CT: The energy sector has been the most active sector in Turkey for a considerably long period of time. This is mainly due to the continuing high value privatisations and government incentives for renewable energy. Following the energy sector, financial services and transportation sectors have been particularly active in 2017 – similar to past years.

The financial services sector is traditionally one of the strongest sectors in Turkey in terms of transaction value, which is mainly attributable to the interest of foreign investors in Turkish banks. The acquisition of Garanti Bank (9.95 per cent shares) by BBVA (Spain), the acquisition of Odeabank (23.58 per cent shares) by IFC and European Bank for Reconstruction snd Development, the acquisition of Alternatifbank (25 per cent shares) by Commercial Bank of Qatar, and the acquisition of Fibabanka (9.95 per cent shares) by the Abraaj Group are examples of the most recent financial services deals in the past 12 months.

The average M&A deal size for private transactions in Turkey is generally around US$50–70 million US dollars. It was around US$65 million in 2015 and US$46 million in 2016. Generally, the vast majority of the deals are small and medium-sized transactions and a number of high-value mega-deals have the dominance on the total value, which is the case for 2017 as well. In 2017, there have been no deals exceeding the US$1billion threshold so far.

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

EAS, PEŞ & CT: As mentioned, 2016 was not an especially active year in M&A deals and therefore the largest deal completed in 2016 was the acquisition of Mars Entertainment Group for US$689.2 million. In 2017, there have been several deals with similar values such as the acquisition of Mersin International Port Management for €738.38 million, the acquisition of Migros Türk Ticaret AŞ for €606.9 million and the acquisition of Türkiye Garanti Bankası AŞ for €867.6 million. However, the majority of the remaining deals are small and medium-sized transactions.

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

EAS, PEŞ & CT: Generally speaking, Turkish shareholders are no exception to preferring cash over other types of consideration. Shares, or a combination of different types of consideration is also possible, but not very common. It is more likely to witness a combination of different types of consideration in cross-border deals. The acquisition of Yemeksepeti.com, the Turkish food ordering platform by Delivery Hero Holding GmbH, and the acquisition of Boyracı Construction by Evershine Group Holdings Limited are recent examples of funding through a combination of cash-shares and cash-promissory notes respectively.

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

EAS, PEŞ & CT: The Turkish corporate law has undergone significant changes in 2011 and 2012. The new Turkish Commercial Code (TCC) and the new Code of Obligations (TCO) were published in 2011 and entered into force on 1 July 2012. These two Codes are the main texts that apply to M&A transactions, as there is no specific legislation in Turkey that solely governs M&A deals.

M&A activity involving a public company is subject to the Turkish Capital Markets Laws and the relevant communiqués, as well as the TCC and TCO.

Under the Turkish merger control regime, a prior merger control filing before the Turkish


Emre Akın Sait


Pınar Engisor Şahin

Competition Authority is required where the revenues of the parties to the transaction exceed the applicable thresholds. The Communiqué No. 2010/4 on Mergers and Acquisitions Requiring the Approval of the Board (Communiqué No. 2010/4) is the main text to refer to for assessing the notifiability of an M&A transaction. Two important changes were introduced in the Communiqué No. 2010/4 in 2013. One was the elimination of the affected market criterion for notifiability, and the other was the increase of turnover threshold of the parties. After entry into force of these amendments, the threshold assessment has become the only test that the parties to an M&A transaction should make in understanding whether or not a notification to the Turkish Competition Authority is necessary.

Another recently implemented change that would be important for investors in the M&A market is the exemption in the Corporate Tax Law that aims specifically to incentivise research and development (R&D) investments. Accordingly, if a patent or utility model is registered with the Turkish Patent Institute following an invention made through R&D activities that took place in Turkey, 50 per cent of all earnings arising from the lease or sale of this industrial property, from the mass production revenues arising from the implementation of such invention (provided the production takes place in Turkey), or from the use of this invention in production processes or manufacturing of products (provided the production takes place in Turkey, and only on that portion of revenues directly related to the invention), will be exempt from corporate tax.

A different amendment that is worthy of note in terms of costs is the removal of stamp duty charged on more than one copy of contracts. In Turkey, different percentages and amounts of stamp duty are imposable on different types of documents. The most important stamp duty within the context of M&A transactions is that imposed on contracts (for 2016, this was 0.948 per cent of the transaction value of the relevant contract). Every contract is taxed separately. Before the amendment that entered into force on 9 August 2016, every original copy of a contract executed by a Turkish company was subject to a stamp duty of 0.948 per cent of the contract value, with a cap amount of approximately 1.7 million Turkish liras (approximately US$602,746) per copy. The amendment removed the obligation to pay the stamp duty for the multiple copies of a contract. This has decreased the transactional costs in M&A deals, as the stamp duty only arises for one original copy of each contract, instead of all executed original copies.

In an effort to increase local and foreign investments, the Turkish government has passed a new law in September 2016, Law No. 6,745, which includes investment incentives to be granted to the investors for the projects supported by the Ministry of Economy. For instance, it is regulated that the social security premiums, half of the energy expenditures and the interests of investment loans will be paid by the Ministry of Economy. Many other fiscal incentives, such as tax exemptions and reductions, are also included in the law. The investors are required to apply to the Ministry of Economy for the request of incentives in each particular project. This could be an important development to note for the foreign investors looking for local targets that are aiming to benefit from this incentive programme.

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

EAS, PEŞ & CT: Dealmakers are still cautious as the impacts of the attempted coup in 2016 is still felt in both ongoing and potential deals. Although there has been a noteworthy improvement in


Can Topukçu

"Dealmakers are still cautious as the impacts of the attempted coup in 2016 are seen on both on-going and potential deals. Although there has been a noteworthy improvement in 2017 in comparison to 2016, it is still behind the previous years' performance."

2017 in comparison to 2016, it is still behind the previous years' performance.

Generally, foreign investors have been very common in the M&A sector of Turkey for the past decade; mainly because Turkey's growing economy and its advantageous location offer many economic opportunities, and the Turkish government's encouraging attitude towards foreign investment, applicable legislation, tax advantages and the variety of incentives provided by the government create a favourable investment environment for foreign investors. Even though domestic investors generally have the lead on deal count, deals with foreign investors almost always constitute the majority of the total deal value. Even with the low deal count in 2016, we observe that this situation has not changed and foreign investors continue to realise more transactions than domestic investors in terms of deal value.

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

EAS, PEŞ & CT: No; the shareholder activists are not a part of the corporate scene in Turkey. The Capital Markets Board is the administrative body that exercises supervisory powers in terms of shareholder protection. There seems to be some efforts made by the Stock Exchange Investors' Association, yet this is rather insufficient to make the shareholder activism a part of the corporate scene.

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

EAS, PEŞ & CT: Intermediaries do play an important role in the M&A activities in Turkey, and are more common in international transactions for introducing a foreign potential buyer to a Turkish seller. The local deals would usually be triggered by a communication between senior management of companies through networking.

The stages of a transaction may vary depending on the type of the transaction. Nevertheless, the stages in private M&A transactions are very similar. The communication between the parties would not go too far without a non-disclosure agreement. So, it is typical that the parties would sign a non-discolsure agreement to kick-off the discussions. It is also a common practice to have an exclusivity agreement in place. This would be followed up by discussions and negotiations on the main aspects of the deal, which would be reflected in a document in the form of a memorandum of understanding, term sheet, heads of terms, etc. The next stage would be the initiation of a due diligence process. The content of due diligence process would vary depending on the activities of the target, however it is usually split into legal, financial-tax and technical phases. The documents would generally be uploaded into an electronic data-room for the sake of easy access, record-keeping and less transportation, however, on-site assessment would also be required in most cases. Very frequently, the buyer will have a deadline to finish the DD process, which requires the legal, financial-tax and technical consultants to work efficiently in a very short period of time. If the buyer is satisfied with the DD results, the lawyers would start drafting the transaction documents – such as the share purchase agreement, as the case may be, shareholders agreement, joint venture agreement, subscription agreement, escrow agreement and other security documents – and then the parties would execute. The interim period after the execution of transaction agreements and before closing can get difficult at times, when there are challenging conditions precedent to the closing. Parties must obtain third-party consents and regulatory approvals (eg, approval from the

THE INSIDE TRACK

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

Well, the uniqueness of M&A transactions in Turkey would be diversity. Although a developing country, Turkey has a good banking sector, which dominates the M&A activities in terms of deal value. On the other hand, the majority of the M&A sector comprises small and medium- sized deals, some of which are companies that are established and managed by self-made entrepreneurs that are used to running companies on their own. Therefore, you get to see and work both ends of the spectrum in respect of deal size, type and culture.

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

(1) Turkey is going through a difficult era. There is lack of political stability and predictability. According to published sources, approximately 70,000 people, including around 2,500 judges and prosecutors, have been suspended from duty in the past 12 months. Under the current circumstances, it is of crucial importance to work with someone who is trustworthy, and would perform a task as per the applicable law and order.
(2) Work with a team that has experience in the relevant sectors.
(3) Ensure that the counsels that are engaged can 'communicate' with businessmen. It is important to have lawyers that can think outside the box and understand the deal in a commercial sense.

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

The most interesting matter we have worked on is the acquisition of Rockwood Specialties Group GmbH and Chemetall US, Inc by BASF SE. Analysing and understanding the technicality of the works performed by the parties was particularly interesting.

Emre Akın Sait, Pınar Engisor Şahin and Can Topukçu
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Turkish Competition Authority, sector-based authorities depending on the parties' activities such as the Energy Market Regulatory Authority, Banking Regulation and Supervision Agency, etc) in this interim period and, this will follow closing.

These stages would vary for M&A transactions involving listed companies, as they are regulated by the Capital Market Laws. Specifically, the provisions of the Communiqué on Shares, Communiqué on Tender Offers, Communiqué on Mergers and Demergers, and Communıqué on Foreign Capital Market Instruments and Depositary Receipts and Foreign Investment Funds would apply in addition to the TCO and the TCC.

An M&A transaction that results in a direct or an indirect change of shareholding structure at 5 per cent, 10 per cent, 15 per cent, 20 per cent, 25 per cent, 33 per cent, 50 per cent, 67 per cent or 100 per cent is required to be disclosed to the relevant authorities in Turkey (eg, Trade Registry, Capital Markets Board, etc). Furthermore, listed companies have an obligation to disclose material events at the Public Disclosure Platform as per the Communiqué on Material Events. In principle, negotiations on a potential M&A transaction are considered as 'insider information' because they can influence the value and price of the capital market instruments and the decisions of investors; and therefore are subject to disclosure on the Public Disclosure Platform.

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

EAS, PEŞ & CT: The Turkish government has been focusing on new investment regulations in order to revive the investment environment. There are a number of new incentive regimes that have been announced recently. As a result, the number of total investment regulations has increased and it may have become confusing for the prospective investors to follow the said regulations. In this regard, we expect that the involvement of investment consultants in Turkey, concentrating on incentive regimes will increase considerably in the following years.

To put it very briefly, the government has introduced a project-based incentive regime for R&D-based projects in addition to the general incentive regime that provides different forms of incentive opportunities – such as tax reductions, tax exemptions and investment interest deductions, etc – based on the region of Turkey where the incentive will be granted. It is anticipated that a government investment amounting to Turkish liras 62 billion will be realised by 2020 and a government incentive amounting to Turkish liras 1.25 billion will be provided for private investments in eastern and

south-eastern regions. With this in mind, it is expected that private investments in these areas will experience a substantial increase.

The Turkish corporate and commercial law has gone through a fundamental change with the entry into force of the TCO and TCC in 2012. Therefore, we do not foresee any substantial changes anticipated in the near future. However, there are always changes in the legal landscape that may indirectly encourage or discourage the M&A activities. The most recent example would be the incentives that will be provided by the Ministry of Economy, as mentioned.

GTDT: What does the future hold? What activity levels do you expect for the next year? Which sectors will be the most active? Do you foresee any particular geopolitical or macroeconomic developments that will affect deal sizes and activity?

EAS, PEŞ & CT: Looking ahead to 2018, geopolitical circumstances and the pressure on the Turkish economy makes it difficult to foresee activity levels. However, according to published sources , the investors are optimistic that M&A activity will continue to increase in 2018. Especially with the anticipated privatisations, such as the privatisation of Fenerbahçe-Kalamış Marina, Bursa Natural Gas Power Plant, Aliağa Natural Gas Combined Cycle Plant and various electricity generation assets of EÜAŞ, and the sales of the companies and businesses taken over by the Turkish government (SDIF) due to the coup attempt in 2016, it is expected that the activity levels will further increase in 2018.

Similar to recent years, we expect that the energy sector will continue to remain active in case the planned privatisation tenders for electricity generation are realised.

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M&A IN UKRAINE

Dmytro Fedoruk is a partner at Redcliffe Partners. Dmytro focuses on M&A and has extensive experience in the oil and gas and energy sectors. Apart from regularly advising on cross-border mergers and acquisitions, Dmytro assists clients with high-profile upstream, midstream and downstream projects in the oil and gas sector. Dmytro is recommended in *Chambers Global*, *Chambers Europe*, and *IFLR 1000*.

Before founding Redcliffe Partners, Dmytro practised in the Kiev and London offices of leading international law firms.

Zoryana Sozanska-Matviychuk is a counsel at Redcliffe Partners. She focuses on M&A, private equity and venture capital transactions. Zoryana's industry experience includes advising clients from the IT, financial, energy, and pharmaceuticals sectors.

Before joining Redcliffe Partners, Zoryana practised in the Kiev, Sydney and London offices of leading international law firms. Zoryana is recommended in *Chambers Global*.

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What trends are you seeing in overall activity levels for mergers and acquisitions in your jurisdiction during the past year or so?

Dmytro Fedoruk & Zoryana Sozanska-Matviychuk: M&A activity levels have risen in Ukraine since the financial crisis. According to EMIS, M&A deals in Ukraine were worth more than €4.7 billion in 2013. However, the M&A market has not picked up after the turbulent events of 2014. The number of deals and their size have shrunk compared to pre-2014 activity levels. While, according to EMIS, there were more M&A deals in 2015 compared to 2014, M&A deals in Ukraine these days tend to be smaller in value.

As far as foreign investment goes, we have witnessed a few exits by foreign investors but have not seen a lot of new foreign investment into the country, with the exception of financing provided by the likes of the European Bank for Reconstruction and Development (EBRD), the International Monetary Fund (IMF) and the European Investment Bank. The role of the international financial institutions in supporting the Ukrainian economy has been critical, and we would like to (finally) see some private money being invested into Ukrainian businesses. A renewed cooperation between Ukraine and the IMF and the latest tranche in September 2016 is expected to give a positive signal to all potential investors. In addition, there is a shared hope that foreign investment will begin to flow into Ukraine again once there has been good progress with the various reforms that are currently underway. The reforms, first and foremost a judicial reform and changes in how the public prosecution authorities operate, should improve the investment climate in Ukraine. An improved investment climate and the abundance of undervalued assets could lead to a significant increase in dealmaking. Assets in Ukraine should generally be cheaper to buy because of a major depreciation of the Ukrainian hryvna (from around 13 hryvnas per US dollar in September 2014 to around 26 hryvnas per US dollar in September 2016).

Privatisation of Ukraine's many state-owned enterprises (SOEs) is one area where interest from foreign investors, and eventual dealmaking, are anticipated. The list of SOEs to be privatised in 2016–2017 has recently been expanded and now includes over 400 enterprises. The government is particularly hopeful about attracting investment into some large infrastructure, chemicals and energy-producing companies. The 'crown jewel' on the list of SOEs to be privatised is the Odesa Portside Plant (OPP). It is a major producer of ammonia and other chemicals, and also operates a sea terminal for transhipment of chemicals. Unfortunately, the first attempted auction of the OPP (with a starting price of approximately US$520 million) that was scheduled for July this year was cancelled because of a lack of interest. A second auction is planned to be held in November 2016, with a significantly reduced starting price of approximately US$150 million.

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

DF & ZS-M: Generally speaking, Ukraine's natural and human resources and, to an extent, its existing production facilities, make it an attractive for investments in areas such as agriculture, energy, IT and heavy industries.

The most active sectors have been finance and technology and telecommunications. Some deals took place in agriculture and pharma. A number of exits by foreign investors from their struggling Ukrainian subsidiaries took place in the banking sector and this trend is expected to continue. The value of the Ukrainian banks has dropped dramatically so banking M&A deals tend to be low-value as a result. In insurance, there was an acquisition by Canada's Fairfax of 100 per cent of shares in QBE Ukraine, an acquisition by the Bulgarian Euroins Insurance Group of almost all of its shares in HDI Ukraine and a very recent (yet to be completed) acquisition by TAS Insurance, a Ukrainian insurance company, of 100 per cent of shares in Aegon Life Ukraine from its Dutch parent.

Ukraine's IT sector has been quite active, although most deals are relatively small (ie, up to US$5–10 million). Recent examples of larger deals in IT were Snapchat Inc's purchase of a Ukrainian start-up Loosery Inc for an estimated price of approximately €130 million, acquisition by Horizon Capital (a regional private equity fund manager) of a minority stake in Rozetka (a Ukrainian e-commerce business) for an estimated price of US$30–50 million and a sale by Horizon Capital of its stake in Ciklum (a Ukrainian software developer) to George Soros for an estimated value of US$40–60 million.

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

DF & ZS-M: A large keynote deal was EBRD's investment into Raiffeisen Bank Aval in late 2015. This acquisition was very high-profile and, perhaps, signalled to the investment community that things may not be as bad in the Ukrainian banking sector as previously thought.

Another very positive deal was the investment by George Soros into Ciklum, which also took place in late 2015. This investment should encourage other investors to venture into the Ukrainian IT industry.

A recent deal that must be noted is Turkcell's acquisition of 45 per cent in Astelit (a Ukrainian mobile operator) in July 2015. It was one of the largest M&A deals in Ukraine, with a value of approximately US$100 million. Before the


Dmytro Fedoruk

acquisition, Turkcell held 55 per cent in Astelit so it became the sole owner of Astelit after the deal. We have recently seen an increased interest in Ukrainian assets from Turkish investors, which could become a trend in Ukrainian dealmaking in the near future.

Had the first attempted auction of the OPP been successful, the deal would have been closed by now. An eagerly anticipated second auction is expected in November this year. The government's preference is for the OPP to be made private by a foreign investor. A successful sale of this flagship SOE could prompt more foreign investment into Ukraine. In particular, there is a number of energy-producing and energy-distributing companies (including various 'oblenergo' SOEs (energy distributors)) up for grabs within the privatisation process.

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

DF & ZS-M: Vendors commonly prefer cash consideration. Share transactions are less common. There still are certain regulatory restrictions that make it difficult for Ukrainian residents (both individuals and companies) to invest abroad by way of acquiring shares of foreign issuers.

First, there is a requirement to obtain a licence from the central bank, the National Bank of Ukraine (NBU), to invest abroad. There are very limited exceptions to that rule. In the past, there have been examples of consideration being paid by way of issue of shares in the foreign holding company, in exchange for shares in the Ukrainian target. Such structures require cautious planning.

Second, there are certain additional restrictions that have been imposed by the NBU in response to the fiscal instability of the post-2014 period, aimed at preventing an outflow of capital. Though some of these restrictions have been relaxed, a few remain. Most notable in the M&A context is the ban on repatriation of proceeds from the sale of shares in Ukrainian companies, and also of dividends (with limited exceptions). These are temporary measures that should be removed once the Ukrainian financial market is in a better shape.

We expect to see many more debt-to-equity conversions by overleveraged Ukrainian companies and their shareholder lenders.

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

DF & ZS-M: There have been quite a few new laws and regulations introduced in the past couple of years. These are part of the government's ongoing reform efforts so more regulatory changes are expected. Some laws were mandated by the IMF and other laws were passed in accordance with the Ukraine-EU Association Agreement, which was (finally) signed in 2014. The Association Agreement requires harmonisation of Ukrainian laws with those of the European Union.

Worth noting are some important changes in corporate governance and in merger control. From 1 May 2016, a few new statutory protections became available to minority shareholders. These include more stringent rules regarding related-party transactions, the right to bring a derivative action (that is, an action by a shareholder of a company on behalf of that company against its officers) and the requirement to have at least two non-executive board members on boards of public companies. In merger control, there was a long-awaited revision of the antitrust clearance thresholds in May 2016. Also, a fast-track procedure (of 25 calendar days in total, as opposed to 45 calendar days for the standard procedure) is now available to clear transactions with limited impact on the relevant market.

From 1 January 2016, the process of registration and maintenance of companies in Ukraine became more user-friendly. There are now are more authorised persons who can process registrable changes (eg, private notaries), and more information about Ukrainian companies is publicly available (including certain basic details of their ultimate beneficial owners and copies of the organisational documents).

The registration of foreign investments with local authorities in Ukraine, commonly seen as a useless bureaucratic procedure, was cancelled

in July this year. Accordingly, the statutory guarantees for foreign investors (eg, protection against expropriations) are also available for those foreign investments that have not been so registered.

Certain measures have been taken in the regulatory landscape to combat corruption, which is perhaps Ukraine's single biggest problem and a major deterrent to foreign investors. For example, liability for bribery has been increased and the National Anti-Corruption Bureau has been established.

Describe recent developments in the commercial landscape. Are buyers from outside your jurisdiction common?

DF & ZS-M: The continuing support of the Ukrainian economy by international financial institutions sends a positive message to private investors. Combined with a significant depreciation of the hryvna and falling prices for Ukrainian assets, a further improvement of the investment climate should encourage more foreign investment. Removal of the NBU's capital controls would also help but is unlikely to happen until 2017.

Overall, foreign buyers have not been common in the past few years. Instead, there have been a few exits by foreign investors, particularly in the banking sector. Some larger recent transactions have been between Ukraine's oligarchs.

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

DF & ZS-M: Put simply, no. Shareholder activism could, in theory, increase – there are still many companies that were created in the course of the earlier privatisation of the 1990s when employees were issued small stakes of shares, and that today have thousands of minority shareholders. There is no statutory squeeze-out mechanism at the moment (though a number of attempts have been made to introduce this into Ukrainian law).

As a general rule, such minorities are not active, and only a small portion of those ever attend the annual shareholders' meetings. So there are no Western-style activist campaigns funded by hedge funds or other third parties.

The reintroduction of the derivative action could lead to minority shareholders joining forces (the law requires holding at least 10 per cent of all shares to be able to bring a derivative action) and becoming more active.

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

DF & ZS-M: A typical M&A transaction will have the following timeline. After preliminary discussions between management teams (with


Zoryana Sozanska-Matviychuk

or without involvement of intermediaries), a term sheet or a similar, largely non-binding, document would be signed. The obligation to maintain confidentiality of any information about the target, and of the negotiations themselves, would normally be in a separate confidentiality or non-disclosure agreement, though it could be a part of the term sheet. The due diligence process will then start. The process of provision of due diligence information has become more structured and virtual data rooms are used in larger deals. Negotiations will continue in parallel but can often be protracted, especially where a foreign investor is negotiating with a potential local partner who is not represented by experienced advisers. Often the signing of the transaction documents will be preceded by some pre-acquisition restructuring so that the target group is investor-ready. Typically, there is a split signing and closing of the transaction, so once the transactions documents are agreed and signed, the parties will work on satisfying the conditions precedent (such as regulatory approvals, in particular). The time it takes to complete a transaction will depend on many factors and usually the involvement of experienced advisors on both sides makes things easier and quicker.

A private company acquisition (especially an acquisition of a limited liability company, which is the most common corporate form in Ukraine) is not extensively regulated by the law so the parties are largely free to determine the process. It will be necessary to take care of statutory registrations after closing so that any changes in the ownership of the company or its management are validly registered with the government authorities.

THE INSIDE TRACK

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

The legal and economic environment in Ukraine is challenging. Though we are seeing improvement, there is red tape even for the implementation of high-profile projects.

It is certainly an interesting feature of mergers and acquisitions practice that virtually all large and medium-sized M&A transactions in the country are completed under English law (though this may not be unique to Ukraine). The shared love of English law in Ukraine (which is a civil law jurisdiction) must have been prompted by the rigidness of Ukrainian corporate and contract laws.

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

When choosing a Ukrainian counsel, a client should look for someone with good practical experience that goes beyond technical knowledge. That person should understand how things are done in more developed jurisdictions and should preferably have worked abroad or at least with an international firm so that he or she can place himself or herself in the shoes of the foreign client, despite cultural differences. Finally, transactional work can be challenging and requires a lot of stamina so it almost takes a special breed of lawyers who are responsive, quick and determined, to get the deal done for the client.

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

Perhaps the most interesting matter that we have worked on in the past few months was (and still is) the OPP privatisation. The fate of other SOEs could depend on whether the privatisation of the OPP is successful. This project is very high-profile and is being closely watched. We are looking forward to the second auction of the OPP, which is scheduled to take place later this year.

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

DF & ZS-M: More reforms and liberalisation of regulation are expected to follow, resulting in a better investment climate. The Ukrainian economy is now poised to (slowly) recover; the Economic Development and Trade Ministry of Ukraine assessed the growth of GDP to be 0.7 per cent in January–July 2016 and predicted this would increase to 1–1.2 per cent by the end of 2016. According to the IMF's 2017 forecast, Ukraine's GDP will grow at 2.5 per cent.

As regards specific legal changes that are anticipated in the near future (which are relevant to M&A transactions), there are draft laws under discussion in the Ukrainian parliament that, if passed, would allow for debt-to-equity conversions in Ukrainian limited liability companies (this is currently restricted by the law), conclusion of Western-style shareholders' agreements under Ukrainian law (such agreements in respect of Ukrainian companies have been predominantly completed under English law) and a minority squeeze-out by a 95 per cent shareholder (no such mechanism is available at present). Out of those three draft laws, the first (regarding debt-to-equity conversion) is likely to be passed soon.

What does the future hold? What activity levels do you expect for the next year? Which sectors will be the most active? Do you foresee any particular geopolitical or macroeconomic developments that will affect deal sizes and activity?

DF & ZS-M: It is expected that the government's big privatisation programme will be implemented in 2017. Many large SOEs, including the OPP, are scheduled to be auctioned this year; however, we think that, realistically, most are likely to be sold in 2017. The State Property Fund of Ukraine (the government agency in charge of the privatisation) has taken a number of preparatory steps with the help of external advisers, whose involvement has been sponsored by the United States Agency for International Development and other donors. But we think that changes to Ukraine's outdated privatisation laws are critical for privatisation to to be successful, which could be a big boost to the economy and would encourage more foreign investment.

We are also cautiously optimistic that dealmaking will start picking up in 2017. Again, any increase in the activity will probably depend on the successful implementation of ongoing reforms, particularly in the anti-corruption area.

As regards sectors, we expect most activity to be in agriculture, energy and IT.

Deal size and activity should increase provided that the geopolitical situation is relatively stable and predictable, and further provided that the economy continues to recover with the help of the IMF and other international financial institutions. The IMF recently provided a new aid tranche of US$1 billion, which resulted in Ukraine placing a US$1 billion eurobond guaranteed by the US government. This was a very positive development.

M&A IN THE

UNITED KINGDOM

A partner based in Simpson Thacher's London office, Clare Gaskell advises private equity firms and corporate clients on private M&A, public takeovers, equity capital markets transactions and general corporate matters. Clare regularly handles complex cross-border transactions and her recent M&A experience includes advising KKR on its acquisitions of A-Gas and Travelopia, Blackstone on its acquisitions of Acetow, Armacell and AIM-traded Japan Residential Investment Company Limited, and Melrose Industries PLC on its acquisition of Nortek and the sale of Elster.

Ben Spiers is a partner at Simpson Thacher based in London. He joined the firm in early 2017 having spent 23 years at Freshfields Bruckhaus Deringer, most recently as co-head of their global M&A group. His focus at Simpson Thacher is corporate and sponsor clients across both public and private deals. He first came upon the Simpson Thacher team across the table, acting for Honeywell who bought Elster off Melrose (for whom Clare acted). Over the past year, Ben has advised Softbank on its acquisition of ARM Holdings; HP Enterprise on the sale of its software division to MicroFocus and Axis on its bid for Novae Group plc.

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Clare Gaskell


Ben Spiers

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

Clare Gaskell & Ben Spiers: Despite the political upheaval resulting from the Brexit vote in June 2016, we have seen healthy, if somewhat inconsistent, levels of M&A in the UK in the past 18 months. In the immediate aftermath of the vote – and the shock effect that it had on a number of processes – two deals stood out. First, Melrose announced its £1.6 billion acquisition of Nortek, Inc within a couple of weeks of the referendum. This was especially noteworthy since Melrose tapped the capital markets in the UK (via a sterling denominated rights issue) to buy a largely US dollar-based revenue stream. Second, Softbank announced a recommended all-cash offer for ARM Holdings in what was the largest ever cash acquisition of a UK company by a foreign buyer.

Apart from a few standout deals like these, the surprise of Brexit did halt a number of transactions that were just getting going and, of course, led to uncertainty that muted activity somewhat. However, fundamentals remained the same: good balance sheets (on the whole); the need for growth; lots of 'dry powder' in the hands of financial sponsors; sterling's dislocation (which over time has become priced in to assets); benign debt markets; and, more recently, some clarity on the path to Brexit and the politics surrounding it (albeit this visibility is still rather opaque).

Hence, 2017 started much stronger than the second half of 2016 with both the largest value for outward M&A transactions recorded since Q1 2011 and a significant increase in public M&A involving UK targets in the first half of 2017 compared with the first half of 2016. Activity levels ramped up – UK M&A in Q2 almost doubled compared to Q1 – though (as was the case globally) deal values and volume dropped off in Q3, partly owing to the absence of mega-deals. That said, the pipeline looks stronger now with some large disposals by strategics on the horizon, though valuations remain high and there is still some nervousness around being seen to have bought at the top of the market.

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

CG & BS: As in other parts of the world, the technology sector has been particularly active. Despite Brexit, the UK remains an attractive centre for technology companies and M&A continues both at the start-up end of the scale as well as at the bigger end. One deal to buck the trend of foreign acquirors buying up what the press and politicians refer to as 'UK assets' was MicroFocus's acquisition of HP Enterprise's software division (which includes the Autonomy business infamously acquired by HP a few years ago). This deal was feted by some politicians as a great 'UK' story. In reality though, with a global marketplace and so many so-called 'UK' assets sitting outside the UK (in terms of customers, contracts and employees), the distinction is somewhat arbitrary.

One especially hot subsector very recently has been online payments (at the big end of the scale) and Fintech and IT generally (often at the lower end). Recent big deals in this space include the Vantiv bid for Worldpay, the Blackstone and CVC bid for Paysafe and Hellman & Friedman's bid for Nets. UK companies have received more

"Chinese acquirers continued to show their appetite for European assets."

funds from US investors than any other European country and early stage investments continue apace in these sub sectors.

There is no 'typically sized' transaction, with a wide variation in deal sizes, up to values in the multiple billions of pounds sterling. The 'UK' market is rather unique in Europe inasmuch as professionals based here tend to cover financing and M&A across multiple European geographies. This can be either because cross border deals happen under English law, because the relevant professionals on the buy or sell side are based in London or simply because of the expertise of the advisers who live and work in the UK. Invariably, the financing of pan-European deals uses debt under English law or capital markets financing under New York law. Hence, even when UK M&A itself is quiet, the M&A professionals based in London tend to be busy dealing with global or pan-European deals (whether or not the relevant assets are wrapped in a UK corporate).

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

CG & BS: There are three key themes that have emerged over the last year or so that have manifested themselves in keynote deals.

First, Chinese acquirers continued to show their appetite for European assets. Blackstone announced the sale of Logicor to China Investment Corporation for US$12.25 billion (the second-largest European real estate transaction ever). This was followed by the closing of ChemChina's acquisition of Syngenta (again not strictly speaking a UK deal but staffed in part with London deal makers) comprising the largest ever China M&A outbound deal. The ChemChina deal cleared regulators on both sides of the pond despite the tide of protectionism in Europe, the US and China.

Second, big-ticket private equity has returned either alone (Hellman & Friedman for Nets at US$5 billion) or in conjunction with one another (Blackstone and CVC for Paysafe at £2.6 billion).

Third, regulation continues to play its part. Deutsche Bourse's merger with the London Stock Exchange failed for regulatory reasons (though it was a small issue in Italy that finally caused it to falter). Rumours abound that the decision to block the merger was in part driven by political expediency against the backdrop of the Brexit vote (that would have made choice of HQ next to impossible to achieve to the satisfaction of both the German and UK governments).

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?

CG & BS: In private M&A the overwhelming majority of deals are cash only.

In the case of public takeovers, in the first half of 2017 a majority of the bids for UK listed targets made were all-cash, with approximately a quarter being all-share (a much higher level than seen in 2016) and most of the remainder offering a mixture of cash and shares. Unlisted securities or loan notes are rare and typically offered only as an alternative to cash. Overseas bidders without an existing UK listing generally do not offer share consideration (unless as an alternative to cash) because overseas securities tend to be unattractive to UK shareholders, while seeking a UK listing to become effective at the same time as completion of the offer is somewhat complex. Having said that, a bidder company offering liquid securities that are listed on a recognised investment exchange should be appealing to a UK PLC shareholder base – especially since those shareholders tend to have a global outlook. For example, Anheuser-Busch In Bev successfully offered stock listed on Euronext Brussels and NASDAQ to SAB Miller shareholders in connection with their merger. On the whole though, share consideration is mostly seen in the case of a takeover of a UK target by a UK bidder – and even these have been relatively rare in recent times.

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

CG & BS: There have been a number of changes to the UK Takeover Code, which governs bids for UK public companies, over the past few years. Following some high-profile transactions, including the Kraft takeover of Cadbury, there was a perception (especially from politicians) that the regulatory landscape was too bidder-friendly. The UK regulator (the Takeover Panel) took steps to 'level the playing field', including introducing a

time limit for bids and new rules requiring bidders to publish their intentions for the target business.

The market has got relatively used to these somewhat draconian time limits that effectively require a would-be bidder who is publicly outed to 'put up or shut up', by making a firm fully financed offer within 28 days of being publicly named. The rule has arguably put off some would-be bidders and allowed targets to fend off unwanted approaches (for example, Kraft's approach to Unilever earlier this year). However these rules operate against the backdrop of regulations which prevent a target company board from engaging true takeover defence tactics. The shareholder is king in the UK and no poison pills or acts designed to frustrate a potential offer are allowed.

The informational rules require bidders to make their intentions about a target business known to target shareholders and the public. These statements are then policed by the Takeover Panel and indeed the regime allows for such statements to become binding on the bidder and hence enforceable in the courts by the Takeover Panel. Such undertakings have only been used once to date – in Softbank's offer for ARM Holdings where Softbank undertook to double the number of jobs at ARM in the UK over the next five years. We expect that big takeovers of UK listed companies by foreign buyers (especially if they are household names) may well require similar undertakings in order to get political buy-in from Westminster.

There is an ongoing consultation about further amendments to the UK Takeover Code that would expand the requirements relating to post-offer intentions for the target business. Bidders would be required to make specific statements of intention with regard to research and development functions, changes in the balance of the skills and function of the target's employees and management, and the likely repercussions on the target's headquarters. Furthermore, bidders would be obliged to report publicly on their compliance (or otherwise) with their intention statements at the end of the 12-month period following completion of the acquisition.

These changes, like those introduced in 2011, are aimed at protecting UK companies from unwanted approaches. Political sensitivity to 'foreign buyers' remains strong here in the UK and indeed across Europe. There are already mutterings in Parliament around the bid for Imagination Technologies by Canyon Bridge (especially since the nature of Canyon Bridge's Chinese backers meant a proposed recent acquisition by them was blocked under CFIUS in the US).

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

CG & BS: As mentioned already, there has been a lot of talk about increased interest in UK

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targets from Chinese bidders – as elsewhere in the world. In addition to the sale of Logicor to China Investment Corporation some private Chinese companies were increasingly active as well – for example, HNA, which bought a 24.95 per cent stake in OM Asset Management. In recent months there has been a reduction in dealmaking by private Chinese buyers amid news of a crackdown by Chinese regulatory authorities (and indeed protectionism generally being a theme). However, this appears to be focused more on private enterprise and the biggest state companies continue to be active as potential acquirers of international, including UK, assets.

Market commentators continue to speculate that overseas buyers have and will look to take advantage of the relative weakness of sterling since the Brexit vote. On the other hand, valuations of UK companies with non-sterling earnings have increased – effectively neutralising the effect of the change in sterling. Indeed, the overall impression is of a sellers' market with high valuations – albeit ones that are being achieved, especially in competitive auction scenarios. Statistics from the Office for National Statistics suggest that in 2017 inbound M&A appears to have dropped off and there has been an increase in disposals by foreign companies of their UK subsidiaries, with the second quarter of 2017 marking the first period of recorded net disposals of UK companies by foreign companies since the end of 2002.

Another recent commercial trend is the increasing acceptance of warranty and indemnity (W&I) insurance as a tool to provide buyers with some post-closing protection without sellers losing the ability to have a 'clean break'. Buyers in the European market have long been accustomed to proceeding with minimal or no ability to recover from sellers for pre-closing liabilities, except for breaches of locked box covenants and the like. In secondary buyouts, where one financial sponsor sells to another, business warranties have been virtually unheard of for years, except where given by management (with relatively low caps on liability). In recent transactions and auction processes, particularly those involving strategic or non-European buyers, sellers have been offering up a package of business warranties (usually still to be given by management) specifically to form the basis for more substantial coverage under an insurance policy.

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

CG & BS: The past couple of years have seen an increase in intervention by activist shareholders seeking a higher offer price on public deals, referred to as 'bumpitrage'. Recent tactics have included threatening to vote down schemes of arrangement, share splitting (to defeat the requirement for shareholder approval of a majority in number), using contracts for difference to build a blocking stake and threatening to oppose the approval of the scheme at the court sanction hearing. Bumpitrage was seen recently on AXIS's bid for Novae, where arbitrage funds accumulated a stake and forced an increase in the offer price. The same was seen on Steinhoff's offer for Poundland last year and was also a feature of Anheuser-Busch InBev's offer for SABMiller. We expect that the seeking of irrevocable undertakings from major target shareholders (to vote in favour of the transaction) before announcement will be even more important to would-be bidders as this trend continues. Equally, we expect bidders will consider more carefully whether to neutralise the arbs by making an offer 'best and final' (subject only to the ability to increase in the event of a competing offer). This tactic was recently used by Michael Kors on their bid for Jimmy Choo (albeit Jimmy Choo had gone through a sale process and so there had been good price discovery for both bidder and target by the time the offer was made) and also by SNC-Lavalin in its bid for WS Atkins (where the bidder went 'best and final' following US activist Elliot amassing a 6.8 per cent stake).

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

CG & BS: The M&A process very much depends on the parties involved. In the case of a big strategic deal, for example, most of the contact from the early stages tends to be at a principal-to-principal level. On the other hand, auction processes are usually run by financial advisers who coordinate with potential bidders and feed information back to their clients.

A typical auction process involves the circulation of a 'teaser' containing limited, often publicly available, information about a target and a non-disclosure agreement is then entered into before more information is made available. Bidders are invited to submit non-binding offers at the end of a first phase, which typically lasts four to six weeks. Selected bidders are taken through to a second phase during which they are given access to a data room, management and sometimes experts such as vendor due diligence providers, and the opportunity to ask follow-up questions. At the end of the second phase, bidders must submit what is referred to as a final 'binding' offer – although it invariably remains subject to negotiation and the signing of definitive transaction documents, at least. If due diligence has been completed before submission of the final offer and the buyer is otherwise ready to proceed, then signing can occur within 24 to 48 hours of the final offer deadline. In other cases, particularly where the target business is being carved out from a larger group, it can take longer – sometimes weeks – for the parties to enter into a legally binding contract.

The extent of due diligence also depends on the parties involved and the type of transaction. In

THE INSIDE TRACK

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

The shareholder base in the UK is generally more capitalist than elsewhere in Europe (inasmuch as we do not have many family, owned or majority, owned businesses). This, together with the lack of works councils and Takeover Code prohibition on poison pills and other 'frustrating action', has traditionally made for an M&A-rich environment. Also, most financial sponsors base their European operations in London, which means that M&A should continue apace here (even if UK M&A itself slows down). It remains to be seen to what extent the additional Code changes and politics generally temper this, as well as whether Brexit leads to a dilution of London-based decision makers in the financial sponsor and lending communities.

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

There's no 'one size fits all' approach – clients should choose counsel with the insight and experience to master complexity and make judgement calls but with the flexibility to collaborate with other advisers, in the UK and elsewhere, to achieve the best possible result. Experience is especially important in relation to public company deals in the UK. The rules are very 'principles'-based and require a detailed knowledge of practice and precedent. As law firms and legal practice continue to disaggregate, partner judgement will be key on complex and fast-moving M&A deals.

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

It's been fascinating to be involved in deals for and opposite Chinese buyers (for HNA in relation to Old Mutual; opposite CIC in relation to Logicor and for ChemChina in relation to Syngenta) and seeing all sides has allowed us to truly see both sides of the arguments. Being involved in two deals immediately after the Brexit vote (Melrose's acquisition of Nortek and Softbank for ARM) taught us much about exchange -rate risk and hedging (in the case of Melrose) and government influence in M&A (in the case of Softbank).

Clare Gaskell and Ben Spiers
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public M&A, due diligence tends to be very limited – partly driven by the Takeover Code requirement that any due diligence information given to one bidder must be given to any other *bona fide* potential bidder on request. Due diligence is also typically limited in secondary buyouts, where financial sponsor buyers focus on big value items and take comfort from the fact that the target will have been the subject of due diligence in the fairly recent past. In contrast, a strategic buyer is more likely to want a detailed due diligence process, partly so that it can fully understand and test potential synergies that may underly its price.

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

CG & BS: Continued political focus on 'foreign buyers' is likely. This is a global theme – driven by politics as much as anything. We expect that public companies – especially large ones that are subject to a takeover by a foreign acquirer – will be subject to increased scrutiny from politicians. Although the statutory powers to block such acquisitions are currently limited, politicians continue to float the idea of tougher regulation. Government support to a large transaction is often really important (even if mainly for PR reasons). So even absent of new regulation (around security and public interest, for example), we expect to see more binding undertakings being given by bidders around jobs in the UK, HQ and perhaps tax.

As already noted, the Takeover Panel will continue to police and monitor statements of intent and binding undertakings given by bidders for listed companies. We expect private companies will continue to be somewhat immune from the rules and politics – probably incentivising many to keep their assets in unlisted corporations to avoid such regulation and scrutiny.

GTDT: What does the future hold? What activity levels do you expect for the next year? Which sectors will be the most active? Do you foresee any particular geopolitical or macroeconomic developments that will affect deal sizes and activity?

CG & BS: Given the likely length of time before the outcome of Brexit is known, there is a sense that political and economic uncertainty is the 'new normal' and that dealmaking will have to continue. A number of financial sponsors benefit from newly raised funds that need to be invested and strategics that have failed to grow organically are looking to acquisitions instead. Cheap debt is easily available – although with a mooted increase in base rates it may soon increase slightly in cost – and covenants are generally loose. The high-yield markets are also very active currently, increasing financing options for buyers. Hence, we feel optimistic that deal flow will continue to ramp up over the coming year from a much better base. Since the financial crisis, deals have still continued to get done despite the uncertainties that have existed for the past few years. Brexit is, of course, somewhat of an unknown but there are plenty of other uncertainties in other geographies. We expect the desire for growth to continue to drive M&A over the next year or two.

M&A IN THE UNITED STATES

Alan M Klein is a partner at 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 assisted Microsoft in its US$24.6 billion acquisition of LinkedIn, ChemChina in its US$46.6 billion acquisition of Syngenta, Tyco in its US$27.7 billion merger with Johnson Controls, Inc, and The ADT Corporation in its US$12.3 billion sale to Apollo Group Management. In addition to the LinkedIn transaction, 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 is co-head of the firm's mergers and acquisitions practice.

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"One keynote for 2017 to date is not a single deal, but a class of transactions."

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

Alan M Klein: In the US the first three quarters of 2017 have seen an overall decline in total deal value and in the number of transactions from the comparable period in 2016, which itself had seen a decline in these metrics from 2015. A somewhat deeper look at the dispersion of activity levels over the three quarters of this year shows a more nuanced story, however. The first quarter of the year was the second-strongest first quarter of the past five years, coming off an extremely strong fourth quarter of 2016. Over US$300 billion of transactions involving a US party were announced in the first quarter of 2017. In the past five years, only the first quarter of 2015 has exceeded that level, with just over US$350 billion of deals. US deal volume in the first quarter of 2017 was 20 per cent higher than that of the first quarter of 2016, and more than double that of the first quarter of 2012. Deal activity in the second quarter of this year was almost flat with the first quarter, but that represented a decline of approximately five per cent from 2016 and was steeply lower than the similar quarter in 2015 and 2014. Deal volume then slumped in the third quarter this year from the second quarter, marking a steep decline from the third quarter of 2016 and the lowest level of third quarter activity in the US since 2012. A fourth quarter with deal volume and a number of deals comparable to the roughly US$500 billion in the fourth quarters of each of 2016 and 2015 would still leave 2017 with a notable decline versus activity in 2016. It remains to be seen how the fourth quarter of 2017 will develop. The fourth quarter of each of 2016 and 2015 both showed significant increases from the prior quarter and was the busiest quarter of that respective year. So the same pattern could hold true for 2017.

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

AMK: The single busiest sector in the US for transactions through the end of the 2017 third quarter was the energy and utility sector, increasing slightly above 2016 levels and representing approximately 20 per cent of the overall US M&A market. Almost 10 per cent of the US$200 billion or so in deal value in the sector is represented by one transaction – the acquisition of Energy Future Holdings by Sempra Energy for US$18.8 billion – and four of the 10 largest deals announced year to date are from that sector. Healthcare and real estate were the next two most active sectors, with approximately 12.5 per cent and 10.5 per cent of total deal value, respectively. The technology sector and industrial and materials all saw significant declines from 2016. The aerospace sector had a jump in activity, as did consumer and retail businesses, increasing from the deeply depressed levels of recent years. The financial sector also saw a significant increase in deal volume, also from relatively low levels in immediately prior years. This general pattern of certain sectors being in favour and then cycling out, and of other sectors increasing in activity, has been the case for the past several years in the US, with energy and utilities and healthcare each being an exception by remaining relatively consistently busy over the past few years. The average transaction size has increased over the last year, as the deal count has declined to a greater degree than the slight decline in overall deal volume. However, with a decline in mega-deals, the largest deals are not as large as in the past two or three years.

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

AMK: Keynote deals in the US in 2017 include United Technologies Corp's acquisition of aerospace manufacturer Rockwell Collins Inc for US$30 billion, the largest US transaction year to date, Becton Dickinson & Co's US$24 billion purchase of medical device manufacturer CR Bard Inc and giant utility Energy Future Holdings Corp purchase out of bankruptcy by Sempra Energy Inc for approximately US$19 billion. These transactions are the three largest in the US in 2017 through September 30. Each transaction is in a different industry, illustrating the range of forms of transactions and sectors that comprise 2017 merger and acquisition activity in the US.

One keynote for 2017 to date is not a single deal, but a class of transactions. Private equity transactions have increased 25 per cent over the same period during 2016 and reached their highest volume since 2007. Acquisitions by private equity buyers made up 20 per cent of the volume of US acquisitions in the first nine months of 2017, a significant increase from 2016 and a level not seen in years. This level of activity has taken place even though valuations are at an all-time high in the equity markets. The return of private equity buyers to the US market in force is a critical development that strengthens sellers and is an important indicator of confidence in the market.

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

AMK: In the US, consideration can be composed of either stock, cash or a combination of both. For a target's shareholders, obtaining shares as a portion of the consideration allows them to benefit from the synergies resulting from the transaction. Additionally, if a majority of the consideration is comprised of shares, then the receipt of shares may be free of taxes. However, acquisitions by non-US buyers of US public companies are generally entirely for cash. Inversion transactions have been the common exception to the use of all cash when the acquirer is a non-US company. In an inversion transaction, however, the combined business is generally viewed as being controlled by US persons and treated as such by the US Securities and Exchange Commission, the US stock exchanges and the stock market indices. In such a situation, institutional shareholders in the US, such as pension funds, foundations and university endowments are permitted to receive the shares of the non-US buyer. In situations where the non-US buyer is truly under non-US control, such shareholders may be reluctant or even not permitted by their investment guidelines to hold shares of non-US entities. Furthermore, under US federal securities law, public company shareholders in the US may only receive shares as consideration for their existing shares that are issued by a company that is registered with the US SEC and that are publicly tradeable. This means that a non-US company that is not already a US SEC-registrant must go through the steps necessary to become registered prior to the closing of a purchase of a US public company if shares are used as part of its consideration. The time and expense of this process is a limitation on the ability and desire of non-US purchasers to use shares as consideration for purchasing a US public company.

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

AMK: Key legal and regulatory developments in the US in the past few years include the increase in scrutiny of non-US buyers by the Committee on Foreign Investment in the United States, better known as CFIUS, as to whether a potential purchase of a US company by a non-US company creates any concerns from a potential US national security perspective; the increase by US antitrust authorities in their level of scrutiny of certain kinds of corporate combinations and the increased willingness of US regulators to challenge transactions in court; the severe restrictions placed on inversion transaction, where a US company and a non-US company merge and US shareholders make up the most significant portion of the shareholder base; and recent cases in Delaware, the state where a majority of US public companies are incorporated, which state that a fully informed vote by shareholders in favour of a transaction can have the effect of ratifying the steps taken by a board of directors in connection with agreeing with a prospective purchaser to recommend that sale.


Alan M Klein

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

AMK: Buyers from outside the US are an important part of the US M&A market. However, the amount of inbound activity has declined materially in 2017. Typically, US companies are the targets of non-US buyers in approximately 15 per cent of global M&A activity. In the first nine months of 2017, US targets made up just 8 per cent of global deal volume. This low level is reflective of several trends. Chinese buyers, who had become an important component of the US market, have stepped back from the US market due to increasing restrictions imposed by the Chinese government on acquisitions by Chinese companies and due to the increasing level of scrutiny by US regulators of Chinese buyers. Most notably, the US government's rejection on national security grounds of the purchase of the Lattice Semiconductor Corp by Canyon Bridge Capital Partners, a Chinese-controlled financial buyer, is indicative of the restrictive approach being taken with respect to prospective Chinese buyers. The

"Shareholder activism has become a regular part of the corporate world in the US."

largest acquisition of a US company by a non-US buyer so far in 2017 has been Reckitt Benckiser Group PLC's US$17.8 billion dollar purchase of the Mead Johnson Nutritional Co. Reckitt Benckiser is a UK company and British buyers are an important source of inbound US M&A activity so far this year. It is safe to assume that the overall decline in non-US buyers coming into the US market reflects the general uncertainty around the political and regulatory climate in the US rather than concerns regarding the US economy. Through the first nine months of 2017 there has been significant uncertainty around US tax policy, antitrust policy and healthcare policy, to name a few, and this has no doubt deterred some degree of M&A activity in the US and inbound cross-border M&A activity in particular.

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

AMK: Shareholder activism has become a regular part of the corporate world in the US. Paul Singer's fund, Elliott Management, has been tremendously active both in the US and around the world in the past several years and he scored a major victory earlier in 2017 with a campaign against Arconic, a company that was spun off from Alcoa, forcing out the CEO. The Trian Group has recently engaged in the most expensive proxy fight of all time in trying to replace one director at Proctor and Gamble, the consumer products company. It currently appears that Trian lost the vote by two-tenths of one per cent. However, the same week that this result took place one of their partners obtained a seat on the General Electric board. There can be no doubt that in 2017 even the most iconic, largest and storied companies in the US can be subject to successful activist efforts. That being said, the dollar value of the assets of activist funds had actually declined in 2016 as many funds had reverses in their investments, particularly in certain well-known companies, such as Valeant, which had a substantial number of activist investors as shareholders and that had precipitous declines in their share prices. This decline in activist assets took place after many years of steep increases in activist funds' assets.

One regular aspect of activist campaigns is the urging of companies to put themselves up for sale or to put up for sale portions of their business. This focus on M&A by activists has had an important role in supporting the US M&A market in recent years. In addition to the transactions directly stimulated by activists, many companies have engaged in transactions even before an activist has acquired a stake in that company in order to forestall such an appearance by an activist.

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 state of entering into a confidentiality agreement is whether the potential seller will agree to grant to a prospective buyer the exclusive rights 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 engaged in an appropriate process intended to obtain the highest price reasonably 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 of a US public company needs to be aware that lawsuits are frequently filed in connection with acquisitions of US public companies. These lawsuits can be filed in the court of state of incorporation of the US company alleging either that the target company's board of directors has violated their fiduciary duties in connection with agreeing to a sale of the company or can file for a so-called appraisal action, if the shareholder has not voted for the sale of the company at a shareholders meeting in connection with the approval of the transaction or tendered

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 challenging in the litigious environment of the US.

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? Second, is there a complete team of specialists and colleagues who work together seamlessly to help the achieve its goals? Thirdly, does the counsel have deep expertise 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 the National Chemical Company of China, known as ChemChina, in its US$43 billion acquisition of Syngenta, a Swiss corporation listed on the New York Stock Exchange and registered with the US SEC, was a 22-month long effort, with regulatory approvals needed in 20 countries, including CFIUS approval in the US, plus the need to help negotiate and document almost US$50 billion in financing, made this one of the most complicated cross-border transactions in history.

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their shares if the form of the transaction is a tender offer. Alternatively, a lawsuit can be filed in a federal court alleging inadequate or misleading disclosure in the documents concerning the transaction that have been filed with the US Securities and Exchange Commission. The majority of US companies are incorporated in the state of Delaware and the Delaware courts have been trying to severely limit the number of suits filed making specious claims that directors have violated their fiduciary duties. The overwhelming number of these suits were simply nuisance suits. Appraisal claims have risen sharply in recent years, but recent Delaware court decisions are similarly trying to curb such suits.

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

AMK: Currently, it is unclear if there will be legal changes that may have a material effect on M&A practice or activity in the US. As of late October 2017, there are proposals to make significant tax law changes in the US, some of which could affect the value of a US company due to a substantial decrease in the US federal tax rate, tax law changes that could greatly facilitate the ability of US companies to bring cash held outside the US back into the country and the possibility that there may be the elimination or addition of other credits and deductions that may favour or disfavour different industries. Furthermore, it is only in the past few weeks that a full complement of antitrust regulators have been appointed by the new administration. As a result, there is no clear guidance or precedent as to whether there will be significant changes in antitrust enforcement. There could be changes in the nature of the analysis brought to bear on transactions or changes to which industry sectors are areas of focus by antitrust regulators.

Further areas of regulation that may come under significant revision are the regulations with respect to banks and other financial services firms as significant changes are considered to the regulations promulgated under the Dodd-Frank Act, which was enacted following the 2008 financial crisis, and changes to US SEC regulations governing public disclosure by US public companies in connection with shareholder votes and takeovers. Both areas of regulation are undergoing substantial review by the current administration, as they are also doing with respect to federal environmental regulation and regulation of telecommunications, approval of new drugs, and health and safety regulation. There is no real certainty as to the timing and scope of any changes that may be implemented, which makes it difficult to assess either the financial impact such changes might have on the valuation of US companies or the changes that might take place in the process or timing of carrying out the acquisition of a US company.

GTDT: What does the future hold? What activity levels do you expect for the next year? Which sectors will be the most active? Do you foresee any particular geopolitical or macroeconomic developments that will affect deal sizes and activity?

AMK: In recent years the fourth quarter of the year has been particularly strong. We do not know if 2017 will repeat that pattern or how activity

levels will look in 2018. Factors that should encourage M&A activity are that debt remains cheap, confidence in the equity and debt markets remains high, and companies and financial buyers continue to have significant amounts of cash available with which to engage in M&A activity. Sectors in which there should be significant amounts of activity include energy and utilities, continuing that sector's current run of activity; financial institutions, as consolidation in the insurance and payments areas continues and the potential easing of the Dodd-Frank rules lets pent up demand for consolidation among regional and local bank finally take place; healthcare, including hospitals, outpatient facilities, medical device manufacturers and pharmaceutical companies all continuing the ongoing consolidation and convergence in those fields; consumer retail, which will increasingly need to consolidate in order to stave off the long collapse that was initially set off by the Great Recession and now continues due to online competition; and finally, industrials and technology, in large part because of the quickly ramping up convergence between those areas, as industrial companies want to integrate with technology companies and vice versa.

To consider what geopolitical or macroeconomic developments could have an effect on M&A activity is to engage in utter speculation. The potential list of developments ranges from threats of nuclear war not seen for the past 25 years, since the end of the Cold War, ongoing and pernicious threats of terrorism, risks of a market correction with equities currently at an all-time high and the potential for political instability in the US and disruption to the EU as Brexit becomes more of a reality, as well as additional natural disasters such as the three major hurricanes which recently hit the US and the Caribbean, a significant earthquake in Mexico and massive forest fires in California. The fact remains that in the face of many of these risks having been outstanding over the past nine months, the equity markets remain unaffected, with market indices going from one new all-time high to the next, and market volatility at a virtual all-time low. Thus, any crystal ball as to future events and their impact remains cloudy.

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