THE Mergers & Acquisitions Review

Twelfth Edition

Editor
Mark Zerdin

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Despite a slight decrease in overall activity compared with 2016, 2017 was a strong year for global M&A activity as, for the fourth consecutive year, global deal-making activity exceeded US$3 trillion with announced transaction volumes reaching US$3.7 trillion. Even though 2017 did not replicate the record-breaking number of mega-deals in 2015 nor the high volume seen in 2016, market participants in a number of sectors took advantage of continued access to cheap capital globally to engage in M&A activity.

The United States remained the most active region, although aggregate deal value decreased by 16 per cent year on year. However, deal volume surged with a record 12,400 individual deals, largely due to an increase in transactions with a value of less than US$1 billion. The relative decline in mega-deals in 2017 is largely attributable to continued regulatory uncertainty, particularly in the United States, where President Donald Trump’s electoral rhetoric on antitrust has led to an increase in scrutiny for M&A deals. In Europe, however, continuing uncertainty arising out of the stuttering progress in the Brexit negotiations and a number of significant elections within the European Union did little to halt the momentum of the M&A market as aggregate deal value in Europe increased by 12.1 per cent in 2017 to reach a post-financial crisis high of more than €830 billion. Notably, the industrials and chemicals M&A sector flourished, with record high aggregate deal value and deal volume. Chinese outbound M&A was limited during 2017 by both a new capital-controls regime and increased scrutiny from the US and European governments.

On the back of tax reform in the United States and encouraging economic growth in Europe, the first quarter of 2018 has displayed record-breaking deal-making activity. However, global political uncertainty presents a threat to global M&A in 2018. Although there were positive signs from the European M&A market in 2017 and Europe registered the largest year-on-year increase in deal volume in the first quarter of 2018, the rise of anti-EU populist parties threatens to derail the buoyant global M&A market. Notably, the election of an anti-EU populist government in Italy, formed from a coalition of the Five Star Movement and the League, threatens to unnerve foreign investors and increase uncertainty about the integrity of the eurozone.

In addition, President Trump’s imposition of tariffs and protectionist instincts have raised concerns about the possibility of a global trade war. It is hoped that a resolution to Brexit-related uncertainty and a settling of trade worries will foster an environment in which markets can thrive. All that being said, markets have shown during the past two years that despite an ever-evolving geopolitical landscape, there are numerous opportunities for those market participants who are keen to pursue them.
I would like to thank the contributors for their support in producing the 12th edition of *The Mergers & Acquisitions Review*. I hope the commentary in the following 50 chapters will provide a richer understanding of the shape of the global markets, and the challenges and opportunities facing market participants.

**Mark Zerdin**
Slaughter and May, London
July 2018
Chapter 1

EU OVERVIEW

Mark Zerdin

I OVERVIEW OF M&A ACTIVITY

Despite the year starting with uncertainty because of the Brexit negotiations and a number of important elections in the European Union, the 2017 M&A deal value in Europe reached a post-financial crisis high. Positive growth, relative macroeconomic stability and a number of mega-deals were factors that helped support the European M&A market. There were 7,439 deals worth a total of €830.4 billion announced in 2017, a 12.1 per cent increase in deal value compared to 2016.² Twenty-eight of the deals were valued at over €5 billion, compared to only 21 such deals in the previous year. There were high levels of investment by European firms into the rest of the world in the final quarter of 2017 and the first quarter of 2018, but the value of foreign investment into Europe remained low. Although the amount of foreign investment in the first quarter of 2018 did increase by 11 per cent compared to the final quarter of 2017, the total foreign investment of US$58.2 billion in Q1 2018 was 23.2 per cent lower than the average quarterly value of US$75.7 billion since 2012.³ The number of intra-European deals in 2017 reached 6,362 with a combined value of US$551.8 billion, which is the second highest value since the financial crisis.⁴

There was M&A activity in a wide range of sectors during 2017, with the industrials and chemicals sector being the most active in terms of both deal count and value. Although the industrials deal count reached its highest level since 2007, total deal value fell to US$131.9 billion, 12.3 per cent short of the record value reached in 2016.⁵ The continuing Brexit negotiations also seemed to act as a deterrent to investing in the industrials sector in the United Kingdom and Ireland, and their share of deal value in the sector fell to 9.3 per cent, half of the 2016 level, whereas the German-speaking region attracted 24 per cent of the deals.⁶

An example of the robust M&A activity in the industrials sector is the €40.5 billion proposed merger of Praxair, an American industrial gases company, and Linde, a German supplier of industrial gases, which was the highest valued deal announced across all sectors in Europe in 2017. In February 2018, the European Commission announced the launch of a Phase II investigation under the EU Merger Regulation to assess the proposed Praxair–Linde

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1 Mark Zerdin is a partner at Slaughter and May.
2 Mergermarket, ‘Deal Drivers EMEA FY 2017’.
5 Mergermarket, ‘Deal Drivers EMEA FY 2017’.
6 Mergermarket, ‘Deal Drivers EMEA FY 2017’.

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tie-up because of concerns that the deal would hurt competition in the supply of gases. However, if successful, the merger will create the world’s largest industrial gases supplier in a market that has become highly consolidated as a result of a wave of combinations.

Another major deal in the industrials and chemicals sector was German Bayer’s proposed US$66 billion purchase of Monsanto, an American agrochemical and agricultural biotechnology corporation. In March 2018, the European Commission approved the proposed transaction, in connection with which Bayer has also agreed to sell some of its herbicide and seed businesses to BASF, a German chemical company, to alleviate the European Commission’s competition concerns. The proposed Bayer–Monsanto deal is the third in a number of recent mega-mergers in the agrochemicals industry.

The European consumer sector attracted 935 deals in 2017 with a total value of US$120.6 billion, a 2.3-fold value increase compared to 2016. The deals in the consumer sector were led by luxury brands, including the announcement of the €24 billion merger of eyewear businesses Essilor and Luxottica, and the €1.2 billion takeover of Jimmy Choo by Michael Kors. Despite the consumer sector having a strong year and the continuing need for businesses to keep up with changing consumer behaviour driving M&A deals, there was a 69.9 per cent decline in the value of consumer deals during the first quarter of 2018 compared with Q1 2017.

Private equity firms did not shy away from deal-making in 2017 either, with buyouts reaching post-crisis record levels. Buyout values in 2017 were up 22.5 per cent over the year, reaching a total value of €140.2 billion and a deal count of 1,423. Intense competition for assets helped push some big deals, with KKR’s €6.8 billion acquisition of Unilever’s spreads business being the second largest buyout in Europe since the financial crisis. In general, the consumer sector experienced significant private equity activity in 2017, with 180 buyouts worth €16.3 billion in total, representing a 63 per cent increase in value compared to the year before. Private equity buyouts remained significant in Q1 2018, reaching a total of US$113.6 billion, the highest Q1 value since 2007.

Despite the political uncertainty that continued to be the backdrop for European M&A activity in 2017, the 2.5 per cent growth of the eurozone economies and the lowest level of unemployment since 2009 led to a more stable market and boosted confidence. The healthy state of the M&A market in Europe continued into 2018, with total deal value reaching the US$250 billion mark in Q1. Six deals in this quarter surpassed the US$10 billion mark and helped deal-making in Europe reach its highest Q1 value since the financial crisis. The uncertain outcome of the Brexit negotiations is likely to remain a factor that market participants will consider before making significant investment decisions. However, as companies learn to navigate uncertainty in Europe, and given the low yields environment, it is hoped that market participants will feel confident enough to continue making deals and choose to invest in growth through the acquisition route.

8 Mergermarket, ‘Consumer Trend Report Q1 2018’.
9 Mergermarket, ‘Deal Drivers EMEA FY 2017’.
10 Id.
11 Id.
13 Mergermarket, ‘Deal Drivers EMEA FY 2017’.
15 Id.
II RECENT EUROPEAN LAW MEASURES RELATING TO CORPORATE LAW

i Brexit update

Phase I of the Brexit negotiations concluded in December 2017, with the European Union and the United Kingdom reaching a broad agreement in the form of a joint report on three headline issues: citizens’ rights, the UK’s financial obligations on exit and the options for managing the Irish border issue. Phase II of the negotiations concluded in March 2018, with negotiators having reached consensus, among other things, on the terms of a 21-month transition period to follow formal departure from the European Union in 2019.

The EU’s draft Withdrawal Agreement published on 28 February 2018, and revised on 15 and 16 March 2018, describes the arrangements for withdrawal of the United Kingdom from the European Union. The draft is subject to discussion with the European Council and the Brexit Committee of the European Parliament, following which it will be formally put the United Kingdom as the basis for negotiation.

At the time of writing, the European Union (Withdrawal) Bill is scheduled to begin its third reading in the House of Lords. Among other things, as currently drafted, the Bill repeals the European Communities Act 1972, incorporates direct EU legislation into domestic law, preserves EU-derived domestic law and gives ministers and devolved administrations the authority to amend legislation to correct deficiencies arising from the retained EU law.

ii Commission consultation on public reporting by companies

On 28 March 2018, the EU Commission published a consultation paper that seeks ‘stakeholder views on whether the EU framework for public reporting by companies is fit for purpose’. Currently, a range of public reporting requirements are set out in EU law and the purpose of the consultation is to determine whether the existing reporting framework is effective, relevant, efficient and coherent, and ‘whether the EU level adds more benefits than would have been the case if the requirements were only introduced at the national level’. The consultation is open for comments until 21 July 2018.

iii Updated ESMA Q&A on prospectuses – identification of profit forecasts

On 28 March 2018, ESMA published the 28th version of its Q&A on prospectuses, which incorporates a new question 102 that considers the identification of profit forecasts. In providing the guidance, ESMA focuses on the scope of the definition of ‘profit forecast’ set out in Article 2(10) of the implementing regulation and sets out that a profit forecast need not be a precise figure, but can also refer to a range of figures. Furthermore, the reference to ‘the likely level of profits or losses’ in the definition should be construed widely; it should not be limited to the actual profit or loss for the year, but should rather be expanded to include EBITDA, EBIT, EBT and other similar performance measures. As a general principle, when considering what financial measures may be viewed as profit forecasts, ESMA adopts a ‘substance over form’ approach so that, for example, in certain situations, projections of cash

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18 Id.
flow metrics may be considered a profit forecast ‘if indications making it possible to deduce
the likely profit level from it are given in the prospectus’. 20 Similarly, using exclusionary
language stating that something is not a profit forecast will not remove that information from
the scope of the definition. The breadth of the definition is further exemplified by the fact
that information may be considered a profit forecast even if the word ‘profit’ is not used and
no specific figure is provided. This means that information can fall within the definition of
‘profit forecast’ if, ‘in combination with other information in the prospectus, it is possible to
calculate a figure or a minimum or maximum for the likely levels of future profit or loss’. 21

Given ESMA’s expansive definition of ‘profit forecast’, 22 companies need to be careful
not to inadvertently include a profit forecast in a prospectus when that is not the intention.
It is intended that this definition of a profit forecast should continue to apply under the new
prospectus regime from 21 July 2019.

iv General Data Protection Regulation

As discussed in the previous edition of The Mergers & Acquisitions Review, the General Data
Protection Regulation (GDPR) was published in the Official Journal on 4 May 2016 and,
as a regulation, it has a direct effect in all EU Member States from 25 May 2018. The aim of
the GDPR is to harmonise the data protection regime across the European Union, replacing
existing national laws based on the Data Protection Directive of 1995 (which is implemented
in the United Kingdom through the Data Protection Act 1998). Under the GDPR, the
territorial scope of the EU data protection regime will be significantly expanded to apply
to any organisation that offers goods and services to individuals in the European Union
(including those that are free of charge), or any organisation that monitors their behaviour.
This means that a larger number of overseas businesses are likely to be affected. The GDPR
also brings with it greater enforcement powers, and sanctions for non-compliance may lead
to fines of up to 4 per cent of annual worldwide turnover or €20 million (whichever is
greater). As under the current law, the GDPR will regulate the transfer of personal data
to countries or companies outside the European Union, providing formal mechanisms to
permit international data flows.

Despite the many similarities between the GDPR and the preceding Data Protection
Act, companies need to ensure that their data processing systems are compliant with the new
elements and enhancements introduced by the GDPR. The Information Commissioner’s
Office (ICO), the UK’s data protection regulator, maintains and frequently updates a Guide
to the General Data Protection Regulation (GDPR), which aims to help organisations
comply with the GDPR requirements. 23

After formally exiting the European Union, the GDPR will continue to apply to
the United Kingdom because, as stated above, the United Kingdom intends to enact EU
legislative provisions directly into domestic legislation to prevent uncertainty about the status
of EU law after Brexit. Thus, the provisions of the Data Protection Bill 2017 will align the
United Kingdom with the GDPR by repealing and replacing the Data Protection Act 1998.

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21 Id.
   at p. 81.
23 Information Commissioner’s Office. ‘Guide to the General Data Protection Regulation (GDPR)’.
v New Prospectus Regulation

On 30 June 2017, the new Prospectus Regulation\(^{24}\) was published in the Official Journal of the European Union; it repeals and replaces the Prospectus Directive.\(^{25}\) The stated aim is to lower one of the main regulatory hurdles that companies face when issuing equity and debt securities, by simplifying administrative obligations related to the publication of prospectuses but in a manner that still ensures that investors are well informed.\(^{26}\)

Under the new rules, issuers will not need to publish a prospectus if they are admitting to trading less than 20 per cent of the number of securities of the same class that are already admitted to trading on a regulated market. This increases the exception to the prospectus requirement from the current threshold of 10 per cent, making it easier to conduct smaller secondary capital raisings. This change came into force on 20 July 2017. The reformed prospectus regime also limits the inclusion of risk factors to those that are specific to the issuer or the securities and that are material to making an informed decision. Risk factors will be divided into a limited number of categories and, within each category, the most material risk factor will need to be mentioned first. The summary of the prospectus will now be limited to seven sides of A4 paper when printed, and the requirement for the format to consist of five tables has been removed. While the new rules still require the summary to have a uniform format, it is less prescriptive both in terms of content and structure. These provisions are not yet in force, but are expected to become effective on 21 July 2019.

iv Cross-border insolvency

The EC Regulation on Insolvency Proceedings\(^ {27}\) (ECIR) was introduced to facilitate the efficient conduct of cross-border insolvencies by, *inter alia*, allocating jurisdiction between Member States (excluding Denmark, which has opted out), and providing that there will only be one main insolvency proceeding. On 20 May 2015, the European Parliament approved a recast version of the ECIR (Recast Insolvency Regulation) and most of the provisions of the recast came into force on 26 June 2017.\(^ {28}\) However, insolvencies commenced before 26 June 2017 will continue to be regulated by the original ECIR. The Recast Insolvency Regulation has been extended to rescue proceedings, including debtor-led pre-insolvency proceedings. It applies to proceedings that are based on a law relating to insolvency. However, it does not apply to proceedings that are based on general company law. Changes to the previous insolvency regulation include the removal of a restriction that secondary proceedings must be winding-up proceedings and the introduction of a concept of ‘group coordination proceedings’, where a ‘group coordinator’ is appointed to oversee the insolvency or restructuring of a group of companies. The impact of the Recast Insolvency Regulation on acquisitions from or of insolvent companies remains to be seen.

\(^{24}\) Regulation (EU) 2017/1129.


\(^{28}\) Regulation (EU) 2015/848.
Directive amending the Fourth Anti-Money Laundering Directive

On 5 July 2016, the European Commission presented a proposal to amend the Fourth Anti-Money Laundering Directive. The proposed changes were made against the backdrop of the Panama Papers revelations in April 2016 and the need to strengthen the fight against terrorist financing in light of recent terrorist attacks. The European Parliament concluded discussions on the Commission's proposals in December 2017 and, on 19 April 2018, the European Parliament adopted a legislative proposal for amending the Fourth Anti-Money Laundering Directive. The aim of the proposed amendments is to 'ensure more transparency and help competent authorities to effectively detect criminal and terrorist financing flows'. The amendments seek to address the risks associated with prepaid cards and virtual currencies, broaden access to information on beneficial ownership and include, among other things, the addition in Article 30 (which requires Member States to ensure that corporate entities to obtain and hold adequate and current information on their beneficial ownership) of an obligation on Member States to ensure that breaches of Article 30 are subject to effective, proportionate and dissuasive measures or sanctions, and the introduction of a requirement for Member States to ensure that beneficial owners of corporate or other entities provide those entities with all the information necessary for the entity to comply with its Article 30 obligation. The amending directive will enter into force 20 days after its publication in the Official Journal.

III RECENT COMPETITION LAW DEVELOPMENTS

Treatment of mergers by the European Commission

Between January 2017 and the end of March 2018, the Commission received 471 merger notifications under the European Merger Regulation (EUMR). During that period, 437 cases were cleared unconditionally at Phase I. In 19 cases, Phase I clearance was conditional on certain remedies being implemented, while eight cases were referred to Phase II for in-depth consideration. Of the seven Phase II decisions made during the period, one case was cleared unconditionally, four cases were given clearance conditional upon remedies being implemented and two cases were prohibited.

In terms of substantive assessment, the Commission has in several recent cases focused on the effects of the merger on longer-term innovation and competition. The Commission has identified concerns in various industries where a transaction would remove a player with significant pipeline products or R&D capabilities, or both, or where it would otherwise negatively affect innovation, including the pharmaceutical and medical devices, energy and agrochemicals sectors. In a recent speech, the Deputy Director of General Mergers, Carles Esteva Mosso, emphasised that 'innovation analysis is an important part of our merger control.

practice [...] the Commission is keen to ensure that innovation competition is not harmed by mergers, which is a particular risk in transactions combining close and important innovators in concentrated industries with high barriers to entry and well-paced innovation processes'.

In addition, there has been a growing trend to request parties’ internal documents as a source of evidence for the potential effects of the merger. In a recent speech, the Director General for Competition, Johannes Laitenberger, noted that ‘internal documents are important, because they can help us understand the plans that companies have for the future and make better decisions’. The Director General announced plans for the Commission to issue best practice guidelines in 2018 to clarify its approach to requests for internal documents.

The Commission has also recently demonstrated its willingness to accept referral requests from national authorities where mergers do not meet the EU jurisdictional thresholds but raise issues that affect the EEA, in particular if the digital economy is affected. In March 2018, the Commission accepted a referral request in relation to Apple’s plans to acquire Shazam. This follows a similar example in 2014 when Facebook’s acquisition of WhatsApp was reviewed by the Commission following a referral request and indicates that the Commission remains concerned about the potential effects on competition where large digital companies acquire smaller rivals, even where these transactions would not meet the thresholds for review by the Commission. Director General Laitenberger recently noted that ‘it is legitimate to wonder whether the competitive pressure of start-ups is still strong enough to push incumbents to innovate’.

ii Possible reforms to the EUMR

Possible reforms to the EUMR are still under consideration following a public consultation between October 2016 and February 2017. The consultation sought to explore the potential for further simplification of EU merger control review, and the possible streamlining of the referral system between the Commission and European national competition authorities. The consultation built on the results of the 2014 public consultation on the Commission’s White Paper, ‘Towards more effective EU merger control’, which proposes certain reforms to the EUMR. One of the proposals is to amend the EUMR so that a ‘full-function’ joint venture, located and operating outside the EEA and without any effects on EEA markets, falls outside the Commission’s competence even if the turnover thresholds are met. Another proposal is to exempt certain unproblematic mergers from the prior notification requirement (subject to the parties submitting a limited information notice and the Commission deciding not to initiate an investigation). In March 2016, Commissioner Vestager said that the Commission has had ‘very positive feedback’ on these ideas for simplifying the merger control process.

The 2016 consultation also focuses on whether the current purely turnover-based EUMR thresholds need to be adapted to reflect new business models and, if so, the possibility of introducing complementary jurisdictional thresholds, based for instance on

31 Innovation in EU Merger Control (speech by Carles Esteva Mosso at the ABA Section of Antitrust Law Spring Meeting, Washington), 12 April 2018.
33 Ibid.
34 Refining the EU merger control system (speech by Commissioner Margrethe Vestager at Studienvereinigung Kartellecht, Brussels), 10 March 2016.
the transaction value.\textsuperscript{35} These proposals stem from a current debate about the effectiveness of the turnover-based jurisdictional thresholds in the context of some high-value transactions (particularly in the digital economy) involving target companies with limited or no turnover, which were not notifiable under the EUMR but may have had significant competitive effects in the EEA.

The Commission has published a summary of the consultation responses received, which indicates mixed views on the proposals, in particular in relation to the proposals for new jurisdictional thresholds.\textsuperscript{36} It is unclear at this stage if the Commission will propose any legislative changes following the consultation.

The Commission’s White Paper, ‘Towards more effective EU merger control’, also proposes a mechanism to extend the current merger control regime to enable the Commission to review acquisitions of non-controlling minority shareholdings (otherwise known as ‘structural links’). However, respondents to the 2014 public consultation expressed doubts about the proportionality of the proposal, in particular in view of the perceived limited scope of the problem identified.\textsuperscript{37} Commissioner Vestager noted in March 2016 that she was, at that point, not convinced that this is ‘a change we absolutely have to make to our system’.\textsuperscript{38} In October 2016, the Commission published the results of a study it had commissioned to obtain further information on this topic. The study found that the number of acquisitions of non-controlling minority interests raising competition concerns is ‘very low’, but that ‘there may be some merit’ in the Commission being able to review such acquisitions. It still remains to be seen whether the Commission will propose any legislative changes in this area.

IV RECENT TAX LAW DEVELOPMENTS

i State aid

State aid continues to be a hot topic. During October 2017, the Commission made three important announcements.

a On 4 October 2017, the Commission referred Ireland to the European Court of Justice for the failure to recover from Apple state aid of up to €13 billion in accordance with the Commission’s decision of August 2016.

b On the same day, the Commission announced that it considered a Luxembourg ruling granted to Amazon in 2003 (and extended in 2011) illegal state aid. It concerned payments by Amazon’s European operating companies to a Luxembourg limited partnership (LP) in respect of intellectual property. Payments to the LP exceeded related payments by the LP to Amazon US by a factor of 1.5. The difference remained effectively untaxed because of the hybrid nature of the LP: it was transparent for

\textsuperscript{35} A similar debate has been occurring at national level in the European Union. Notably, the German and Austrian governments have recently voted in favour of legislation introducing an additional jurisdictional threshold relating to the transaction value, which will apply as an alternative to the existing turnover-based criteria.

\textsuperscript{36} Summary of replies to the Public Consultation on Evaluation of procedural and jurisdictional aspects of EU merger control, July 2017.


\textsuperscript{38} Refining the EU merger control system (speech by Commissioner Margrethe Vestager at Studienvereinigung Kartellrecht, Brussels), 10 March 2016.
Luxembourg tax purposes and opaque for US tax purposes. Crucially, the arrangement is also subject to a challenge in the United States; the US tax authorities consider the payments to Amazon US too low. At first instance, the US courts found in favour of Amazon; an appeal is pending. It remains to be seen whether the Commission will reconsider its state aid decision if, on appeal, it is decided that the payments by the LP to Amazon US should have been at a level similar to that of the payments to the LP. Clearly, it would cause considerable additional uncertainty if the Commission’s decision could be influenced by the ruling of a court outside the European Union some 15 years after the supposed aid was first granted.

On 26 October, 2017, the Commission announced that it had opened a state aid investigation into the group financing exemption under the UK controlled foreign company regime. If the Commission decides that the exemption constitutes illegal state aid, the implications are likely to be particularly complex if a group relies on the partial group financing exemption. Given the interaction with the Cadbury Schweppes and Vodafone principles, such a group may find that it paid too much (rather than too little) tax.

In an M&A context, the review of tax rulings and, where relevant, the use of the UK’s group financing exemption should, to the extent possible, form part of the due diligence process. Where warranty or indemnity protection is obtained, purchasers should, when negotiating time limits, bear in mind the 10-year-plus look-back for state aid.

Update on the multilateral instrument and country-by-country reporting

While US tax reform has recently taken the spotlight, the OECD’s base erosion and profit shifting project (BEPS) is still one of the hot topics in international tax.

The multilateral instrument (MLI), which incorporates treaty changes required by BEPS into the existing bilateral treaties between the signatories of the MLI, entered into force on 1 July 2018.

By the end of 2018, most multinational groups whose parent is resident in the European Union will have submitted their first country-by-country reports (as required by BEPS Action 13). It remains to be seen how tax authorities use the reported information once it is collected and exchanged.

While Action 13 of BEPS envisaged that country-by-country reports would be confidential to tax authorities, the Commission proposed that certain information should be made public.39 On 4 July 2017, the European Parliament adopted an amended version of that proposal.40 Pursuant to that amended version, multinational groups with an annual turnover of €750 million or more, and branches in the European Union, would be required to publish a global country-by-country report. The next step is for the measure to be approved by the Council.

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40 P8_TA(2017)0284.
iii Common consolidated corporate tax case

On 15 October 2016, the Commission published a proposal to introduce the Common Consolidated Corporate Tax Base (CCCTB) in two stages with the aim of agreeing the common corporate tax base and consolidation separately. On 15 March 2018, the European Parliament approved the draft directives on both sets of measures with some key amendments. The amended text envisages that both sets of measures are to be implemented on 1 January 2020. It also includes new rules in respect of digital permanent establishments. The next step would be the approval of the amended text by the Commission and the Council. At the time of writing, it seems unlikely that approval by the Council will be forthcoming.

iv Financial transactions tax

Although it has not been officially abandoned, there appears to be no measurable progress in the development of a financial transactions tax through enhanced cooperation between the following 10 Member States: Austria, Belgium, France, Germany, Greece, Italy, Portugal, Slovakia, Slovenia and Spain.

v Taxation of the digital economy

BEPS Action 1 seeks to address the tax challenges of the digital economy. On 16 March 2018, the OECD published an interim report, identifying the main challenges posed. These include nexus rules that link taxation rights to physical presence, the allocation of profits from the cross-border gathering and use of data, and the characterisation of payments made for digital products or means to deliver services. The interim report does not recommend a solution. It is intended that a further update will be provided in 2019 with a view to developing consensus-based solutions by 2020.

On 21 March 2018, the Commission published two proposals for the taxation of the digital economy. The first is an interim measure in the form of a new Digital Services Tax, being an indirect tax levied at a rate of 3 per cent on turnover resulting from the supply of certain digital services. The second proposal is a long-term solution that seeks to widen the Member States’ corporation tax bases by establishing a taxable nexus through a significant non-physical commercial presence. It is intended that the second proposal will eventually form part of the CCCTB. In fact, the European Parliament has included the concept in its amendments to the Commission’s CCCTB proposals.

It is too early to tell whether either of these proposals will change how digital services are supplied. It also remains to be seen to what extent they will be adopted. Given the less than lukewarm responses to the Commission’s proposals by some Member States, including Germany and Ireland, it seems unlikely that we will see any significant developments in the near future.

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I INTRODUCTION

Expectations were high in the private equity industry for 2017 and it is safe to say that 2017 met those expectations – it was a record-breaking year for private equity fundraising, with more capital raised globally than ever before. Although macroeconomic factors tended to support uncertainty, private equity repeatedly demonstrated its robustness, proven by its ability to cope with disruptive times of economic turbulence, political uncertainty and social upheaval, but also increased public scrutiny and regulation. However, as we pointed out in the previous edition, the United Kingdom’s vote to leave the European Union and the related negotiations of the Brexit terms, Donald Trump surprisingly winning the US presidential elections and since demonstrating going his own way, the banking and economic crisis in Italy, the continuing Greek woes and the weak economy in some other European countries still do not allow the private equity industry to rise above its uncertainties.

As a result, there continues to be a disconnect between the number of deals and transaction volume versus the capital available and raised by investors. The bulk of capital is also supported by banks and debt funds, which are continuously hungry to lend. Furthermore, interest rates remain low as the European Central Bank and governments pursue loose monetary policies to spur investments and growth, which is another reason for the continuous flow of capital to private equity funds.

Thus, the challenges in 2017 remained basically the same as in 2016, since the global situation has not changed significantly, with a degree of geopolitical and economic uncertainty and currency volatility: there is plenty of capital causing fierce competition between investors that chase few and even higher-valued targets.

Preqin’s latest report on global private equity development shows that 2017 witnessed the largest amount of capital (US$453 billion) raised in any year. With record levels of dry powder, growth of raise funds and the nearly zero interest environment, underlying macroeconomic conditions are almost perfect for private equity investment models. However, there is a shortage of acquisition targets to meet the demands, which means that competition for deals remains fierce. The flood of money in private equity has driven up purchase prices significantly and eliminated the formerly large gap between private and public market valuations. According to Preqin, 88 per cent of investors consider valuations to be the greatest challenge facing the private equity industry in the year ahead.
The industry has focused again on new concepts, as it becomes more and more difficult to realise the intended returns with the traditional methods. Mere financial engineering has been a thing of the past for quite some time now. Optimising the operations of the portfolio companies (with the effect of longer holding periods) has been one of the answers to date. There is an emphasis on driving down portfolio company costs and improving margins. Continuing trends also include more buy-and-build activities.

In this environment, Germany seems to maintain its position as the new core market for private equity in Europe. The development of the private equity market in Germany, Switzerland and Austria (GSA) will continue to stand out from the market in the rest of Europe in 2017, as in the previous year. Even if the record numbers from 2016 could not be reached, where the total value of the transactions rose by 51.7 per cent to €41.3 billion,4 2017 was a solid year with overall activity (buyouts and exits) of €34.7 billion.

In terms of diversification of investments, the industrial and chemicals sector continues to be top-ranked in 2017 for the number of transactions. Although these sectors lost some share in 2016 and 2017 compared to the period from 2012 to 2015, they still lead in volume with a 22 per cent share. By contrast, the buyout value deteriorated significantly compared to 2012–2015, when the industrial and chemicals sector still accounted for 18 per cent of the shares, but only 12 per cent in 2016–2017.

A notable disparity could be seen in the energy, mining and utilities sectors. The high stake of 16 per cent in value and the lower stake of 4 per cent in volume show that the transactions dominating these sectors are few in number but large in volume.

II  FACTS AND FIGURES: EUROPEAN PRIVATE EQUITY IN 2017

After the optimistic years of the past, with a continuing growth in the European private equity market, even though there was a slight decrease in 2016 in terms of value and volume of deals, there was a marked improvement in 2017 in both volume and value.

In the buyout segment, volume increased from 1,295 transactions in 2016 to 1,431 in 2017.5 At the same time the overall transaction value increased from €108 billion to €140 billion. While 2016 was characterised by a growth disparity in value and volume, in 2017 the volume to value differential was evident in acquisitions. This is reflected in the 10.5 per cent increase in volume and the 22.3 per cent surge in value. Furthermore, the number of buyouts (30) valued at more than €1 billion was the highest number of mega-deals since the financial crisis. In addition, the upward trend could also be observed in the lower mid-market (between €15 million and €100 million) with an increase in deal count of 14.9 per cent.

This observation is paralleled by the developments in the exit market, in which the number of transactions improved from 983 in 2016 to 1,023 company sales in 2017. In Q2 2017, six of the top 10 largest exits of the year were made, resulting in an exits leap by 18.4 per cent on a value basis.

After the setback in 2016, in particular regarding the UK and Ireland market, caused by the uncertainty since the Brexit referendum, investors do not appear to have completely adapted to the fact that the United Kingdom is leaving the European Union: private equity buyout activities in the United Kingdom plummeted from €28.7 billion in 2015 to €12.5 billion.

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in 2016, the lowest level of buyout activity since 2009. Nevertheless, the United Kingdom and Ireland continue to dominate the European private equity market in terms of value and volume, claiming 22 per cent of the total buyout activity in 2016–2017. However, compared with their share of 25 per cent in the years 2012 to 2015, this was a notable fall.

The losses suffered by the United Kingdom and Ireland led to single percentage point volume gains in France, Germany and Benelux in 2016–2017, accounting for 18 per cent, 13 per cent and 11 per cent respectively of all European buyout volume. However, the most noticeable change in value was recorded in the Nordic countries, gaining four percentage points from 2012–2015 to 2016–2017, now claiming 14 per cent of all European buyout value. This increase is mainly due to three top 10 acquisitions in the Nordic countries: the €4.7 billion Visa deal in Norway; the €4 billion buyout of Finnish energy group Elenia by Allianz Capital Partners, Macquarie Infrastructure and Real Assets, and the country State Pension Fund; and the acquisition of €3.6 billion Finnish real estate group Sponda Oyj by Blackstone Group.

As already mentioned, Germany, Switzerland and Austria remained the leaders in the European private equity market even though in the buyout sector, volume decreased slightly in 2017 with 228 buyout deals in total, compared to the record-breaking 232 deals in 2016. However, in 2017 there were six transactions in the €500 million-plus bracket, one of which was the third biggest private equity deal in Europe in 2017 – the €5.2 billion buyout of the German generic drugmaker STADA by the financial investors Bain Capital and Cinven.

Although there was a decrease in mega-deals exceeding €1 billion during 2016, there were 30 buyouts in 2017 valued at more than €1 billion, representing an increase of more than 30 per cent year on year.

For exits, the numbers recovered in 2017 compared to the previous year with a notable uplift of 4.1 per cent, rising to 1,023 company sales. This means that the positive trend in volume observed in recent years (up 20 per cent in 2013, 11 per cent in 2014 and 20 per cent in 2015), with the exception of 2016, will continue. Similarly, in terms of value, with exception of the shortfall in 2016, the upward trend seen in previous years (100 per cent in 2014 and 12 per cent in 2015) will continue in 2017 with 18.4 per cent growth.

### SIGNIFICANT TRANSACTIONS AND KEY TRENDS IN EUROPE

#### Transactions

Unlike 2016, 2017 was characterised by mega-deals exceeding €1 billion. The impact of Brexit and the associated uncertainty in the financial market seem to have diminished as no other deal size bracket was able to achieve such growth as the €1 billion-plus segment.

In Q2 2017, the three biggest exits of the year in Europe were made: Blackstone’s divestment of UK warehouse and logistics company Logicor to China Investment Corporation, valued at €12.25 billion, the exit of AWAS, a Dublin-based aircraft lessor, by Terra Firma alongside its co-investor, the Canada Pension Investment Board, to Dubai Aerospace Enterprise for €6.9 billion and NB Private Equity Partners’ offloading of pharmaceutical developer Patheon to Thermo Fisher for €6.5 billion. Thus, 2017 can be regarded as the year in which mega-deals have recaptured the European market.

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7 See ‘PwC Private Equity Trend Report 2018’.

8 See ‘PwC Private Equity Trend Report 2017’.
Europe's three biggest buyouts in 2017 were the €6.8 billion purchase of Unilever's global spreads business by Kohlberg Kravis Roberts, followed by the €5.6 billion takeover of Nets, a Danish payment processor, by Hellman & Freidman, and the €5.2 billion buyout of the German generic drugmaker STADA Arzneimittel AG by the financial investors Bain Capital and Cinven.

ii Key trends
As in 2017, the market concentrated on finding suitable assets, on fee structures and compliance with tightening regulatory requirements on both sides of the Atlantic. Trends observed in previous years are still valid, including longer holding periods, extended buy-and-build activities, the application of warranty and indemnity (W&I) insurance policies and trading in secondaries.

Typically, private equity funds hold their portfolio companies for three to five years on average before exiting. This holding period has increased in small steps, reaching an average of six years in 2014. One of the reasons for these longer holding periods is the macroeconomic stagnation and uncertainty caused by the financial crisis beginning in 2008. In 2017, the median holding period returned to a ‘new normal’ of five years. Parallel and in line with the observed trend to longer holding periods are the continuous buy-and-build activities, which are used to increase potential exit returns. This corresponds with the increasing number of add-ons, which funds can use to execute buy-and-build strategies. For several years, the number of add-on deals globally increased notably and make up around half of all deals today. On the other hand, so called quick flips (i.e., transactions with a holding period of up to three years) decreased in the last few years. In 2008, at 44 per cent, nearly half of all buyouts were quick flips. More recently the number has retreated by half, to around 20 per cent. This sharp drop of quick flips is a result of factors such as high prices, limited future market beta and tax reform in the United States, under which carries generated from investments held for a maximum of three years will be taxed at the higher ordinary income rate. These factors make it rather unlikely that quick flips will experience an upswing in the foreseeable future, but rather indicate the continuous trend to longer holding periods.

A further trend is the growing familiarity with and use of W&I insurances in transactions. Under these insurance policies (usually), the buyer insures the risks occurring in case of a breach of the representations and warranties or indemnities that are given in a sale and purchase agreement. Damage claims incurred as a result of a breach of a representation and warranty or indemnity are paid by the insurance company (which, apart from certain exceptions, may not turn towards the seller), subject to the terms and conditions of the policy, including baskets and caps as agreed. While the majority of W&I insurance policies are issued to buyers, seller policies also exist. Thus, a W&I insurance reduces significantly the risks of the seller to become liable for damage claims under the sale and purchase agreement. In 2017, new and increasingly aggressive insurers in the Australasian region have driven certain overall market trends: first, the excessive prices for insurance have fallen, which means that the cost of insurance for larger deals is lower than ever before, and second, the decline in surplus prices with simultaneous low primary interest rates led to the average premium rates in 2017 falling below 1 per cent of the sum insured for the first time. As the uptake of W&I insurance on deals increases globally, more and more US$1 billion-plus deals are being

10 Id.
insured, which means that regularly insurance programmes of $100 million-plus are being structured. As a result the average amount of insurance per deal underwritten by the market has risen from US$30 million in 2016 to almost US$65 million on average in 2017. The significant growth in the M&A insurance market is also reflected in the following figures: there was an increase of 76 per cent in the number of M&A insurance policies in Q1 2017 compared to Q1 2016. The falling premium rates, lower retention levels and new insurers entering the market are the reasons for this development, resulting in continuing fierce competition among W&I insurers.

Last but not least, foreign investors, in particular from the United States but also from China, are increasingly seeking to invest in Europe (in the case of US investors also, as valuations and multiples are lower than in the United States). Countries of particular interest are the strongest markets (i.e., the United Kingdom, Germany and France).

IV LEGAL FRAMEWORK FOR PRIVATE EQUITY FUNDS IN GERMANY AND EUROPE

i Legal form of private equity fund vehicles in Germany

The legal framework for private equity funds has not changed significantly in recent years. The biggest change on the regulatory side was introduced through the transformation of the Alternative Investments Fund Managers Directive (AIFMD) into national law. For this purpose, Germany established the Investment Code (KAGB), which came into effect on 22 July 2013. As to the legal form of vehicles, German (corporate) law offers various types. Generally, vehicles for funds can be organised in the legal form of a stock corporation (AG), a limited liability company (GmbH) or a form of a limited partnership (GmbH & Co KG). Furthermore, the KAGB provides variations of the AG and the KG, the investment-AG or investment-KG, introducing additional regulations. Generally, the legal form now depends on the specific fund concept with regard to the invested assets of an open or closed-end fund and its circle of investors.

From a practical standpoint and an investor’s tax perspective, the limited partnership in the form of a GmbH & Co KG still prevails for German private equity funds. The limited partnership (KG) essentially has two kinds of partners – LPs (limited partners) and GPs (general partners). While the investors subscribe for limited partnership interests, thus becoming LPs, the sole GP of the limited partnership is a separate company usually organised as a limited liability company in accordance with the Limited Liability Company Act (GmbHG). With the combination of these two legal forms, investors combine the advantages of both. In particular, the personal liability of investors is limited to their liability contribution, as LPs are only liable for debts of the limited partnership up to the liability amount registered with the German commercial register. Since German law does not require a minimum liability amount, usually only a small portion of the actual capital commitment of an LP is registered with the commercial register as liability amount, and as such revealed to the public. Once an LP has fulfilled his or her obligation up to the respective liability amount, and has not received a repayment in the meantime, the LP does not assume any further responsibility for the liabilities of the limited partnership. In contrast to the LPs, a GP of a limited partnership is liable for all obligations of the partnership without limitation. In a GmbH & Co KG, the
liability of the GP (as limited liability company) is limited to the assets of the company. Its shareholders cannot be held liable for more than the capital contribution paid (or owed) by the respective shareholders.

Furthermore, based on the principle of freedom of contract, the partnership agreement can be tailored in a very flexible way to the needs and objectives of the investors. In general, investors as LPs only have limited information rights compared to other legal forms unless broader information rights have been agreed upon in the partnership agreement. Also the entry and exit of investors in and out of a GmbH & Co KG are simple and do not require a notarial form. Thus, the accession of a new investor as LP is uncomplicated and cost-efficient. In addition, there are beneficial tax rules if the GmbH & Co KG as a limited partnership is not engaged in business activities for German tax purposes. Last but not least, the limited partnership agreement does not have to be revealed to the public and, in particular, does not have to be registered with the German commercial register.

ii  Monitoring of PE funds in Germany

According to the KAGB, AIFMs are now obliged to establish a depositary for AIFs under their management. This depositary shall, inter alia, review legal title in an AIF’s assets on a continuous basis. The depositary’s obligation is not limited to holding companies, but applies to all subsidiaries in the case of a holding structure within the portfolio. Additionally, the depositary may not solely rely on an AIF’s due diligence, but is requested to also conduct its own review.

iii  Transactions

Types of private equity transactions

The typical private equity transaction structure has not changed significantly in recent years. From a legal standpoint, the acquisition of interests or shares remains the most important type of transaction, in most cases, of a private equity transaction in the form of a leveraged buyout (LBO). In an LBO, usually all or the majority of interests of the target company are acquired by the private equity investor, although the acquisition is funded only fractionally with equity, while the larger portion of the purchase price is financed with bank or other third party debt (leveraged transaction). The leverage shall be defrayed by the free cash flow of the target company.

Disclosure requirements

Under German law, several acts deal with disclosure obligations that apply to all shareholders and investors, thus also for private equity investors. The most relevant disclosure obligations relate to stock corporations and, in particular, listed companies. The German Securities Trading Act (WpHG) sets forth various thresholds for equity holdings in listed companies that trigger certain disclosure requirements, while the German Stock Corporation Act (AktG) governs all companies organised as a German stock corporation. According to the WpHG, everyone reaching, exceeding or falling short of 3, 5, 10, 15, 20, 25, 30, 50 and 75 per cent of the voting rights in a listed company by purchase, sale or any other means is obliged to notify both the company and the competent Federal Financial Supervisory Authority (BaFin). The same obligations apply for persons who ‘act in concert’.
To capture all sorts of arrangements to build up positions in a German listed company, the German legislator also extended the disclosure requirement for ‘financial instruments’ by including ‘other instruments’ that do not necessarily qualify as financial instruments but grant the right to acquire voting shares or vote such shares.

To restrict undesired activities – in particular by financial investors – the German Securities Trading Act enhanced, in a similar way to respective provisions under the US Securities Exchange Act, the transparency of certain financial transactions obliging an investor to disclose its specific intentions with the target company and the sources of the funds to finance the transaction. Thus, an acquirer of an essential participation (i.e., a participation reaching or exceeding a threshold of 10 per cent of the voting rights) is, subject to certain exemptions, required to disclose the aforementioned information regarding the purpose of the transaction and the origin of funds.

Concerning stock corporations (no matter whether listed or not), the German Stock Corporation Act sets forth that any enterprise (thus, private investors are not subject to this obligation) reaching a threshold of more than 25 or 50 per cent in the capital of a stock corporation, or that whenever that enterprise falls below these thresholds, it is obliged to promptly notify the stock corporation. If the enterprise fails to fulfil its disclosing obligations, it will lose its rights rooted in its shares.

To make the shareholder structure of non-listed stock corporations more transparent, the AktG limits the admissibility of bearer shares. This amendment came into effect on 31 December 2015. Since then, non-listed stock corporations may generally only issue registered shares.

On a European level, besides the above-mentioned implementation of the AIFMD into German law and the additional provisions introduced in the KAGB, the industry is facing further changes in the legal regime. Solvency II (adopted by the European Parliament on 11 March 2014) created new insurance regulations as of 1 January 2016 that require insurance companies to hold more liquid assets, restricting the amount that can be invested in private equity. The Markets in Financial Instruments Directive II (MiFID II), the update of the MiFID, was adopted by the European Parliament in April 2014 and published in June 2014 after formal adoption by the Council of Ministers. In addition, the European Commission resolved on a revision of the EU Pension Funds Directive (IORP) – IORP II – which must be transformed into national law by January 2019 and has far-reaching consequences for both the funding of pension schemes and the way they are managed.

V OUTLOOK

The sentiment in the private equity industry is predominantly characterised by optimism and positivity for the development of the private equity market in Europe in 2018. Almost half (49 per cent) of the private equity houses expect the European deal market for private equity to get slightly better in 2018, while 45 per cent of the respondents assume it will stay broadly the same. This compares with only 5 per cent of the firms that anticipate that it will get slightly worse. German private equity firms are slightly below the average in terms

13 The following survey results are based on a survey conducted by Mergermarket’s research and publication division on behalf of PwC, who spoke to 250 private equity principals in Europe.
of optimism: 45 per cent of them expect a slight improvement, but only a tiny minority of 2 per cent expect a slight deterioration. The Benelux countries are most confident in the development of the private equity market in Europe in 2018; 65 per cent expect the situation to get slightly better in 2018 and none of the respondents expect it to get worse.14

On the whole, investors remain optimistic that Europe will still be a region for investments that have high potential in 2018. Most European countries still offer a high grade of legal certainty in a stable environment, which continues to be an essential argument for future investments. However, there are record levels of dry powder now exceeding €1 trillion and leverage in the global private equity market, caused by the huge amounts of money successfully raised in recent years, which means that deals have never been more expensive.

This results in fierce competition among private equity investors. Ninety-nine per cent of private equity firms expect competition for investments to remain the same or to increase in 2018, with 15 per cent believing competition will rise significantly and 55 per cent that it will increase slightly.15 In addition, more competitors from outside the industry, such as pension funds and insurance companies, are developing a taste for the private equity model, which increases competition. Furthermore, additional players, such as Chinese investors, are becoming more and more established in the market. In light of the above, investors will most likely be pulled into fierce competition and private equity houses are well advised to analyse pricing even more carefully.

Despite a very solid investment environment in Europe and investor confidence seen in the public market, the following risks should not be overlooked: some parts of Europe are still fighting with macroeconomic stagnation and structural challenges, while many European countries are having difficulties in finding their European identity, paving the way for the re-emergence of populist political groups and parties harmonising with anti-euro politics. In particular UK’s decision to leave the European Union has caused uncertainty and unpredictability as there seems to be a deadlock in the crucial questions of the Brexit terms. The lack of clarity can make it difficult for investors in terms of investments over a five or 10-year period.

To mention just some of the influencing factors, the continuing uncertainty about which direction Europe is going, the Italian banking crisis, Greece’s continuing woes, a potential interest rate increase in Europe, the fact that the US yield curve has flattened to its lowest level in 10 years in 2018 (which is seen as a reliable indicator of an impending recession in the world’s largest economy) and last but not least, President Trump himself, may affect the private equity market in the longer run. Given all these uncertainties, private equity funds will have to closely analyse the possible scenarios in each investment. Identifying companies with the resilience and flexibility to weather a market downturn and negotiating the right price remain the main challenges.

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15 Id.
Chapter 3

M&A LITIGATION

Roger A Cooper, Meredith Kotler and Vanessa C Richardson

I  INTRODUCTION

The past few years have been a time of tremendous change in Delaware merger litigation. Those changes include the further development of substantive doctrines under *Corwin* and *MFW* (discussed further in Sections II and III, respectively), which provide defendants with strong bases for dismissing many complaints. At the same time, appraisal litigation has expanded in Delaware and provided stockholders with a different angle of attack on the adequacy of the merger price. The Delaware Supreme Court has issued several key rulings on appraisal issues and is expected to provide further guidance on appraisal rights in the coming year.

II  CLEANSING EFFECT OF INFORMED, UNCOERCED STOCKHOLDER VOTE

During the past few years, the Delaware courts have underscored the deference afforded to merger transactions approved by an informed, disinterested and uncoerced stockholder vote. In *Corwin v. KKR Financial Holdings*, the Delaware Supreme Court unanimously affirmed the Court of Chancery’s dismissal of a post-closing damages action, holding that the business judgment rule applies in post-closing damages suits involving mergers not subject to entire fairness and that have been approved by a fully informed, uncoerced majority of the disinterested stockholders. The court explained that it is reluctant to interfere with a stockholder decision on approving a merger, because ‘when the real parties in interest – the disinterested equity owners – can easily protect themselves at the ballot box by simply voting no, the utility of a litigation-intrusive standard of review promises more costs to stockholders in the form of litigation rents and inhibitions on risk-taking than it promises in

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1 Roger A Cooper and Meredith Kotler are partners and Vanessa C Richardson is an associate at Cleary Gottlieb Steen & Hamilton LLP.

2 *Corwin v. KKR Financial Holdings*, 125 A.3d 304 (Del. 2015).

3 *In re KKR Financial Holdings LLC’Holders Litig*, 101 A.3d 980, 1003 (Del. Ch. 2014); see also *Singh v. Attenborough*, 137 A.3d 151, 151-52 & n.3 (Del. 2016) (reiterating that stockholder approval has a cleansing effect on a merger transaction and makes it subject to the irrebuttable business judgment rule, extinguishing all claims except for waste).
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terms of benefits to them’. 4 Since Corwin, the Court of Chancery has repeatedly dismissed post-closing challenges to non-controller stockholder-approved transactions at early stages of the litigation. 5

The Delaware courts extended this protection to transactions that are ‘approved’ by fully informed, uncoerced stockholders tendering a majority of shares in a two-step merger pursuant to Section 251(h). 6 In finding that the business judgment rule applied, the Court of Chancery held that the tendering of a majority of shares in a two-step merger pursuant to Section 251(h) ‘essentially replicates a statutorily required stockholder vote in favor of a merger’, and thus would invoke the same highly deferential standard of review as a ‘vote in favor of a merger by a fully informed, disinterested, uncoerced stockholder majority’. 7

The Court of Chancery has cautioned that this cleansing effect will apply only when the stockholder vote is not coerced and is fully informed. 8 It has also cautioned that not all conduct may be cleansed by a stockholder vote: ‘The policy underlying Corwin . . . was never intended to serve as a massive eraser, exonerating corporate fiduciaries for any and all of their actions or inactions preceding their decision to undertake a transaction for which stockholder approval is obtained’. 9 Future cases will continue to develop a framework for determining whether certain disclosed acts or omissions are so problematic, or certain deal structures so coercive, that they cannot be cleansed through approval by stockholders.

4 Corwin, 125 A.3d at 313.
5 See, e.g., In re Cyan, Inc Sholders Litig, C.A. No. 11027-CB, 2017 WL 1956955 (Del. Ch. 11 May 2017); In re Paramount Gold & Silver Corp Sholders Litig, C.A. No. 10499-CB, 2017 WL 1372659 (Del. Ch. 13 Apr 2017); In re Columbia Pipeline Group, Inc Sholders Litig, C.A. No. 12152-VCL (7 Mar 2017) (ORDER); In re Merge Healthcare Inc Sholders Litig, C.A. No. 11388-VCG, 2017 WL 395981 (Del. Ch. 30 Jan 2017); In re Solera Holdings, Inc Sholders Litig, C.A. No. 11524-CB, 2017 WL 57839 (Del. Ch. 5 Jan 2017).
6 In re Volcano Corp Sholders Litig, 143 A.3d 727 (Del. Ch. 2016), aff’d 2017 WL 563187 (Del. 9 Feb 2017) (TABLE).
7 Id. at 744, 747.
8 Appel v. Berkman, 180 A.3d 1055 (Del. 2018) (determining that stockholder vote was not adequately informed and thus did not have cleansing effect); Sciacacucchi v. Liberty Broadband Corp, C.A. No. 11418-VCG, 2017 WL 2352152, at *2 (Del. Ch. 31 May 2017) (determining that plaintiff adequately pleaded that a vote was structurally coercive, and refusing to dismiss); In re Saba Software, Inc Sholders Litig, C.A. No. 10697-VCS, 2017 WL 1201108, at *8, 14 (Del. Ch. 31 Mar 2017, revised 11 Apr 2017) (determining that plaintiff adequately pleaded that a vote was coerced and was not fully informed, and refusing to dismiss).
III ‘GOING PRIVATE’ TRANSACTIONS WITH CONTROLLING STOCKHOLDERS

The Delaware courts have clarified certain issues regarding the framework adopted in *Kahn v. M&F Worldwide Corp* (*MFW*) for reviewing ‘going private’ transactions by controlling stockholders.10 In *In re Books-A-Million, Inc Stockholders Litigation*, the Court of Chancery applied *MFW* and found that a controlling stockholder’s proposal to take a company private had complied with the conditions set forth in *MFW*, which subjected it to the business judgment level of review.11 The case demonstrated that defendants may prevail on a motion to dismiss, even where the transaction involves a controlling stockholder, and thus avoid costly and time-consuming discovery and a trial.

*Books-A-Million* also confirmed that a controlling stockholder has no obligation to sell its shares or otherwise facilitate a third-party offer. Nor does a controlling stockholder breach its fiduciary duties simply by offering to acquire the minority’s shares – even at a price lower than might be available from a third-party bidder – so long as the price offered is within a rational range.12 The Court of Chancery noted that although special committees are not required to solicit offers from third parties in the face of a statement by the controlling stockholder that it is not willing to sell its shares, a ‘committee goes one better when it takes the additional step of gathering additional information through a market canvas’ because any third-party offer ‘would be a data point in any post-closing appraisal action, giving the [controller] a reason to bump their offer’.13 The Delaware Supreme Court affirmed *Books-A-Million* in a one-page Order.

In *In re Martha Stewart Living Omnimedia, Inc Stockholders Litigation*, the Court of Chancery extended the standard set forth in *MFW* to transactions involving the sale of a controlled company to a third party, even when the controlling stockholder receives disparate consideration for its shares.14 The court rejected the plaintiffs’ position that the *MFW* procedural protections must be in place at the outset of negotiations between the controlled company and the third party, holding instead that the trigger for the *MFW* protections is the beginning of negotiations between the controlling stockholder and the third party for additional consideration, which is when the potential conflict with the minority stockholders emerges.15 The *Martha Stewart* decision shows that significant incentives exist for controlling stockholders and directors to insist on procedural protections that allow the parties to replicate arm’s-length bargaining.

10 *Kahn v. M&F Worldwide Corp*, 88 A.3d 635, 645 (Del. 2014) (holding that business judgment rule would be operative standard of review if transaction satisfied these requirements: ‘(i) [from the beginning of negotiations,] the controller conditions the transaction on the approval of both a Special Committee and a majority vote of the minority stockholders; (ii) the Special Committee is independent; (iii) the Special Committee is empowered to freely select its own advisors and to say no definitely; (iv) the Special Committee meets its duty of care in negotiating a fair price; (v) the vote of the minority is informed; and (vi) there is no coercion of the minority’).
12 Id. at *15-16.
13 Id. at *18.
15 Martha Stewart, 2017 WL 3568089, at *18 and 19; see also *In re Synutra Int’l, Inc*, 2018 WL 705702 (Del. Ch. 2 Feb 2018) (holding that transactions will satisfy the MFW requirements and receive business judgment review so long as the protections are in place before negotiations begin).
IV APPRAISAL RIGHTS

For many years, practitioners considered appraisal to be a ‘sleepy’ topic, but it has recently become a key doctrinal battleground in Delaware courts.\(^{16}\) Section 262 of the Delaware General Corporation Law provides stockholders with the right to demand a judicial appraisal of the ‘fair value’ of their stock.\(^{17}\) To exercise appraisal rights a stockholder must:

\(\begin{align*}
& a \quad \text{deliver a written demand prior to the vote;} \\
& b \quad \text{not have voted in favour of the transaction;} \\
& c \quad \text{continuously hold the stock through closing; and} \\
& d \quad \text{perfect appraisal rights after closing.} \quad \text{18}
\end{align*}\)

With the developments in Delaware merger litigation disfavouring disclosure-only settlements and clarifying the standards for dismissal of complaints (as discussed above), plaintiffs have increasingly looked to appraisal actions as a backstop for pricing imperfections.\(^{19}\) Furthermore, because a stockholder need not have owned the shares as of the deal announcement or even as of the record date for the vote,\(^{20}\) hedge funds began to engage in appraisal arbitrage, where they would buy shares just before a merger closed to exercise the appraisal rights.\(^{21}\) Appraisal offered the opportunity for a potentially large payoff if the transaction was found to be undervalued or if the company settled the case above deal price. It also allowed a petitioner to collect prejudgment interest pegged at the prevailing Federal Reserve discount rate, plus 5 per cent (compounded quarterly), while the action resolved itself.\(^{22}\) That offered higher risk-adjusted rates of return compared to similar investments, even if the nominal appraisal valuation came in at or slightly below the deal price.

To combat appraisal arbitrage, certain provisions of the Delaware General Corporation Law governing appraisal proceedings were amended in June 2016. First, appraisal claims in respect of less than 1 per cent of the total outstanding shares of any class or less than US$1 million in consideration will now be dismissed, except if the transaction is a short-form merger.\(^{23}\) Second, corporations may now make preliminary payments in respect of appraisal

\(\begin{align*}
& \quad \text{https://www.clearygottlieb.com/-/media/organize-archive/cgsh/files/2017/publications/the-ma-journal-}
\quad \text{a-sleepy-topic-the-return-of-appraisal-rights-05-23-17.pdf; see also Guhan Subramanian, Appraisal After} \\
& \quad \text{https://ssrn.com/abstract=3095164.}
\end{align*}\)

\(\begin{align*}
17 & \ \text{In general, holders of listed stock (or stock held by more than 2,000 holders of record) have appraisal} \\
& \quad \text{rights if they are required to accept as merger consideration anything other than (1) stock of the surviving} \\
& \quad \text{company, (2) listed stock of any other corporation or (3) cash in lieu of fractional shares. 8 Del. C.} \\
& \quad \text{Section 262(b).}
\end{align*}\)

\(\begin{align*}
18 & \ \text{8 Del. C. Section 262.}
\end{align*}\)

\(\begin{align*}
19 & \ \text{See Matthew D Cain, et al, ‘The Shifting Tides of Merger Litigation’, 71 Vanderbilt Law Review, 603} \\
& \quad \text{2016 were record years with respect to both the number of deals challenged and number of petitions filed’);} \\
& \quad \text{Charles R Korso and Minor Myers, ‘Appraisal Arbitrage and the Future of Public Company M&A’, 92} \\
& \quad \text{Wash. U.L. Rev. 1551, 1553 (2015) (describing a tenfold increase in appraisal litigation from 2004 to 2013).}
\end{align*}\)

\(\begin{align*}
20 & \ \text{In re Appraisal of Transkaryotic Therapies, Inc, 2007 WL 1378345 (Del. Ch. 2 May 2007).}
\end{align*}\)

\(\begin{align*}
21 & \ \text{Wei Jiang, et al, ‘Appraisal: Shareholder Remedy or Litigation Arbitrage?’, 59 J Law & Econ. 697 (2016)} \\
& \quad \text{finding actions brought by hedge funds made up three-quarters of appraisal volume measured by dollars.)}
\end{align*}\)

\(\begin{align*}
22 & \ \text{8 Del. C. Section 262(h). Note that amendments to the statute in 2016 permit the company to prepay some} \\
& \quad \text{amount of the consideration to the petitioner in cash, which would cut off further interest on that amount.}
\end{align*}\)

\(\begin{align*}
23 & \ \text{8 Del. C. Section 262(g).}
\end{align*}\)
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claims, thus cutting off statutory interest on the amount of the preliminary payment.\footnote{24} However, the General Assembly did not adopt other proposals intended to reduce ‘appraisal arbitrage’, such as preventing investors who purchase their shares after the announcement of a merger agreement from exercising appraisal rights.

The statute provides the Court of Chancery with wide discretion in how to determine ‘fair value’ in appraisal proceedings, imposing only two requirements. Under the statute, the court must (1) ‘take into account all relevant factors’; and (2) ‘exclu[de] any element of value arising from the accomplishment or expectation of the merger’.\footnote{25} Over several cases, the Court of Chancery had expressed a strong preference for reliance on the merger price to determine ‘fair value’ for the purposes of the appraisal proceeding.\footnote{26} In late 2017 and early 2018, the Delaware Supreme Court issued several appraisal decisions giving additional guidance about how the Court of Chancery should conduct the appraisal valuation.

First, in \textit{DFC Global Corp v. Muirfield Value Partners, LP}, the Delaware Supreme Court concluded that the Court of Chancery’s determination that the company’s fair value was 7.5 per cent higher than the deal price was not supported by the record, which showed a robust and conflict-free sale process.\footnote{27} The court explained that the standard for deferring to the trial court’s determination of fair value is whether it ‘has a reasonable basis in the record and in accepted financial principles relevant to determining the value of corporations and their stock’.\footnote{28} Applying that standard, Chief Justice Strine concluded that neither the regulatory risks facing the company nor the mere fact that a private equity buyer won the transaction made the deal price any less reliable an indication of fair value.\footnote{29} Nonetheless, the court declined to establish a bright-line rule in favour of deferring to the deal price in arm’s-length mergers, reasoning that the text of the appraisal statute empowers the Court of Chancery to determine fair value by taking ‘all relevant factors’ into account.\footnote{30} The Court reversed and remanded the case, noting that the Chancellor ‘may conclude that his findings regarding the competitive process leading to the transaction, when considered in light of other relevant factors, . . . suggest that the deal price was the most reliable indication of fair value’.\footnote{31}

Then, in \textit{Dell, Inc v. Magnetar Global Event Driven Master Fund Ltd}, the Delaware Supreme Court applied the standard set forth in \textit{DFC} to hold again that the record did not support the Court of Chancery’s decision to assign no weight to the deal price in determining

\begin{itemize}
\item \footnote{24} 8 Del. C. Section 262(h).
\item \footnote{25} Id.
\item \footnote{26} See, e.g., In \textit{re Appraisal of PetSmart, Inc}, C.A. No. 10782-VCS, 2017 WL 2303599 (Del. Ch. 26 May 2017) (deferring to deal value where the deal price was the product of a process reasonably designed and appropriately implemented to achieve a fair value); Merion Capital LP v. Lender Processing Servs, Inc, C.A. No. 9320-VCL, 2016 WL 7324170, at *33 (Del. Ch. 16 Dec 2016) (giving ‘100% weight to the transaction price’ where ‘[t]he Company ran a sale process that generated reliable evidence of fair value’); Huff Fund Inc v. Pship v. CKx, Inc, C.A. No. 6844-VCG, 2013 WL 5878807, at *15 (Del. Ch. 1 Nov 2013), aff’d, No. 348, 2014, 2015 WL 631586, (Del. 12 Feb 2015) (finding ‘the sales price to be the most relevant exemplar of valuation available’); In \textit{re Appraisal of Ancestry.com, Inc}, C.A. No. 8173-VCG, 2015 WL 399726 (Del. Ch. 30 Jan 2015) (same).
\item \footnote{27} DFC Global Corp. v. Muirfield Value Partners, LP, 172 A.3d 346, 349 (Del. 2017) (finding market price to be the best evidence of fair value, at least in open, competitive and conflict-free mergers).
\item \footnote{28} Id. at 348 and 349.
\item \footnote{29} Id. at 372 to 376.
\item \footnote{30} Id. at 348 and 349.
\item \footnote{31} Id. at 351.
\end{itemize}
the company’s fair value.\textsuperscript{32} As the court explained, it appeared instead that ‘the deal price deserved heavy, if not dispositive, weight’ based on the record, which included ‘evidence of market efficiency, fair play, low barriers to entry, outreach to all logical buyers, and the chance for any topping bidder to have the support of [the CEO’s] own votes’.\textsuperscript{33} The court disagreed with the trial court’s conclusion that the deal price does not reflect fair value in management-led buyouts because of (1) structural issues, (2) risks resulting from asymmetries in information and (3) management’s inherent value to the company, noting based on the record that those features were absent from the transaction in question.\textsuperscript{34} As in \textit{DFC}, the court in \textit{Dell} again rejected a ‘private equity carve-out’ from using the deal price as a reliable indication of fair value.\textsuperscript{35} Remanding the case, the court noted that the Vice Chancellor had the discretion ‘to enter judgment at the deal price if he so chooses, with no further proceedings’.\textsuperscript{36}

Other recent appraisal decisions have shown that there is a material risk that the court will determine fair value to be not just at the deal price, but lower than the deal price, even in an arm’s-length merger.

In \textit{Merlin Partners, LP v. SWS Group, Inc}, the Delaware Supreme Court summarily affirmed the decision of the Court of Chancery to value SWS at US$6.38 per share, which was 8 per cent below the merger price.\textsuperscript{37} The Court of Chancery had noted that ‘the fact that my DCF analysis resulted in a value below the merger price is not surprising: the record suggests that this was a heavily synergies-driven transaction’.\textsuperscript{38}

In \textit{Verition Partners Master Fund, Ltd v. Aruba Networks, Inc}, the Court of Chancery found that the deal price was the product of an uncompetitive and flawed process, and then determined that fair value was significantly below deal price because the merger resulted in substantial synergies.\textsuperscript{39} Instead of relying on a discounted cash flow (DCF) analysis or attempting to back out synergies, the court found fair value to be equal to the pre-announcement market trading price of the public shares, which was 30 per cent below the deal price.\textsuperscript{40}

\textsuperscript{32} \textit{Dell, Inc v. Magnetar Global Event Driven Master Fund Ltd}, 177 A.3d 1, 32 (Del. 2017).
\textsuperscript{33} Id. at 32, 35.
\textsuperscript{34} Id. at 30 to 34.
\textsuperscript{35} Id. at 28 to 31.
\textsuperscript{36} Id. at 44.
\textsuperscript{37} \textit{In re Appraisal of SWS Group, Inc}, C.A. No. 10554-VCG, 2017 WL 2334852 (Del. Ch. 30 May 2017), aff’d, \textit{Merlin Partners, LP v. SWS Group, Inc}, 2018 WL 1037477 (Del. 23 Feb 2018) (ORDER)).
\textsuperscript{38} Id. at *18.
\textsuperscript{39} \textit{Verition Partners Master Fund, Ltd v. Aruba Networks, Inc}, No. CV 11448-VCL, 2018 WL 922139 (Del. Ch. 15 Feb 2018). The court found several issues with the sale process that led it to conclude that Aruba could have obtained a higher price, including that HP knew it had no competition for Aruba and that Aruba’s bankers ‘catered’ to HP and were ‘less effective negotiators than they might have been’. Id. at *42 and 43. Noting, however, that Dell makes clear that ‘[t]he issue in an appraisal is not whether a negotiator has extracted the highest possible bid’ but ‘whether the dissenters got fair value and were not exploited’. Id. at *36, 44, the court determined that the transaction ‘looks like a run-of-the-mill third-party deal’ and ‘[n]othing about it appears exploitative’. Id. at *38.
\textsuperscript{40} Id. at *53 and 54 (finding that unaffected market price provided the most straightforward and reliable method for determining fair value as a going concern, because it ‘provides a direct measure of the collective judgment of numerous market participants’, as to the fair value of the shares exclusive of any element of value arising from the merger, whereas the deal-price-less-synergies method is ‘messy and provide[s] ample opportunities for error’).
In *In re Appraisal of AOL, Inc*, the Court of Chancery valued AOL at US$48.70 per share, which was about 3 per cent below the deal price.\(^{41}\) As a result of flaws in the negotiation process, the court gave deal price no weight at all; instead, the court relied on its own DCF analysis and used deal price as a ‘check’ on that result. The court observed that the lower valuation was likely because the deal price included synergies that were not considered part of the company’s fair value as a stand-alone enterprise. Furthermore, the court said it had not considered the unaffected market price, as in *Aruba*, because the parties had not argued for reliance on it.

We expect that *Dell* and *DFC* will continue to reduce appraisal risk for most arm’s-length mergers going forward, including management-led buyouts and deals with financial sponsors.\(^ {42}\) Subject to the result of any appeal from these decisions, *Aruba* and *AOL* continue the trend of substantially reducing appraisal risk for buyers of public companies.\(^ {43}\)

The court remains more likely to reject the deal price as persuasive evidence of fair value in arm’s-length mergers involving a seriously flawed sale process, or in non-arm’s-length mergers such as controller transactions, squeeze-outs and certain management buyouts. But even in those circumstances, the court may find that fair value is either above or below the deal price. In *ACP Master, Ltd v. Sprint Corp (Clearwire)*, the Court of Chancery ruled that the fair value of the company was less than half the actual deal price.\(^ {44}\) The Court of Chancery did not consider the deal price in determining the company’s fair value because the transaction involved a buyout by a controlling stockholder, the deal price was inflated by synergies from the transaction, the parties had not asked the court to give weight to the deal price and the record contained other reliable evidence of fair value.\(^ {45}\) The Delaware Supreme Court affirmed the decision without discussion.\(^ {46}\) Furthermore, the Court has yet to confront an argument that deal price should be given some weight in an appraisal action involving a controlling stockholder buyout if the transaction complied with the requirements set forth in *MFW*.\(^ {47}\) We expect the Delaware Supreme Court will provide additional guidance regarding appraisal in future opinions.


\(^ {45}\) Id. at *1*, *30 and 31.

\(^ {46}\) *ACP Master, Ltd v. Spring Corp*, No. 380, 2017, 2018 WL 1905256 (Del. 23 Apr 2018).

\(^ {47}\) See *MFW*, 88 A.3d at 644 (Del. 2014) (‘... where the controller irrevocably and publicly disables itself from using its control to dictate the outcome of the negotiations and the shareholder vote, the controlled merger then acquires the shareholder-protective characteristics of third-party, arm’s-length mergers.’).
PRIVATE EQUITY: AN OFFSHORE PERSPECTIVE

Rolf Lindsay

I GENERAL INTRODUCTION

The last couple of years have witnessed a period of fundraising not seen since the leviathan leveraged buyout funds that preceded the global financial crisis. Billions of dollars in capital commitments have been gathered and need to be put to work. Investor confidence is high and there is an almost universal enthusiasm to maintain or increase allocations to the asset class. While most of the names remain familiar, and though there has certainly been a concentration of capital in the hands of the institutional fund managers, what is different from the previous cycle is that there are now more specialist funds in the marketplace.

The social and political context could not be more fascinating. Unpredictable leaders and even more unpredictable voters have undermined the certainties of the past. Technology has altered the way in which we live, work and interact with the world; all of which means that there are opportunities for the nimble and for those who embrace the fast-developing global socio-political uncertainties.

In this context of fresh dry powder, the older generation of funds are coming to the end of their contractual terms and are faced with the challenge of extracting liquidity from their historic portfolios. For these funds, the uncertainties are less welcome. One of the many unique factors about an investment in a private equity fund is that such funds are closed-ended and so, by definition, have an end point. Happily, there are sophisticated investors with recently filled war chests who are seeking to exploit the availability of secondary investments in funds and their assets. That presents a rather complex set of challenges with which we anticipate the industry will be heavily occupied in the days ahead.

Pressure on fees, or at the very least on the ability to be innovative about fees, remains the area in which investors feel that their interests with fund managers could be better aligned. For fund managers, and for law firms that consider themselves genuinely to be in partnership with their fund manager clients, this should be an encouragement to be innovative: to embrace the benefits of technology in order to improve internal efficiency so that services can be provided more profitably at lower costs. Take-up among fund managers and their counsel alike has been remarkably languid, but it seems inevitable that the days of traditional approaches to fee generation are numbered.

We consider below the key trends for both old and new funds.
i Restructuring end-of-term funds

Each year we run a rule over the funds that we help to raise. The relatively unique vantage point enjoyed by us as offshore counsel allows us to see the huge cross-section of funds that run the entire spectrum in terms of size, strategy and jurisdictional focus. One notable conclusion that emerges from our analysis is the degree to which the documentation for funds at the time of their launch is remarkably homogenous.

Whatever those similarities at the time of formation, however, by the time that a fund has reached the end of its life, the nature of its investors, their particular imperatives and concerns, the relationship between the investors and the fund manager, and the state of the fund’s investment portfolio are entirely distinct. All this means that lawyers advising their clients on how best to approach the end-of-life scenario need to have a number of tools at their disposal. In an industry so heavily influenced by arguments as to what is on-market or industry-standard, the need for creative thinking and the ability to consider and implement innovative structures mean that the year ahead promises to be refreshing for lawyers.

The most interesting funds to consider are those that are near the end of their contractual term but that retain significant assets that, either because of the state of the global markets or because of factors unique to the particular assets, do not lend themselves readily to disposal. Inevitably, there will be investors looking for end-of-term liquidity and there will be those who prefer to exploit the prospect of the long-term generation of value. Assets may need significant additional investment before their value can be fully realised. In addition, fund managers may be in a position where the effect of the fund’s contractual terms on their ability to generate fees for completing the work required simply means that interests are no longer aligned. Balancing those competing interests can be a supreme test for fund managers; however, managed properly, a fund restructuring can achieve that balance by providing liquidity for those who seek it without forcing a fire-sale exit from the assets themselves.

Not all funds lend themselves to restructuring transactions. The investor group may be too disparate in terms of interest, or the assets simply not suitable. Often, a simple extension of the fund’s term will do the trick, affording the manager the extra time needed to tie up loose ends. Or it may simply be that allowing the fund to click over into winding-up mode is perfectly sensible: Cayman law does not impose timetables for winding up and the process may take as little or as much time as makes sense given all the circumstances. Fund managers may find the generation of fees is adversely affected, but where assets do not require particularly active management, that is of no great consequence. However, where there is a significant pool of assets, and in particular assets that will require active management and investment to achieve their value potential, then a restructuring offers the best solution for managers and investors alike.

Of course, in all this, the usual imperatives apply: for legal counsel, an understanding of the client’s commercial context, the need to preserve and entrench long-term relationships with investors, and careful analysis of the likely effect of any proposed course of action. For fund managers, more than ever, communication in relation to a restructuring is critical; it is imperative to explain in detail the reasons for and objectives of the transaction, and to provide transparency as to the manager’s motives and incentives. Fiduciary issues will be thrown into stark contrast. Cayman law does afford contracting parties the ability to manage those issues to an extent, but effective agreement between contracting parties relies on disclosure of the relevant conflicts. Provided that disclosure is full and fair, the risk that disgruntled investors may seek redress will be capable of management.
**New fund trends**

For new funds, a world of often baffling uncertainty abounds, and managers, replete from a successful few years’ fundraising, are now tasked with deploying their capital to take advantage of volatility as it arises. When we compare the most recent round of fundraising with that of the previous generation, one of the clearest differences has been the institutionalisation of the industry. Again using the offshore counsel’s perspective, we are able to view this trend by examining its effect on a broad range of funds.

**Fund size**

Apart from large leveraged buyout funds, we have witnessed effective fundraising for a number of smaller, more specialised funds. Historically, these funds would often have been formed by new fund managers seeking to exploit a unique selling point. However, barriers to entry for new fund managers are now prohibitive. The regulatory compliance burden, the imposition of European-style waterfalls as standard, the narrowing of mandates by institutional investors and the broader context of volatility have meant that these smaller funds, many of which are brand new in terms of teams and very focused in terms of strategy, are being raised under the umbrella of the large institutional fund managers.

**Fund strategies**

Fund strategies show something similar, from a different perspective. Comparing recent years, we see what we would expect in terms of traditional large funds generating very predictable returns over the short to medium term for institutional investors. Of particular interest has been the growth in distressed debt and work-out structures and, more recently, the debt-origination and direct lending funds and the much-discussed displacement of ordinary banks as providers of credit continues. In part, these funds fill the holes left by traditional lenders. However, more positively, they look to leverage unique industry knowledge and more flexible balance sheets.

Some of the challenges presented by new strategies are well illustrated by the relationship between these credit and lending funds and the energy funds sector. There are significant transactions between the two and this has generated a sort of microclimate within the funds industry, where exposure to the global energy markets and geopolitical uncertainty have been amplified as a consequence. What is encouraging for an industry that has had a consequential double exposure to changes in the price of oil is that energy valuations have been better than expected and the long-term prognosis is more optimistic.

Something that has gained momentum recently is the interest in access fund structures that afford investors of more modest means to invest in private equity assets where historically the ticket price would have been too high: a consequence of the success of closed-ended asset managers as compared to open-ended hedge funds has meant that the demand on the part of individuals and other investors on the retail end of the spectrum has increased. For an industry seeking new capital in addition to the traditional sources from pension funds, endowments and sovereigns, an access structure or being able to tap into mutual fund capital or 401k platforms presents opportunities.

At the other end of the spectrum, challenges associated with the cost of regular rounds of fundraising, the benefits of being able to pursue strategies without being concerned about end-of-life fire sales and pressure from very long-horizon investors such as pension funds and endowments to manage capital over longer periods, have all meant that some interest...
in very long-dated (and even evergreen) funds has seen a revival. The prosaic economics of compensation mean that only the large institutional funds are really able to sustain these sorts of models.

iii Regulatory trends

The pre-eminent position of the Cayman Islands as the jurisdiction of choice for offshore private equity fundraising is long-established. Cayman offers a flexible statutory regime within a common law system renowned for its sensible approach to commercial disputes. Nowhere is this better illustrated than in the response to changes in the global investment and regulatory context. Regulatory transparency and a robust anti-money laundering regime provide peace of mind to investors and regulators alike, but these are now a given for credible jurisdictions. The implementation of legislation to enforce intergovernmental agreements relating to the US Foreign Account Tax Compliance Act and Common Reporting Standard reporting has been well documented and these provisions have simply become an inevitable part of the investment funds landscape.

The Cayman Islands have continued to refine our approach to anti-money laundering, and the updates to practice and procedure in this regard published recently by the Cayman Islands Monetary Authority preserve Cayman’s position as the avant garde in terms of a practical, risk-based approach to preserving the integrity of the capital raised and deployed by investment entities.

iv Fund structuring

Remaining relevant and innovative in response to market reality, as well as being credible, is critical to the world’s most prominent financial institutions and international investors, which is why most see Cayman as the favoured tax-neutral jurisdiction for private equity funds. Key to this market is the existence of architecture that allows fund sponsors to structure and manage entities with many investors, a variety of strategies, and multiple layers of efficient and effective debt and equity in a multinational environment.

In this context, Cayman legislation and regulation continue to be responsive to trends and challenges in current market practice. An active partnership between the government and the private sector ensures the development of legislation, and recent amendments to the law have streamlined procedures for raising and managing Cayman-based funds, going some way to addressing long-standing concerns about the delineation of the lines of general partners’ fiduciary duties.

In particular, Cayman is the first significant common law jurisdiction to offer a limited liability company (LLC) product. LLCs occupy an interesting jurisprudential territory somewhere between a company and a partnership, exhibiting properties of both in a way that affords a skilled and experienced draftsman significant flexibility. The Cayman LLC is based very closely on the traditional Delaware model, although it leans more towards English common law when delineating fiduciary responsibilities, affording a degree of clarity and contractual certainty that many practitioners have welcomed.

In response to the anticipated trend for fund restructuring discussed above, Cayman will shortly be amending its Exempted Limited Partnership Law to provide partners with the tools they need to restructure funds in innovative ways. In particular, the introduction of statutory processes to merge and amalgamate funds, and to propose schemes of arrangement, and exploit Cayman’s position of being an English jurisdiction in an American context, will draw the best from both legal systems.
I  OVERVIEW OF M&A ACTIVITY

Since Mauricio Macri took office in December 2015, with the clear intent of shifting policy towards a pro-business model, investors have shown a renewed interest for opportunities in Argentina.

While the country still needs to go through some critical and long-term structural reforms, the current government is encouraging investment in several sectors, including technology, agribusiness, energy and infrastructure. Within this context, the Argentine economy still benefits from reasonable, well-priced commodities (in particular, agricultural commodities), an educated workforce and a strong entrepreneurial community.

Thus, it is expected that the rise in M&A activity evidenced since December 2015 will keep growing during the next few years, albeit subject to the ups and downs typically observed in emerging markets.

II  GENERAL INTRODUCTION TO THE LEGAL FRAMEWORK FOR M&A

The Argentine capital market is relatively small, lacks sufficient depth, has limited liquidity and is subject to regulations that are just now in the process of being modernised to meet international standards. Further, most Argentine public companies generally have a minority portion of their capital floating in the capital markets (between 10 and 30 per cent). Accordingly, public M&A transactions in Argentina are not frequent.

As a result of the foregoing, most of the M&A activity is done through private deals. These may involve shares, assets or a combination thereof. Share deals are preferred to asset deals.

Share deals are undertaken through stock purchase agreements that generally follow international standards for private transactions. These agreements can be subject to foreign law and jurisdiction (including foreign arbitration tribunals). This is generally the case in transactions for high-end Argentine companies. However, there are some aspects that will necessarily depend on and be governed by Argentine laws (e.g., matters relating to the consummation of transactions, certain matters covered by local securities regulations, labour laws, regulatory requirements, etc.).
Assets deals (such as the bulk transfer of assets) are less common in Argentina (1) for tax reasons (as further detailed below), which, in general, make such transfers expensive as the transfer of each asset is subject to a different set of taxes, and (2) because of timing concerns.

Public M&A transactions that involve the acquisition of a controlling stake may require the acquirer to launch a tender offer to all the minority shareholders in the target company. A mandatory tender offer is not required when the acquisition of a ‘significant ownership’ does not entail acquiring the control of a company (i.e., more than 50 per cent of the voting securities or de facto control) or when a change of control occurs as a result of a merger or a spin-off. The tender offer shall contemplate a ‘fair value’, which is a term currently being redefined by new regulations.

On a separate note, corporate foreign shareholders must register at the Public Registry of Commerce to be able to hold shares of a company incorporated in Argentina. A foreign shareholder must submit certain corporate and accounting information to obtain registration (it must also submit certain other documents every year to maintain the registration). Basically, a foreign shareholder is required to provide evidence that – either directly or indirectly – it owns substantial assets outside Argentina. Offshore companies may be restricted, and companies incorporated in ‘tax havens’ are not accepted except under certain limited circumstances. The new Capital Markets Law has introduced a significant change in this regard by eliminating the registration requirement for foreign shareholders, stipulated in Section 123 of the General Business Organizations Act, when the target company is listed on the stock market.

### III DEVELOPMENTS IN CORPORATE AND TAKEOVER LAW AND THEIR IMPACT

There have been no major amendments in corporate and takeover law in recent years, other than as described above.

Certain amendments introduced by the Macri administration to the foreign exchange regime have been critical to the development of the M&A market, in particular the elimination of foreign exchange restrictions to acquire foreign currency and for the transfer of proceeds outside Argentina (including dividends or other profits).

Congress has approved a law to eliminate the 10 per cent tax on dividends imposed pursuant to Law No. 26,893.

Finally, Congress has approved a new public–private partnership (PPP) law. This regime seeks to replace the existing regulatory frameworks, which failed because of technical defects and the critical legal, institutional and economic context affecting Argentina during the past few years. The new law is ambitious and includes various protections in favour of the private sector (contractors and lenders) to effectively foster the development of these associative schemes and generate massive infrastructure investments.

### IV FOREIGN INVOLVEMENT IN M&A TRANSACTIONS

As already mentioned, up to December 2015, foreign investment in Argentina decreased sharply as a result of a high level of state intervention in the economy, coupled with a shortage of foreign exchange, which resulted in the former (Kirchner) government freezing all outflow
of dollars from Argentina. As a result, companies were not allowed to transfer monies abroad (such as in the form of dividends, royalties or payments for services) and thus foreign investment was drastically reduced.

In this context, most M&A activity involving foreign investors was related to the exit of foreign investors from Argentine assets because of the economic difficulties or as a result of multinationals leaving the region.

Following the election of a more pro-business government in December 2015, foreign investor appetite has increased and we are now seeing a renewed interest in Argentina. While the arrival of foreign investments is still moderate, there is a clear increase in the volume of M&A activity and the size of transactions.

Local and foreign hedge and private equity (PE) funds are particularly active and have closed transactions in the last three years in different sectors: energy (including oil and gas and renewable energy), agribusiness, infrastructure and real estate.

There are no specific required approvals for foreign investments either through PE funds or other types of foreign investments (other than antitrust approval, if applicable). However, depending on the type of portfolio company, activity or industry, as a general rule, certain investments may be subject to prior (or, in some cases, subsequent) approval by different regulatory agencies.

In some regulated industries, such as financial services, insurance, telecommunications, aviation, oil and gas, mining, utilities, companies and utilities, the approval of the applicable regulatory authority is necessary to transfer either the control of, or a relevant portion of the shares of, a company operating in those industries. Investments in real estate (rural lands or land adjacent to country borders) may in certain cases require regulatory approval, and restrictions may apply for foreign entities or individuals.

These processes generally involve the filing of detailed information about the acquirer company, and the various formalities (e.g., translations, legalisations, specific forms) will depend on the type of agency. The timing will also depend on the regulatory agency involved in the process (typically, this may take more than three months to complete).

V SIGNIFICANT TRANSACTIONS, KEY TRENDS AND HOT INDUSTRIES

As already discussed, between 2003 and 2015 (under the Kirchner administration), M&A activity was extremely modest, both in terms of the number of deals and deal volumes, because of limited foreign direct investment (inbound). In contrast, during the same time period, many other countries in the region (in particular Brazil, Mexico, Colombia, Peru and Chile) experienced an increase in foreign direct investment and a resulting increase in M&A activity.

During those years, the M&A market in Argentina was marked by less sophisticated transactions, and deal amounts were far below the average in the region. Only a few transactions have come close to, or crossed, the US$1 billion barrier (YPF, Telecom Argentina, Apache). Instead, most deals closed at a price below US$100 million.

To restore confidence in the (local and international) business community and attract investments, the new Macri administration quickly addressed some of the most urgent economic and legal issues the Kirchner administration had either created or failed to address. Before completing six months in office, Macri, inter alia, ended more than 12 years of legal dispute with the holders of Argentine sovereign debt in default, put Argentina back into international capital markets, eliminated taxes on certain exports and eliminated several foreign exchange restrictions (including on the transfer of dividends to foreign parent
companies). While it is expected that the deal flow in Argentina will increase significantly in the coming years, there is already a clear renewed interest in Argentine assets, and we have seen steady growth in the number of deals closed.

In our experience, there is an increased appetite for renewable energy (incentivised by a new special law); PE funds have already closed several deals in this sector. Additionally, several players have compromised investments in the renewable energy sector for more than US$6 billion following a series of auctions conducted by the government.

The recovery in the oil prices should also trigger renewed interest in oil and gas assets (including the shale oil and shale gas projects in Vaca Muerta (see also Section X)). Recently, for example, ExxonMobil and Qatar Petroleum signed a deal for a record investment in Vaca Muerta. International trader Trafigura has also completed a couple of deals to start its downstream operation in Argentina (including in association with its affiliate, Puma Energy).

Further, the offshore bidding round being organised by the government to award exploration permits over offshore blocks is expected to generate substantial foreign investment. In this regard, the bidding procedure established under the Hydrocarbons Law is currently in a preliminary phase. Blocks will be awarded in the Austral, West Malvinas and the northern portion of the Argentina Basin, covering around 200,000 square kilometres.

The agribusiness sector also offers opportunities, and commodities prices have been recovering well in the past few years. This sector is critical to the Argentine economy, as it will trigger a cascade effect on the industrial and services sectors (in which deal volume remains modest).

The aforementioned new PPP law is also expected to foster investments in infrastructure.

VI FINANCING OF M&A: MAIN SOURCES AND DEVELOPMENTS

Acquisition financing originated in Argentina is very limited and costly. As a result, most foreign investors (including PE funds operating in Argentina) usually obtain their funding from foreign investors, including a wide variety of foreign institutional investors, pension funds, banks, hedge funds, multilateral institutions and individuals. Some PE funds incorporated abroad but managed by Argentine managers obtain funding from local family offices, private individuals and some investment companies. Local banks, insurance companies and government agencies do not normally invest in PE funds, and there are currently no regulations to promote or provide incentives for this.

Generally speaking, local portfolio companies are funded mainly through capital contributions. Therefore, debt obtained from foreign sources is used to a lesser degree, and local financing is available, although it may not cover all the financial needs of the portfolio company.

Interest under a debt has the advantage of being tax deductible. The Argentine Central Bank regulations contemplate that, under certain circumstances, some loans may need to be reported to the Bank. Currently, there are no foreign exchange regulations applicable to lending transactions or otherwise.
VIIL EMPLOYMENT LAW

In the case of the assignment of a business, all liabilities in relation to employees will be transferred to the purchaser. If an employee is seriously affected by the assignment of a business, it is possible for that employee to consider him or herself in a position of constructive dismissal. The same applies in the case of the leasing or temporary assignment of a business.

The transferor and transferee (on any title) will be jointly and severally liable for the obligations deriving from the labour relationships that exist at the time of the transfer or assignment of a business. The transfer of personnel (without the establishment) shall only be carried out with the written consent of the affected employees.

The main effect of the assignment of a business is that the former employer is replaced by the purchaser or successor. It is not necessary that employees consent to the transfer.

A change of employer has consequences with respect to all the employment relationships that are in force, not only to all current labour relationships but also to those in which the obligation to effectively render services has been temporarily suspended (e.g., if personnel are on holiday or on sick leave).

A purchaser or successor may not oppose an employee whose services were suspended for any reason at the moment of the assignment of a business, even if the purchaser or successor has not been informed by the previous employer of the suspension.

The labour conditions currently in force regarding the assignment of a business, such as the office location, working hours and salaries, should be maintained by the purchaser or successor without prejudice to the legitimate right of the employer to modify labour conditions in the future within the limits established by the applicable labour law.

Pursuant to the mandatory case law, a purchaser or successor of a business is liable for the transferor’s obligations that derive from employment relationships that were terminated before the transfer. This implies that the purchaser or successor shall even be liable for the labour credits of previous employees who have worked for the transferor within the statute of limitations period, which for labour credits is two years.

Under the applicable law, an employee may consider him or herself to be in a situation of constructive dismissal if the assignment of a business causes serious damage to him or her – for example, if he or she was working for an economically sound company and, as a result of the assignment of the business, he or she has to start working for a markedly insolvent company. The sole fact of the assignment of a business to a purchaser or successor does not mean that the employee can automatically consider that he or she is subject to constructive dismissal.

In the case of the purchase of the stock of a corporation, there would be no assignment of a business, since the employer (the corporation) would remain the same no matter who the shareholders are.

According to the majority of local legal scholars, the transferor of a business does not assume any liability for the labour obligations of the purchaser or successor after the date of transfer. All liabilities with respect to employees shall be assigned to the purchaser or successor in interest.
VIII TAX LAW

Capital contributions are not subject to any tax in Argentina as long as the company receiving the contribution is located in the City of Buenos Aires or a province that does not apply stamp tax (which some provinces do).

Holdings of shares issued by Argentine companies when the holder is a foreign resident are subject to a 0.25 per cent personal assets tax on their percentage net equity on 31 December every year. The Argentine company is liable for the tax, but it has a claim against the foreign shareholder for the amounts paid. Under recent National Supreme Court case law, branches of foreign companies are not subject to this tax.

Dividends distributed by Argentine companies to their foreign shareholders are subject to withholding tax depending on when the distributing company earned the profits out of which the dividends are paid. For fiscal years beginning on or before 31 December 2017, there is no withholding tax (provided the profits have been taxed at company level). For fiscal years beginning on or after 1 January 2018 and until 31 December 2019, dividends are subject to a 7 per cent withholding tax. For fiscal years beginning on or after 1 January 2020, dividends are subject to a 13 per cent withholding tax.

In a share deal, capital gains arising from the transfer of shares issued by an Argentine company (including redemption) are subject to a 15 per cent income tax when made by a foreign resident. In the case of a non-resident entity, the transferor may opt to pay a 13.5 per cent tax on the transfer price. If both the transferor and the transferee are non-resident entities, the local representative of the transferor is liable to pay the tax. Stamp tax on the share transfer agreement may be avoided through a letter offer agreement in most provinces.

Capital gains tax also applies to transfers of shares of entities above the direct shareholder, but only when the transferred shares were acquired on or after 1 January 2018.

Transfers of assets as a going concern are subject to various taxes depending on the asset. The transfer of all sorts of assets is subject to income tax on any capital gain. For fiscal years beginning between 1 January 2018 and 31 December 2019, the income tax rate will be 30 per cent. For fiscal years beginning on or after 1 January 2020, the income tax rate will be 25 per cent. The transfer of real estate is subject to stamp tax at a rate of around 4 per cent, depending on the province where the real estate is located; the tax is customarily shared (half by the seller, half by the purchaser). The transfer of fixed movable assets is subject to VAT at a rate of 21 per cent (10.5 per cent on machinery and similar equipment). The transfer of inventory is subject to VAT at a rate of 21 per cent (10.5 per cent on some agricultural products) and to gross turnover tax (at a rate of around 3 per cent, but this depends on the province to which the tax basis is allocated). In all cases, the agreement is subject to stamp tax, but this may be avoided through a letter offer (with the exception of transfers of real estate and automobiles). As already stated, the tax is customarily shared by the seller and purchaser.

IX COMPETITION LAW

A new antitrust law was passed by Congress in May 2018.

An important change introduced by this new law lies in the timing for auditing mergers and acquisitions. The old regime established an *ex post* control (i.e., transactions where reviewed after closing), whereas the new law establishes an *ex ante* control (i.e., transactions are now reviewed prior to closing).

The Antitrust Law requires that transactions in which the ‘aggregate business volume’ of all companies involved therein in Argentina is higher than 100 million mobile units (which
is roughly equivalent to US$80 million (as at May 2018) be approved by the Antitrust Authority before closing. The ‘aggregate business volume’ means the amounts resulting from the commercial activity and direct subsidies received by the companies involved in the transaction during the last financial year, corresponding to their ordinary business, and calculated on an after-tax basis.

Authorisation will have to be obtained from the Antitrust Authority for the transaction to enter into force between the parties and to be effective with regard to third parties. Failure to request and obtain authorisation, or if authorisation is not granted by the Antitrust Authority, shall render the transaction void, without prejudice to any sanction that may be applicable in the case of rejection.

The Antitrust Authority shall make the request for approval public, so that interested parties can submit objections. Within 120 days of the request being made public, the Antitrust Authority will have to decide whether to (1) approve the transaction, (2) approve the transaction subject to certain conditions or (3) reject the transaction. Failure to issue a decision within 120 days shall be regarded as an unconditional authorisation by the Authority.

Transactions closed prior to obtaining the Antitrust Authority’s authorisation will render the companies involved subject to fines, regardless of the Authority’s decision regarding the transaction. If the Authority finds that it was a prohibited transaction under the Antitrust Law, the companies will have to divest the acquired assets. The transactions subject to review and approval are:

a. mergers;
b. the bulk transfer of assets, including transfers of ongoing concerns;
c. the purchase or acquisition of any interest in stock, equity participations or debt instruments convertible into stock, or equity participations that provide the right to influence the decisions of the issuer thereof, when, in either case, the purchaser of the same obtains through the acquisition of those securities or equity interests, the ‘control’ of or a ‘substantial influence’ on the issuer; and
d. other transactions that entail a de facto transfer or a dominant influence upon the decisions of the company in question.

The law does not contain any specific definition of ‘substantial influence’. However, recent rulings by the Antitrust Commission have concluded that the right to appoint a certain number of directors, or the right to appoint key officers or the existence of supermajorities are relevant factors for deciding in a particular case whether the buyer of a non-controlling interest in a company nevertheless acquires a ‘substantial influence’ therein.

During the first year of the Antitrust Authority being established, notice of any of the transactions subject to prior review and approval may be filed with the Antitrust Authority either prior to their consummation or within ‘one week’ of closing.

However, until the Antitrust Authority is created, and the aforementioned one-year period elapses, the old antitrust regime will continue to apply.

Companies involved in a potential transaction may submit their situation to the advisory opinion of the Antitrust Authority, which will determine whether the proposed transaction should be submitted for authorisation.

Significant changes to the previous regime are being introduced. Even though transactions were only considered valid between parties and with regard to third parties upon review and approval under the old antitrust regime (a requirement that continues under the
new regime), approval could be obtained after closing. The only real obligation of the parties was to notify the authorities either before closing or within a week of closing. Failure to notify was penalised with fines.

Although failure to obtain the required prior approval and denial of the approval after closing did not entail the imposition of penalties insofar as the filing had been made within the specified deadlines, by consummating the transaction without approval, the parties assumed the risk that approval could be denied or conditional, thus resulting in a need to divest the acquired assets totally or partially.

X OUTLOOK

As has been outlined, the change of administration in December 2015 triggered a change in expectations that should translate into the renewed interest of foreign investors in Argentina.

The government has clearly indicated that one of its main goals is to attract foreign investments. This goal requires some pending structural changes, including those aimed at reducing the fiscal deficit and high inflation rates, reducing labour costs and improving quality standards within government institutions.

Infrastructure and energy are both in need of investment and, to that effect, the government has launched a public auction to construct projects to provide more than 1,000 megavolts of energy from renewable sources (mainly solar and wind). Additionally, Vaca Muerta (a rock formation in the province of Neuquén where a large oil and natural gas discovery was made in 2010 – it is considered to be one of the largest shale fields in the world) has attracted a lot of attention from foreign investors, which have positioned themselves in the area and are waiting for pricing conditions to develop.
I OVERVIEW OF M&A ACTIVITY

As a recent study in M&A Review Issue 1-2/2018 reports, Austria saw approximately 409 deals in 2017, an increase of 4.9 per cent from 2016. This makes 2017 one of the top years since 1988, with the years 2000 to 2007 being the strongest, peaking in 2005 with over 500 deals. According to the EY M&A-Index Austria 2017, deal volume rose from €10.7 billion in 2016 to €14.7 billion in 2017, such rise being mainly driven by:

- the takeover offer by Vonovia to BUWOG shareholders (€5.6 billion);
- the acquisition of UPC Austria by T-Mobile Austria (€1.9 billion);
- the acquisition of a stake in the Russian gas field Yuzhno-Russkoye by OMV (€1.7 billion); and
- the acquisition of a real estate portfolio of RFR-Holding GmbH by SIGNA (€1.5 billion).

Due to these large transactions, the average deal volume of all M&A transactions involving Austria rose from €30.2 million to €42.7 million.

The statistics published in M&A Review show that in 2017:

- 31 per cent of the deals were domestic (compared to 37 per cent in 2016);
- 33 per cent were outbound (acquisitions of foreign targets by Austrian investors, compared to 44 per cent in 2016);
- 24 per cent were inbound (acquisitions of Austrian targets by foreign investors, compared to 17 per cent in 2016); and
- 11 per cent involved only an Austrian seller, but a foreign target and a foreign buyer (compared to 3 per cent in 2016).

According to the EY M&A-Index Austria 2017, 28 per cent of inbound acquisitions were made by German investors, while 32.6 per cent were made by investors from other European countries. Thus, 60.6 per cent of all foreign investors were European. In terms of transaction volume, European investors accounted for 90.3 per cent, and German investors for 86.8 per cent.
II GENERAL INTRODUCTION TO THE LEGAL FRAMEWORK FOR M&A

The main corporate law statutes are the Stock Corporation Act and the Limited Liability Company Act for corporations, and the Enterprise Act for partnerships. The Takeover Act and the Stock Exchange Act are relevant for listed companies (in relation to, public takeovers, stake-building, ad hoc disclosures, insider trading, etc.), whereas for private companies they do not apply. Merger control issues are governed by the Cartel Act, unless the EU Merger Regulation applies. In relation to corporate reorganisations, such as mergers, spin-offs and squeeze-outs, in particular the EU Merger Act, the Demerger Act, the Shareholder Squeeze Out Act and the Transformation Act complement the general corporate law statutes, while from a tax perspective the Reorganisation Tax Act provides for roll-over treatment under certain conditions. From a general tax perspective, the Corporate Income Tax Act as well as the Individual Income Tax Act are of most relevance, with, inter alia, transfer taxes being primarily subject to the Stamp Duty Act and the Real Estate Transfer Tax Act. In the employment law area, the Labour Constitution Act and the Act on the Amendment of Employment Contracts (AVRAG) are to be taken into account. In addition, for specific industries, sector-specific laws apply, such as the Banking Act, the Insurance Supervisory Act or the Telecom Control Act.

III DEVELOPMENTS IN CORPORATE AND TAKEOVER LAW AND THEIR IMPACT

In 2017 and early 2018, the amount of public M&A activity had been substantial. Some of the transactions are covered below, in particular relating to the real estate sector. Among others, the increase in partial takeover bids has been notable in recent years. These aim to stay below the formal control threshold of 30 per cent (unless lowered in the articles of association, as implemented by several Austrian companies in particular in the recent past), which triggers a mandatory bid obligation for all shares in the target, or are even limited to only 26 per cent, which is the ex lege cap of exercisable voting rights (unless another shareholder holds voting rights in excess of that threshold or a bid is launched). Often, though, they are followed by subsequent bids, which usually trigger a mandatory offer.

Another recurrent topic is access to documents and information to conduct due diligence. In this context, certain differences depend on the legal form in which the target is established.

As a general rule, third parties do not have a right to obtain information from the stock corporation besides those pieces of information that are publicly available. A board is thus not obliged to disclose confidential information to a prospective buyer. Even shareholders have very limited information rights. They can request financial statements, including the management report, as well as the supervisory board report. Furthermore, shareholders have an individual information right at the shareholders’ meeting in relation to the agenda, and to the extent such information is necessary to properly assess an agenda item. Given that such information will usually not suffice for the purposes of due diligence by a potential investor, shareholders will often request the management to disclose additional information. The decision on the disclosure of confidential information, and thus the decision on the admission or refusal of a due diligence, is a management measure, and thus generally does not require the consent of the supervisory board or the shareholders. The management has to avoid any damage to the company, and must consider all potential advantages, risks and disadvantages. Positive impacts may include, for example, new or cheaper means of financing,
access to new customers or markets, access to product or technical know-how, and advantages for the company’s production or procurement. Negative impacts could arise if, for example, a competitor or a major supplier or customer of the target can access the information. The decision to allow due diligence is not necessarily an ‘all-or-nothing’ decision; the greater the interest of the company in due diligence, the more sensitive the data that can be disclosed. The interest of shareholders also has to be taken into account by the management, whereby shareholders should generally be treated equally in equal situations. Another aspect to consider is the time frame. The more advanced the stage of the acquisition process, the more comprehensive and detailed the information that can be made accessible to the buyer. Due diligence will mostly only be permitted if the buyer’s intention to commit to a purchase has become more concrete, for example by signing a letter of intent. At the same time, the prospective buyer should also sign a nondisclosure agreement.

The situation for limited liability companies is generally comparable to that of stock corporations. Although its shareholders have only limited access to information rights, the Austrian Supreme Court states that every shareholder has to be granted a comprehensive information claim. Therefore, managing directors are, in general, obliged to provide requested information to shareholders. However, this information claim does not apply without restriction. The purpose of the comprehensive information right is to monitor managing directors, to control the business situation of the company and to prepare for general meetings. This information claim should thus only be used for these objectives. Accordingly, there is some legal argument in Austria that the information claim would not include a due diligence for the sale of shares; meanwhile, others argue that managing directors may not deny access to documents or information for purposes of a due diligence. Overall, a due diligence claim by a shareholder of a limited liability company must be honoured, if and to the extent that it is essential for selling the shares to a potential buyer, and the shareholder’s request is not a misuse of the law (e.g., if the shareholder intends to avoid disclosure of the information to a prospective buyer), but only to the extent that is necessary to sell the shares, and only insofar as the interests of the company are not negatively affected. Regarding the question of what information the seller is allowed to share with a potential buyer, the company’s confidentiality interests must be carefully weighed against the shareholder’s interests in the dissemination of information, and will often require a shareholder resolution (at least in scenarios in which the sale of the shares is subject to shareholders’ approval). The shareholders of a limited liability company are subject to the duty of loyalty to the company and to the other shareholders. The nature of such duty of loyalty among the shareholders means paying due regard to the legitimate interests of the other shareholders even when exercising their voting rights.

M&A data protection is also in the spotlight. The General Data Protection Regulation (GDPR) came into effect on 25 May 2018. For the seller side in an M&A process, there are important GDPR concerns to be aware of. During a due diligence, there are potential risks of data and privacy breaches, when sensitive information is shared between potential buyers and the seller company. For the buyer side, the company’s GDPR compliance or readiness must be taken into account during the due diligence process if the potential acquisition target does business in Europe or deals with data related to European citizens, even if the company does not have a physical office location in the EU. The GDPR is a comprehensive set of rules and regulations, and there are several important steps organisations must carry out in order to comply, such as a classification of all personal data being processed by a company, performance of risk assessments, implementation of specific processes, and notifications of the competent authorities and – in some scenarios – the individuals who have been affected.
by a breach. Further, individuals have important rights under the GDPR (such as the right to be informed, the right of access and rectification, right of data portability, etc.). To avoid fines for non-compliance, companies will need to have an in-depth understanding of where personally identifiable information is stored and processed throughout the organisation and will have to transfer such information into a record of all processing activities. Various opening clauses provide Member States with discretion to introduce additional national provisions to further specify the application of the GDPR. In this context, the Austrian legislation provides that declarations of consent to the processing of personal data lawfully obtained according to the current data protection framework shall remain valid under the GDPR if such declarations also comply with the new regulations of the GDPR. As Austrian case law has already been rather strict in this respect in the past, it can be expected that the need to adapt existing declarations of consent may be lower in Austria compared to other European countries. Compliance can potentially be very expensive, and these costs should be considered very carefully when it comes to the purchase price of a target company. Further, fines related to non-compliance with the GDPR can be very high – in some cases up to 4 per cent of the company’s prior year worldwide revenue or up to €20 million. Based on the announcement that the staff of the Austrian data protection authority will be increased significantly, it can be assumed that breaches of the GDPR will soon be dealt with seriously.

IV FOREIGN INVOLVEMENT IN M&A TRANSACTIONS

Under the Foreign Trade Act, the acquisition of an interest of 25 per cent or more, or a controlling interest in an Austrian business by a foreign investor (for the purposes of this law, that is an investor domiciled outside of the EU or the EEA and Switzerland; if the investor is resident in these regions or country, no advance approval is required, but ex officio investigations can be initiated without time limit) is subject to advance approval by the Austrian Minister of Economic Affairs where that business is involved in internal and external security (e.g., defence and security services) or public order and security, including public and emergency services, such as hospitals, emergency and rescue services, energy and water supply, telecommunications, traffic or universities and schools. Transactions subject to approval cannot be completed pending approval. Failure to obtain approval is subject to imprisonment and criminal penalties.

The acquisition of ownership and certain lease interests in real estate by non-EEA nationals or the acquisition of control over companies owning such interests is subject to notification or approval by the local real estate transfer commission. What interests are covered and whether notification or approval is required varies among the pieces of legislation of the nine states in Austria. Where the real estate is used for commercial rather than residential purposes, approvals are usually granted.

In regulated industry sectors (e.g., banking, insurance, utilities, gambling, telecoms or aviation), the acquisition of a qualified or a controlling interest is typically subject to advance notification to, or approval of, the competent regulatory authority. Sanctions for failure to notify or obtain approval in advance range from monetary penalties to a suspension of voting rights or a partial or total shutdown. Although such rules also apply to domestic investors, they usually are a more burdensome hurdle in the cross-border context.
V SIGNIFICANT TRANSACTIONS, KEY TRENDS AND HOT INDUSTRIES

i Real estate
In 2017, activity in the real estate sector continued to be remarkably busy. Most notably, Vonovia made its takeover offer to BUWOG shareholders, the largest announced transaction in Austria in 2017. The takeover offer was accepted by over 70 per cent of the shareholders by early 2018. Listed company S IMMO was also in the spotlight: investor Ronny Pecik acquired a total of 21.86 per cent of S IMMO shares in two tranches, and SIGNA, Austria’s largest privately owned real estate company, acquired options on these shares. Rather surprisingly, Ronny Pecik and SIGNA sold their shares to listed Immofinanz, which also owns 26 per cent of CA Immo, but which has abandoned its plans to merge. In Germany, SIGNA launched a takeover offer for Kaufhof for €3 billion. Recently, Starwood Capital Group launched tender offers for a 26 per cent stake in CA Immo and a 5 per cent stake in Immofinanz.

Besides the public M&A segment, many private transactions regarding real estate companies can also be reported. SIGNA has shown significant deal activity: it sold the office construction project ‘The Icon Vienna’ to Allianz Real Estate for over €500 million. Further, SIGNA sold three office buildings belonging to ‘Austria Campus’ to PGIM Real Estate for €530 million. In buy-side transactions, SIGNA acquired, *inter alia*, a real estate portfolio in Germany from RFR for €1.5 billion comprising assets in Berlin, Hamburg, Frankfurt and Munich.

ii Financial services
There were some major financial services transactions in 2017. easybank, a subsidiary of BAWAG, purchased the Austrian credit and pre-paid card business from financial service provider Six to continue the business under the brand ‘Paylife’. Walser Privatbank sold its subsidiary Raiffeisen Privatbank Liechtenstein to Hong Kong-based Mason Group for 58.6 million Swiss francs. Arca Capital acquired a 61 per cent stake in publicly listed Wiener Privatbank for €36.9 million, with closing expected to occur in 2018. Liechtensteinische Landesbank AG (LLB) agreed to acquire Semper Constantia Privatbank from Hans Peter Haselsteiner and other investors for a consideration of €185 million. Closing is expected to happen in July 2018, and Semper Constantia will thereafter be merged with LLB. Austrian retail bank Volksbank Wien AG acquired Austrian cooperative bank SPARDA-BANK AUSTRIA eGen. Austrian pension fund VBV-Pensionskasse AG acquired EVN-Pensionskasse Aktiengesellschaft, an Austrian pension fund manager, from listed Austrian energy company Energie-Versorgung-Niederösterreich AG. Finally, Chinese HNA Group agreed to acquire an 88.1 per cent stake in C-QUADRAT Investment AG, an Austrian asset management company.

iii Telecoms, media and IT
There were several telecoms and media transactions in 2017. Most notably, T-Mobile Austria, a subsidiary of Deutsche Telekom, acquired UPC, an Austrian company providing broadband internet, cable television and telephony services, from Liberty Global for €1.9 billion. Other telecoms companies were busy as well: Hutchinson Drei acquired its competitor Tele 2 for €95 million, thereby expanding its offering to many business clients. Telekom Austria, which is majority-owned by telecoms giant América Móvil, increased its participation in its Macedonian subsidiary one-Vip to 100 per cent by acquiring a 45 per cent share previously held by Telekom Slovenije for €120 million.
Media transactions included Dentsu Aegis’ acquisition of media.at GmbH, Austria’s second-largest media agency, from A1 Telekom, Österreichische Lotterien, Österreichische Post, BAWAG and Industriellenvereinigung. Media house Kurier acquired the regional television station Schau-TV from Schau Media Wien.

Swiss pharmaceutical giant Roche acquired Austrian app provider MySugr, thereby increasing its presence on the diabetics market. Following the sales of Runtastic and Shpock, the MySugr transaction was the third large sale of an Austrian app provider within two years. Insight Venture acquired a majority stake in Vienna software company Tricentis. The investment was made by the subscription of new shares and by the purchase of existing shares from existing shareholders. Dialog Semiconductor Plc, a listed UK supplier of mixed signal and system level integrated circuit solutions for wireless, automotive and industrial applications, acquired the Austrian LED backlight technology and product portfolio of ams AG, a listed Austrian designer and manufacturer of high-performance analogue and mixed signal solutions. Listed German XING AG acquired Prescreen GmbH, an Austria-based developer of HR recruiting software, from Kizoo Technology Ventures. Listed France-based Schneider Electric SA acquired nxtControl GmbH, an Austrian developer of automation software and hardware, from Austrian private equity firms TecNet Equity and eQventure. Listed German Bechtle AG agreed to acquire Ulbel & Freidorfer GmbH, an Austrian provider of IT solutions. Private equity firm Castik Capital acquired a majority stake in inet-logistics GmbH, an Austrian software provider for transport management, freight costing, container management and transportation analytics, from transport and logistics company Gebrüder Weiss Gesellschaft mbH.

Austrian Siemens subsidiary Convergence Creators, a provider of digital transformation solutions, was acquired by French IT service provider Atos. German Autoscout24 GmbH, a subsidiary of Scout24 group, acquired the Styrian advertising portal gebrautuchwagen.at. Recently, THQ Nordic AB, a Swedish developer and publisher of PC and console games, acquired Koch Media GmbH, an Austrian producer and marketer of digital entertainment products and accessories, from private investor Lars Wingefors for a consideration of €121 million.

**Machinery and plant engineering, industrial goods**

Swiss plant manufacturer ABB acquired the Austrian automation specialist Bernecker & Rainer for US$2 billion. RHI Magnesita sold two dolomite rock plants in Italy and Spain to German Intocast AG. The transaction was made to fulfil merger-control requirements imposed by the European Commission in connection with the RHI/Magnesita merger. In another deal, RHI sold its subsidiaries in Italy and Russia to Livia. In a buy-side transaction, RHI Magnesita acquired Swedish Agellis Group, thereby expanding its offering in measurement technology. TowerBrook Capital Partners acquired pulp manufacturer Schweighofer Fiber from Schweighofer group. Listed UK company Synthomer plc agreed to acquire the Austrian Styrene Butadiene Rubber business of listed German chemical company BASF SE for a consideration of €30 million. Germany-based KSG Leiterplatten GmbH acquired Häusermann GmbH, an Austrian manufacturer of printed circuit boards and input systems. PIA Automation Holding GmbH agreed to acquire M&R Automation GmbH, an Austrian developer and manufacturer of custom-made production lines and testing systems for the automotive, electronics, consumer goods, pharmaceutical and medical industries, from German private equity firm Quadriga Capital. German private equity fund DPE Deutsche Private Equity Management III GmbH acquired a 70 per cent stake
in VTU Holding GmbH, an Austria-based engineering company that designs plants for the processing industry. Recently, listed ALTEN Group acquired the Austrian engineering company Kämmerer GmbH through its German subsidiary ALTEN Europe.

v Retail and food

MTH Retail Group acquired Swiss office supplies company OWiba AG from Migros-Genossenschafts-Bund. Austrian supermarket chain Spar purchased the Croatian Billa supermarkets from German REWE Group. AVAG Holding SE, a German owner and operator of automotive dealerships, acquired eight automotive dealerships from Austrian car dealer Wiesenthal. Food producers were also sought-after targets. Vivatis purchased frozen food producer Frisch & Frost from Lamb Weston/Meijer and Raiffeisen Ware Austria. Hannover Finanz acquired a stake of over 30 per cent in Sporternährung Mitteregger, a producer of food supplements for athletes. Ankerbrot purchased a 65 per cent stake in wholesale bakery Linauer & Wagner. The sale of BackWerk Group by private equity investor EQT to Swiss strategic investor Valora also had a local angle, since Austria is one of its five markets outside Germany. In the retail sector, the takeover bid by Chinese Fosun Group for the listed lingerie specialist Wolford attracted much attention. In this transaction, Fosun outbid private equity investor OpCapita in the final stage of a process initiated by Wolford majority shareholders in connection with a restructuring plan. In connection with such purchase, a public takeover bid for all outstanding shares in Wolford had been launched. On the sell side, OpCapita is expected to sell fashion retailer NKD Group through an auction process involving Austria and other CEE jurisdictions, as these are among their main markets outside Germany.

vi Energy

Listed Austrian oil and natural gas group OMV acquired a 25 per cent stake in the Russian gas field Yuzhno-Russkoye for €1.7 billion. In another large transaction, OMV sold its Turkish service station chain for €1.37 billion to VIP Turkey Enerji, a company of the Vitol Group. Furthermore, OMV acquired a 40 per cent stake in SMATRICS GmbH & Co KG, a provider of charging points for electric cars, from listed Austrian energy company Verbund AG. Chinese listed United Energy Group acquired Pakistan oil and gas assets through the purchase of an Austrian subsidiary of OMV.

vii Transport and traffic

Austrian national railway company ÖBB and Swiss rail vehicle manufacturer Stadler Rail set up a joint venture for the maintenance and repair of the Westbahn rail vehicles. F List, a producer of aircraft equipment, expanded its business by acquiring the assets of OHS Aviation Services, a German company, under insolvency proceedings. Vueling Airlines SA, a Spain-based airline, agreed to acquire NIKI Luftfahrt GmbH, an Austria-based provider of airline services, in an insolvency and auction transaction, which had been contested and eventually led to the purchase of NIKI by its former founder and Formula One legend Niki Lauda. In another transaction, Niki Lauda agreed to sell a 75 per cent stake in LaudaMotion GmbH, an Austria-based airline operator, to listed Irish low-cost carrier Ryanair Holdings Plc. Wanfeng Aviation Industry, a China-based aviation company, acquired Diamond Aircraft Industries GmbH, an Austrian manufacturer of general aviation aircraft and motor gliders, from the Austrian investor Christian Dries.
Construction and the construction materials industry

Wienerberger has had a busy year with regard to acquisitions: the Austrian construction materials company expanded its brick business in Romania by acquiring a 98.3 per cent stake in Brikston Construction Solutions SA from ADM Capital. In the United States, Wienerberger purchased facing brick producer Columbus Brick through its subsidiary General Shale. SEMMELROCK International GmbH, a subsidiary of Wienerberger, agreed to sell its Austria-based paver business to Süd Bayerisches Portland-Zementwerk Gebr Wiesbök & Co GmbH, a Germany-based manufacturer of cement, concrete, sand and gravel. Listed Austrian construction company PORR AG agreed to acquire G Hinteregger & Söhne Baugesellschaft mbH, an Austrian construction company, from Brandstetter and Hinteregger families, for a consideration of €29.8 million. Austrian building materials manufacturer Schmid Industrie Holding AG agreed to acquire w&p Baustoffe GmbH, an Austria-based company that manufactures plaster, mortar, screeds and paints for building construction, from Austrian cement producer WIG Wietersdorfer Holding GmbH. Sweden-based incubator Sdiptech AB agreed to acquire a 51 per cent stake in Aufzüge Friedl GmbH, an Austria-based company engaged in the installation and servicing of elevators, and ST Lifsysystems GmbH, an Austria-based company engaged in manufacturing compact lifts. Saudi Arabian Amiantit Company Group, a construction company manufacturing pipe systems, tank systems, valves, water wells, manholes and rubber components, and Austrian cement producer WIG Wietersdorfer Holding GmbH, agreed to form a 50:50 joint venture.

Healthcare

Swiss private equity firms Capvis Equity Partners and Partners Group Holding AG agreed to acquire a majority stake in Amann Girrbach AG, an Austria-based original equipment manufacturer of laboratory equipment for dental technicians and dental laboratories, from US private equity firm TA Associates Management. Listed French company Orpea SA agreed to acquire Dr Dr Wagner GmbH, an Austrian operator of nursing homes, rehabilitation hospitals and health spa hotels. Austrian private equity firm aws-mittelstandsfonds Management GmbH, along with the management of AMI Agency for Medical Innovations GmbH, an Austrian developer and manufacturer of medical products and surgical equipment, acquired the company in a management buyout transaction.

Other industries

Austrian packaging group Constantia Flexibles sold its labels division to US Multi-Color Corporation for €1.15 billion. Constantia Flexibles may become a target itself in 2018. Austrian binderholz Group acquires German wood manufacturer Klenk Holz from Carlyle Group. Salesianer Miettex GmbH, an Austrian provider of laundry services, agreed to acquire Wozabal Management GmbH, an Austrian textile and workwear rental company, for an estimated consideration of €70 million. French private equity firm Ardian agreed to acquire a majority stake in CCC Holding GmbH, an Austrian provider of business process and outsourcing solutions, from UK private equity firm Silverfleet. An interesting aspect of this transaction is the fact that Ardian had sold CCC to Silverfleet in 2013.
VI FINANCING OF M&A: MAIN SOURCES AND DEVELOPMENTS

Corporates have found that the financing environment has somewhat improved, in particular for those with strong financials. Banks are also more active in approaching blue-chip companies, so financing opportunities for acquisitions are rather good.

The financing environment for buyout transactions has remained more or less unchanged, and is quite different for domestic market participants (as opposed to international players), which typically seek financing from domestic banks, and international financial sponsors, which are able to tap international banks (at least on large-cap deals). Leverage levels for large-cap transactions have gone up slightly to around 5 times EBITDA, and relative debt-to-equity ratios of 40 to 50 per cent. Small to mid-cap transactions are sometimes financed through equity alone, or by domestic or German banks. Leverage levels and relative debt-to-equity ratios generally tend to be lower for small to mid-cap transactions than for large-cap deals.

Where leverage is employed on small and mid-cap transactions, there is usually only senior and institutional debt, as mezzanine structures tend to add another layer of complexity that is often not supported by the limited transaction size. On large-cap transactions, mezzanine financing is sometimes considered but, given the limited transaction size, is ultimately seldom employed. High-yield instruments are usually only considered for post-completion refinancing, as the time and cost involved tend to be disproportionate to any gains on the pricing side.

Experience shows that certain limitations under Austrian corporate law are often unexpected for foreign investors when structuring a deal, particularly in relation to intragroup (financing) transactions: Austrian law generally prohibits the return of equity to shareholders (i.e., up and side-stream transactions) of both a limited liability company as well as a stock corporation (and is applied by the Austrian courts by analogy to limited partnerships with only a limited liability company or stock corporation as unlimited partner). Based on this principle, Austrian courts have established that a company cannot make any payments to its shareholders outside arm’s-length transactions except for the distributable balance sheet profit, in a formal reduction of the registered share capital or for the surplus following liquidation.

The prohibition on return of equity covers payments and other transactions benefiting a shareholder where no adequate arm’s-length consideration is received in return. To the extent a transaction qualifies as a prohibited return of equity, it is null and void between the shareholder and the subsidiary (and any involved third party if it knew or should have known of the violation). It may result in liability for damages. Most of the above principles are also applied by the Austrian courts by analogy to limited partnerships with a limited liability company or stock corporation as (the sole) unlimited partner.

Austrian courts have developed case law suggesting that a subsidiary may lend to a shareholder, or guarantee or provide a security interest for a shareholder’s loan, if it:

- receives adequate consideration in return;
- has determined (with due care) that the shareholder is unlikely to default on its payment obligations, and that even if the shareholder defaults, such default would not put the subsidiary at risk; and
- that the transaction is in the interest of the Austrian subsidiary (corporate benefit).

In addition, the Austrian Stock Corporation Act prohibits a target company from financing or providing assistance in the financing of the acquisition of its own shares or the shares of...
VII EMPLOYMENT LAW

In the case of a transfer of a business within the meaning of the Act on the Amendment of Employment Contracts implementing Directive 2001/23/EC on safeguarding employees’ rights on transfers of undertakings, businesses or parts of businesses (Transfer of Undertakings Directive), the employment relationships of the employees associated with the business transfer together with the business to the purchaser (Section 3 Act on the Amendment of Employment Contracts). Employees can object to the transfer of the employment relationship within one month if the purchaser does not maintain dismissal protection pursuant to a collective bargaining agreement or take over pension commitments based on a single contract. This does not apply if the seller ceases to exist (e.g., in the case of a legal merger).

The Austrian Supreme Court has held that a dismissal of employees in the course of an asset sale (both by the seller and the acquirer) is against good morals (bonos mores) unless there are valid economic, technical or organisational reasons unrelated to the asset sale. If dismissals occur in close proximity to an asset sale, there is a (rebuttable) presumption that such exceptions do not apply. In addition, the general rules of Austrian employment law concerning appeals against dismissals apply.

There is no special protection against a dismissal in the context of a share sale (i.e., where not the business as such but the company is transferred). Only general rules of Austrian employment law concerning appeals against dismissals apply.

Another area of interest to investors is whether there are obligations to inform or consult employees or their representatives, or to obtain employee consent to a share sale or an asset sale. If a works council is established at the target company, the target company must inform the works council in accordance with Section 109 of the Labour Constitution Act, and consult with the works council on request in relation to a share deal. If no works council is established, no information or consulting requirements apply. In relation to an asset deal, the following has to be observed: the Labour Constitution Act provides for information and consultation rights of the works council in general, as well as specifically in relation to certain transactions and changes to a business. The information must be given sufficiently in advance, in writing and in a manner that allows the works council to assess the relevant transaction or change. The information must specifically include the reason for the transaction or measure, and the legal, economic and social consequences as well as any associated measures that may affect employees. The works council must be given an opportunity to comment on the transaction and propose measures mitigating adverse effects for employees. Where no works council is established, an asset sale only triggers information requirements if a transfer of a business is concerned. In that case, the seller or the purchaser must provide certain information to the employees affected. Affected employees do not, however, have consultation rights. There is no obligation to obtain the consent of the employees affected. However, where by operation of Section 3 of the AVRAG a transfer of a business results in the transfer of an employee to the purchaser together with the business, the employee can object to the transfer in certain limited circumstances (see above).
VIII TAX LAW

As there is no tax exemption for capital gains realised from the sale of shares in an Austrian company (as opposed to shares in a foreign company), foreign investors will often choose an acquisition vehicle in a foreign country with which Austria has concluded a double taxation treaty that provides that only such other jurisdiction is entitled to tax the capital gains.

On the other hand, an Austrian acquisition vehicle allows the establishment of a tax group between the acquisition vehicle that incurred the debt and the target, which enables the purchaser to offset the interest expenses for the acquisition from the operational profits of the target. In general, non-Austrian corporations may also be part of an Austrian tax group, and their respective losses may reduce the Austrian tax burden under certain circumstances.

Furthermore, foreign investors will usually opt for structures that avoid or minimise withholding tax. Dividends and interest payments are generally subject to withholding tax of 27.5 per cent. However, limitations and exemptions apply under domestic law as well as applicable tax treaties. In particular, withholding tax on dividend payments to non-Austrian investors is typically subject to the limitations under the EU Parent–Subsidiary Directive and applicable double taxation treaties. Interest payments on loans to non-Austrian lenders are, in principle, no longer subject to Austrian withholding tax, as the previously applicable withholding tax in the case of loans that were secured by real estate located in Austria has been abolished.

Debt-financed acquisitions should be structured carefully to secure the deductibility of interest as well as the offsetting of such interest expenses from business profits of the target company. A new regime provides for non-deductibility of interest expenses in Austria if the interest is not taxed at the level of the related party lender at an effective tax rate of 15 per cent or more. It is worth noting, however, that there are no statutory rules on thin capitalisation in Austria. From a practical perspective, tax authorities usually accept debt-to-equity ratios of around 3:1 to 4:1. Besides the non-deductibility, the breach of such ratio would also result in interest payments being treated as deemed dividends, which – unlike interest on shareholder loans – would be subject to withholding tax in Austria (see below). Finally, it is worth noting that there is currently no interest barrier rule providing for a general limit on the deductible amount of interest expenses paid to unrelated parties (see below).

Besides the developments mentioned above, tax audits in relation to M&A deals are becoming more common and burdensome. In particular, transfer pricing issues, for example, in relation to interest on shareholder loans or certain fees payable to related entities, are under scrutiny. Accordingly, tax rulings are also becoming more popular.

Recent proposed changes in tax legislation, including controlled foreign countries rules and the introduction of a legal definition for abuse of law, are expected to have an effect on transaction structures. In this context, the inclusion of the existence (or non-existence) of an abuse of law in the scope of binding tax rulings is likely to have high practical relevance. In Austria, and different to other EU Member States, the introduction of an interest barrier rule foreseen under the BEPS Anti-Avoidance Directive has been deferred for now. Accordingly, financing structures with unrelated parties should not be challenged by the tax authorities. If combined with intragroup financing, limitations, in particular thin capitalisation and the arm's-length principle, have to be observed.
IX  COMPETITION LAW

The following types of concentrations are subject to merger control (intragroup transactions are exempt) under the Austrian Cartel Act:

a  the acquisition of an undertaking or a major part of an undertaking, especially by merger or transformation;
b  the acquisition of rights in the business of another undertaking by management or lease agreement;
c  the (direct or indirect) acquisition of shares, if thereby a shareholding of 25 per cent or 50 per cent is attained or exceeded;
d  the establishment of interlocking directorships where at least half of the management or members of the supervisory boards of two or more undertakings are identical;
e  any other concentration by which a controlling influence over another undertaking may be exercised; and
f  the establishment of a full-function joint venture.

A concentration must be notified to the Federal Competition Authority (FCA) if the following cumulative thresholds, which in an international comparison context are rather low, are fulfilled (based on the revenues of the last business year): the combined worldwide turnover of all undertakings concerned exceeds €300 million; the combined Austrian turnover of all undertakings concerned exceeds €30 million; or the individual worldwide turnover of each of at least two of the undertakings concerned exceeds €5 million.

However, even if the above thresholds are satisfied, no obligation to notify exists if the Austrian turnover of only one of the undertakings concerned exceeds €5 million; or the combined worldwide turnover of all other undertakings concerned does not exceed €30 million.

For calculating the turnover thresholds, the revenues of all entities that are linked with an undertaking concerned as defined under the Cartel Act are considered one entity (thus the turnover of a 25 per cent subsidiary must be attributed fully). Indirect shareholdings only have to be considered if the direct subsidiary (of at least 25 per cent) holds a controlling interest in the indirect subsidiary. Revenues of the seller are disregarded (unless the seller remains linked with the target undertaking as defined under the Cartel Act). Specific provisions for the calculation of turnover apply for mergers in the banking, insurance and media sectors.

Transactions that are notifiable in Austria may have an EU dimension under Article 1 of Regulation (EC) No. 139/2004 on the control of concentrations between undertakings (Merger Regulation). In that case, the European Commission generally has sole jurisdiction to assess such case. However, the Cartel Act contains specific rules regarding media mergers, which require a filing with both the European Commission and the FCA.

The relevant merger authorities in Austria are the FCA and the Federal Cartel Prosecutor, collectively referred to as the official parties; and the Cartel Court.

The official parties assess notifications in Phase I proceedings. Should a notification raise competition concerns, either official party may apply to the Cartel Court to open Phase II proceedings. Decisions of the Cartel Court may be appealed before the Supreme Cartel Court. The Competition Commission is an advisory body that may give (non-binding) recommendations to the FCA as to whether to apply for an in-depth Phase II investigation of a notified transaction.
A notifiable transaction must not be implemented prior to formal clearance. Possible sanctions for the infringement of this suspension clause are that the underlying agreements or acts are declared null and void, or the undertakings may be fined up to 10 per cent of their worldwide annual turnover (by the Cartel Court on application of the official parties).

Non-compliance with remedies imposed on the parties is equivalent in seriousness to breaching the suspension clause and may lead to similar fines.

A merger must be prohibited if it is expected to create or strengthen a market-dominant position. An undertaking is generally considered market-dominant for that purpose if it can act on the market largely independently of other market participants (the Austrian Cartel Act contains a rebuttable presumption of market dominance if certain market share thresholds are achieved). Even where a merger is expected to create or strengthen a market dominant position, it must nevertheless be cleared if either it will increase competition, and therefore the advantages gained by implementing the transaction will outweigh the disadvantages; or it is economically justified and essential for the competitiveness of the undertakings concerned.

A media merger will be assessed not only against its compatibility with the competition rules, but also as to its adverse effects against media plurality.

**OUTLOOK**

It is rather difficult to predict the remainder of the course of 2018, due to macroeconomic developments (e.g., Brexit) that may change the current investment environment in Europe and internationally. Generally, the first quarter of 2018 was active, based on the assumption that the economy remains stable, and the Austrian M&A market should continue its strong performance. This outlook is also supported by the fact that private equity firms hold substantial cash reserves to be invested, and that many of their portfolio companies are overdue to be sold again.
I OVERVIEW OF M&A ACTIVITY

After two years of economic downturn, Brazil’s economy experienced modest growth in gross domestic product (GDP) of 1 per cent in 2017. M&A activity followed this lead. According to PricewaterhouseCoopers, there were 643 transactions in 2017, which is equivalent to 8 per cent more than the 597 deals concluded in 2016. Non-Brazilian investors conducted 251 transactions, representing a 2 per cent decrease compared to the 255 deals recorded in 2016, and private equity activity was up to 147 transactions among Brazilian and non-Brazilian investors.

Deals announced in 2017 with Brazilian involvement included:

a. Banco Itaú Unibanco’s acquisition of XP Investimentos for 6.3 billion reais and of Citibank Brasil for 710 million reais;
b. the acquisition of ThyssenKrupp CSA by Ternium for €1.2 billion;
c. Brookfield’s 2.42 billion reais acquisition of Odebrecht Ambiental, which operates in the basic sanitation sector; and

d. Raízen Energia’s 823 million reais acquisition of Santa Cândida and Paraíso mills, which were held by Tonon Bioenergia.

While political uncertainty remains, especially given the forthcoming presidential and congress elections next October, the beginning of the economic recovery provides the market with a positive scenario for M&A activities in 2018. In terms of value, the first quarter of 2018 exceeded the same period in 2017, resulting in an increase of 6.86 per cent. However, the number of transactions decreased in the first quarter of 2018; a total of 210 transactions were announced (a 19.84 per cent decrease compared to the number of transactions announced in the same period in 2017).
Deals announced to date in 2018 include the 36.7 billion reais transaction involving the combination of operations of Fibria Celulose and Suzano Papel, the more than 5 billion reais public tender offer by Enel for the acquisition of Eletropaulo, and the 1.95 billion reais acquisition by Didi Chuxing of 99, a mobile transportation and urban mobility platform.

II GENERAL INTRODUCTION TO THE LEGAL FRAMEWORK FOR M&A

M&A is regulated mainly by the Brazilian Corporation Law,6 and rules, regulations, opinions and precedents of the Brazilian Securities Commission (CVM) (the CVM Regulations), including:

a  CVM Rule No. 319 (mergers involving public companies);
b  CVM Rule No. 358 (disclosure of material information by public companies);
c  CVM Rule No. 361 (tender offers);
d  CVM Rule No. 481 (disclosure of information prior to shareholders’ meetings and proxy solicitations);
e  CVM Rule No. 561 (remote participation and voting of shareholders at shareholders’ meetings);
f  CVM Rule No. 565 (disclosure requirements for M&A transactions);
g  CVM Rule No. 567 (disclosure requirements regarding share buyback programmes and transactions with own shares);
h  CVM Rule No. 568 (use and disclosure of information of significant investments in listed companies);
i  CVM Rule No. 570 (application of remote voting rules);
j  CVM Opinion No. 34 (conflicts of interest);
k  CVM Opinion No. 35 (fiduciary duties);
l  CVM Opinion No. 36 (poison pills); and
m  in the case of companies listed on the Novo Mercado or Level 2 listing segments of B3 (the São Paulo Stock Exchange), the corresponding listing rules (in addition to tax, antitrust and regulatory rules).

M&A deals involving solely closely held companies are only subject to the provisions of the Brazilian Corporation Law (excluding those exclusively applicable to publicly held companies). Transactions that involve public companies, in addition to the CVM Regulations, are also regulated by the applicable listing rules.

Foreign investment is restricted in certain industries as follows:

a  aviation: non-Brazilian capital is now limited to 20 per cent of the voting capital, and no nationality restriction is applied on the appointment of officers;
b  public services: telecommunications, electric energy, gas distribution and rail transport, to name but a few public services in Brazil, are provided directly by the government (especially by means of state-owned companies) or indirectly, with the execution of concessions agreements, permissions or authorisations with private parties that become responsible for the provision of such services, in accordance with the relevant rules applicable to each of them. As a rule, non-Brazilian investment is allowed, subject to certain restrictions (for instance, transfers of control of public service concessionaires may be subject to prior government approval;

6  Law No. 6,404 of 15 December 1976.
Brazil

real estate: acquisition of rural land in Brazil by foreigners is subject to certain restrictions, which may apply to Brazilian companies where the majority of the capital is held or controlled by foreigners (e.g., prior authorisation from a Brazilian government authority may be required for title transfer);

d mining: non-Brazilian investment must be made through a Brazilian entity, with mining in national border zones being restricted (transfers of mining rights are also subject to prior government approval);

e oil and radioactive minerals are a Brazilian state monopoly; oil-related activities by private or state-owned companies are subject to concession or authorisation;

radio and television broadcasting and journalistic companies: foreign capital is limited to 30 per cent of the company's capital; and

g banking: subject to the prior approval of the government (transfers of control of financial institutions or of significant stakes therein are also subject to prior government approval).

III DEVELOPMENTS IN CORPORATE AND TAKEOVER LAW AND THEIR IMPACT

Brazil's general takeover law did not undergo major amendments during 2017. On 2 January 2018, however, the new version of the Novo Mercado listing segment rules (the New Rules) came into force, with certain provisions already in effect that impact on specific tender offer proceedings. Essentially, the New Rules aimed to demonstrate B3’s intention to simplify the tender offer proceedings; adapt tender offers to the market’s reality; and reduce the extensive provisions once considered mandatory in the by-laws of companies listed with the Novo Mercado. The main changes can be summarised as follows.

The previous Novo Mercado rules (the Previous Rules) set a relative presumption of control for any shareholder, or group of shareholders, that holds shares enough to ensure an absolute majority of the votes in the last three shareholders’ meetings, even if such shares do not represent an absolute majority of the company’s total voting capital. This presumption was excluded from the New Rules, and the concept of control must follow the Brazilian Corporation Law.

A mandatory tender offer as a result of an acquisition of control is still an obligation under the Novo Mercado. Pursuant to the Previous Rules, in the case of an acquisition of control by several different transactions, the purchaser was required to pay the difference between the price of the tender offer and the amount paid for shares acquired by the purchaser in a stock exchange in the six-month period prior to the date of such acquisition of corporate control, which it is not necessary under the New Rules.

As to a delisting tender offer (DTO) from the Novo Mercado, pursuant to the New Rules, the prior approval of the delisting by a shareholders’ meeting is no longer required. The DTO must be accepted (or the delisting consented to) by more than one-third of the free float shares unless a higher quorum is set forth in the company’s by-laws. Furthermore, the requirement to launch a DTO may be even waived by a shareholders’ meeting installed in the first call with the presence of at least two-thirds of the free float shares and approved by the majority of holders of the free float shares attending the meeting. With respect to the price of the DTO, the rules of CVM Rule 361 will be generally applicable, as opposed to the

7 Shares not held by the controlling shareholders, its related persons and the management, and treasury shares.

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Previous Rules, which had several specific provisions applicable only to companies listed on the Novo Mercado. The New Rules also eliminate the possibility that holders of the free float shares had to elect the appraiser that would determine the economic value of the company (for purposes of the price to be paid under the DTO) based on a list of three prospective appraisers recommended by the board of directors. Therefore, the price per share of the DTO must be fair (based on book value, market value of the company’s assets, discounted cash flow, comparable multiples, market value or any other criteria accepted by CVM), and it can be challenged by minority shareholders with at least 10 per cent of the company outstanding shares, according to the Corporation Law.

Concerning a tender offer for the cancellation of a company’s registry as a publicly traded company, pursuant to the New Rules, it will follow the relevant proceedings set forth in CVM Rule 361, as opposed to the Previous Rules, which had a set of specific provisions applicable for such tender offer.

Finally, with respect to the board of directors’ report required 15 days counted as of the release of a tender offer’s public notice, according to the New Rules, in addition to its convenience, opportunity and strategic plans (which were provided under the Previous Rules), it must also state the available alternatives to the acceptance of the tender offer in the market, aiming to allow investors to be informed about the potential implications of choosing whether or not to participate in the relevant tender offer.

IV FOREIGN INVOLVEMENT IN M&A TRANSACTIONS

In 2017, Brazil experienced a slight downturn in foreign involvement in transactions. Non-Brazilian investors saw a decrease in the number of transactions – 251 transactions up to December 2017 – which represents a decrease of 2 per cent when compared to the 255 transactions in 2016.\(^8\)

Foreign investors took a leading role in major transactions announced in 2017. Examples of significant foreign investment in Brazil included the 2.35 billion reais acquisition of 25 per cent of Campo de Roncador by Statoil, which was announced in December 2017.

In April 2017, Brookfield (through its affiliates) completed the acquisition of 90 per cent of NTS Nova Transportadora do Sudeste, a company that operates a network of pipelines in southeast Brazil, with the payment of US$4.23 billion.

In August 2017, Neoenergia and Elektro Holding, both Brazil-based energy companies held by Spain-based Iberdrola, completed a merger to create a new electricity company in Brazil. The deal value was 4.26 billion reais.

In October 2017, Lala Derivados Lácteos completed the 5.02 billion reais acquisition of Vigor Alimentos, an important Brazilian player in the field of dairy products and processed foods.

In November 2017, State Grid completed its acquisition of 94.76 per cent of CPFL Energia, by means of a public offer, in an amount of 11.3 billion reais.

The ongoing Operation Car Wash investigation is expected to continue to drive M&A activity involving distressed assets, strengthening foreign investors’ long-term interest in such investments.

V SIGNIFICANT TRANSACTIONS, KEY TRENDS AND HOT INDUSTRIES

Some of the most active target sectors involved in announced M&A deals in 2017 in Brazil were education, financial, industrial (transportation and infrastructure), energy and power (including oil and gas).

In the education sector, the US-based private equity Warburg Pincus acquired 27.07 per cent of Eleva Educação (which develops activities in Brazil’s basic education sector) for approximately 300 million reais, through its Brazil-based subsidiary WP Búzios.

In the financial sector, Banco Santander Brasil acquired 39.35 per cent of Santander – Serviços Técnicos, Administrativos e de Corretagem de Seguros, an insurance brokerage unit, for 533.54 million reais. In addition, Zerrenner Foundation, one of the largest shareholders of the brewer Ambev, acquired a 5.76 per cent stake in Itaúsa for 4.5 billion reais.

In the industrial sector, China Merchants Port, through its subsidiary Kong Rise Development, has completed its acquisition of 90 per cent of TCP, a company that operates Terminal de Contêineres de Paranaguá, located in Paraná state, Brazil, in an amount of 2.9 billion reais.

With respect to the energy and power sector, in November 2017, State Grid completed the acquisition of 94.76 per cent of CPFL Energia, by means of a public offer, in an amount of 11.3 billion reais.

VI FINANCING OF M&A: MAIN SOURCES AND DEVELOPMENTS

It is common knowledge that the cost of credit in Brazil remains prohibitively expensive.

Acquisitions are usually funded via securities offerings (debt and equity) and bank loans, or via both. Private equity investment funds are also used as vehicles for funding in specific cases.

Furthermore, local financing is generally not available in all industries. Inbound cross-border investments are typically financed outside Brazil. Leveraged buyouts are not usual, although in certain cases (especially where the buyer is a local private equity fund) pre-acquisition debt is pushed down to the target following the closing (subject to certain conditions or requirements in cases in which the target is a listed company).

Security for acquisition financing normally consists of shares of the target company and guarantees of the acquiring group.

VII EMPLOYMENT LAW

In 2017, the government decided to foster and stimulate foreign investment and production in the industrial, commercial and services areas. Two laws brought innovations in Brazil: the Labour Reform Law and the New Migration Law.

i Labour Reform Law

The Labour Reform Law was sanctioned on 13 July 2017, amending several articles of the Brazilian Labour Code and of Laws No. 6,019/1974 (temporary employment), No. 8,036/90 (FGTS, the severance fund) and No. 8,212/1991 (INSS, social contributions).

9 Law No. 13,467, of 13 July 2017.
The Labour Reform Law grants greater autonomy to parties to negotiate, for example:

a the termination of an employment agreement, which may be performed by mutual agreement;

b the means to settle individual conflicts, which may be performed by arbitration; and

c the type or method of agreement; whether a worker will be contracted as a self-employed worker or contracted to perform intermittent work; and whether the work is on-site or remote (home office), etc.

**ii New Migration Law**

The New Migration Law establishes the rights and duties of migrants and visitors, regulating their entrance and stay in Brazil. The revoked Law No. 6,815 of 1980 did not include the innovations the new Law has brought from the point of view of human rights, promoting the fight against xenophobic views that immigrants represent a threat to internal security or to the job market, and in this sense welcoming refugees and displaced people, aiming also to impose non-discrimination in general by guaranteeing equal conditions for aliens and natives. The types of visa include visitor, temporary, diplomatic, official and complimentary visas.

**VIII TAX LAW**

This section presents general matters regarding the ultimate beneficial owner (UBO) disclosure requirements taking into account the recent rules enacted by the Brazilian Internal Revenue Service (RFB).

Normative Instruction No. 1,634, dated 6 May 2016, issued by the RFB (NI 1,634), regulates the information that must be provided to the RFB in order for foreign investors incorporated as entities (NRIs) to obtain a national taxpayer identification number (CNPJ), which is required for an NRI to invest in the Brazilian financial and capital markets pursuant to the mechanism set forth by Resolution No. 4,373, dated 29 September 2014, of the Brazilian Monetary Council (4,373 investment and 4,373 investor); and also for the NRI to directly invest in Brazilian-resident legal entities pursuant to the mechanism set forth by Law No. 4,131, dated 3 September 1962 (4,131 investment and 4,131 investor).

When applying for a CNPJ, any prospective NRI must provide information regarding the respective legal representative in Brazil and its shareholding chain if it reaches an individual (natural person) that is deemed to qualify as its UBO; or any entity listed by Paragraph 3 of Article 8 of NI 1,634, which are exempt from disclosing the respective UBO (exempt entities).11

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11 The following are listed as exempt entities: (1) legal entities incorporated as publicly-held company in Brazil or incorporated in countries that require public disclosure of all relevant shareholders and that are not incorporated in favorable tax jurisdictions or submitted to a privileged tax regime; (2) not-for-profit entities that do not act as fiduciary managers and that are not incorporated in favourable tax jurisdictions or submitted to a privileged tax regime, as long as they are regulated and inspected by a competent governmental authority; (3) multilateral organs, central banks, governmental entities or those related to sovereign funds; (4) social security entities, pension funds and similar institutions, as long as they are regulated and inspected by a competent governmental authority in Brazil or in their country of origin; (5) Brazilian incorporated investment funds regulated by the CVM, as long as the Brazilian Individual Taxpayers’ Registry or the CNPJ of the respective quota-holders is informed to the RFB; (6) investment funds specially incorporated to manage complementary pension plan resources as well as insurance plans if regulated and inspected by the qualified public authority in its country of origin; and g collective
According to Article 8 of NI 1,634, an individual is deemed the UBO of the 4,373 or 4,131 investor if he or she ultimately, directly or indirectly owns, controls or have significant influence over the entity, or is the individual on behalf of which a transaction is conducted. For the purposes of such rules, significant influence is deemed to exist whenever an individual owns more than 25 per cent of an entity's capital stock, directly or indirectly; or an individual directly or indirectly has or exercises preponderance in corporate resolutions, and has the power to elect the majority of an entity's directors, even without controlling it.

Furthermore, if the shareholding chain of a certain 4,373 or 4,131 investor reaches one of the listed exempt entities, there is no obligation to disclose the UBO.

In addition to NI 1,634, the RFB issued Declaratory Act No. 09, dated 23 October 2017 (ADE 09/2017, jointly with NI 1,634 (UBO Regulation)), to further regulate the application of the UBO disclosure requirements. To do this, ADE 09/2017 classifies the entities subject to UBO disclosure rules in three different categories: entities exempt from disclosing the UBO (group 1), entities resident abroad (group 2) and Brazilian-resident entities (group 3).

Group 1 entities correspond to the exempt entities listed by Paragraph 3 of Article 8 of NI 1,634. ADE 09/2017 provides that such entities are not obliged to provide information regarding the respective UBO considering their particular features, despite the information regarding the legal representative. Nonetheless, note that such waiver is only applicable if the 4,373 or the 4,131 investor qualifies as an exempt entity itself. On the other hand, group 2 entities are further categorised into three subcategories: those that obtain a CNPJ through the RFB; those that obtain a CNPJ through the Brazilian Central Bank; and those that obtain a CNPJ through CVM. The information to be presented depends on the tier that the entity is ranked in.12

Besides information, the UBO Regulation may also require some documents to be presented to the RFB up front, depending on the qualification of the 4,373 or the 4,131 investor, which must be reviewed on case-by-case basis. Furthermore, note that there are deadlines for presenting the information and documents requested under the UBO Regulation.13 Failure to comply with the UBO Regulation may result in the suspension of a CNPJ, and the consequent inability of the 4,373 or 4,131 investor to carry out transactions in Brazil.

12 ADE 09/2017 provides four tiers for entities qualified under this subgroup – each one of the entities are required to comply with different disclosure obligations.
13 The deadline depends on the type of investment and whether the 4,373 or 4,131 investor obtained the respective CNPJ prior to or after the enactment of NI 1,634.
IX  COMPETITION LAW

The competition rules did not undergo any major amendments during 2017. However, Administrative Council for Economic Defence (CADE) decisions in certain complex M&A transactions have demonstrated a more rigorous approach in the analysis of those cases. CADE’s decisions have also established clearer criteria for the definition of associative agreements.

The year’s highlights include the signature of a memorandum of understanding between CADE and the Central Bank of Brazil (BACEN) aimed at coordinating merger and conduct investigations in the financial sector to avoid conflicting decisions.

i  CADE’s rigorous analysis of M&A transactions

The antitrust authority blocked three mergers in 2017. This number represents a record since the new competition regime came into force five years ago.

The first case rejected by CADE’s Tribunal in 2017 was the proposed acquisition of Estácio Participações by Kroton Educacional. In August 2017, the Tribunal unanimously blocked Ipiranga Produtos de Petróleo’s proposed acquisition of fuel distributor Alesat Combustíveis. In October 2017, CADE also blocked the proposed acquisition of JBJ Agropecuária by Mataboi Alimentos.

CADE conducted a rigorous analysis of the three cases. All the notifying parties proposed remedies packages to CADE to mitigate the antitrust concerns arising from the transactions; however, the negotiation of remedies packages between CADE and the parties was not successful, and the transactions were blocked by the Tribunal.

This rigorous and sophisticated approach concerning the analysis of M&A transactions is expected to continue: in 2018, a five-to-two majority of the Tribunal voted to block Ultragaz’s planned buyout of Liquigás, rejecting the company’s proposed remedies package.

ii  Characteristics of associative agreements

CADE’s regulations set forth that associative agreements are those that have a minimum term of two years and establish a joint enterprise with the purpose of engaging in an economic activity, provided that the agreement stipulates risk and profit sharing and the parties (or respective economic groups) compete in the market related to the agreement. Such characteristics of associative agreements are set forth in CADE Resolution No. 17/2016, which became effective on 24 November 2016.

CADE precedents do not establish clear, precise and consolidated guidelines regarding the requirements for mandatory filing of associative agreements. Notwithstanding, certain CADE decisions highlight some relevant characteristics that define associative agreements:

a  common enterprise: CADE has considered the parties’ independence in defining strategic business matters (pricing, starting or discontinuing new activities, etc.), as well as the existence of the exchange of competitively sensitive information, as important elements for the characterisation of a common enterprise.

b  risk and profit sharing: CADE understands that risk and profit sharing do not mean sharing revenues. Other risks and related costs may be considered in the analysis. For example:

• coordination between the parties on costs, pricing, rates, marketing strategies, supply capacity, sharing of costs, responsibilities, operational matters and other factors involving risks;
• the presence of clauses that restrict competition (i.e., non-compete, exclusivity) or that prevent the parties from increasing their supply capacity; and
• the exchange of competitively sensitive information; and
c potential competition: in assessing whether the parties compete in the market related to the agreement, CADE has considered not only the current scenario, but also the possibility of the parties competing post-transaction.

iii Memorandum of understanding between CADE and BACEN
On 28 February 2018, CADE and BACEN signed a memorandum of understanding (MOU) seeking to establish cooperation between the two entities in the analysis of merger cases and antitrust investigations involving financial institutions, which are regulated by BACEN. The cooperation is expected to increase consistency and predictability in the proceedings conducted by BACEN and CADE.

With respect to merger cases, the general rule consolidates the current situation: transactions involving financial institutions must be approved by both entities. However, the MOU establishes that BACEN can unilaterally approve merger cases that involve significant and imminent risks to the stability of the national financial system. In this case, BACEN will notify CADE, which will unconditionally clear a transaction based on BACEN’s decision.

With respect to antitrust infringements, the MOU establishes that both entities should cooperate and exchange information, while maintaining such information’s confidentiality, and CADE must seek BACEN’s opinion before imposing any penalties.

The cooperation between CADE and BACEN indicates the positive attitude of the antitrust authority in seeking to bring technical knowledge about the market into its analysis, which could benefit companies that may be under CADE’s scrutiny in the future.

X OUTLOOK
After a decrease in 2016 compared to recent years, and following the first signs of economic recovery, M&A activity increased in 2017, and the numbers for the first quarter of 2018 project a positive scenario for the rest of the year. Although this year’s elections might bring more uncertainties, investors may take advantage of the current environment to enter or further expand into the Brazilian market.

The current foreign exchange levels may also continue to play a role in incentivising seasoned foreign investors (especially by private equity) to take advantage of investment opportunities in the country.

Another important driver for M&A activity in Brazil should continue to be the number of companies facing severe financial difficulties as a result of the prevailing macroeconomic conditions. Distressed assets available for sale are likely to include companies in various sectors. Also contributing to this trend is the Operation Car Wash probe, which should continue to boost divestitures as companies affected by the scandal struggle to raise funds and shift their focus to core or new activities.

Finally, there are still industries with growth and consolidation potential (e.g., utilities, healthcare and education) that may be further explored as the country’s GDP continues its tendency to grow.
I OVERVIEW OF M&A ACTIVITY

The British Virgin Islands (BVI) has for many years been at the forefront of international corporate structuring for cross-border transactions. The BVI is the world's largest offshore domicile for companies. There are just under 400,000 currently active BVI business companies, of which approximately two-fifths originate from Asia (whereas clients in G7 countries account for less than one-fifth) and the assets held by these companies have an estimated worldwide value of US$1.5 trillion. Approximately 32,500 new BVI companies were incorporated during 2017. This represented an increase over the number for 2016 (approximately 31,800), a result that was especially heartening considering the widespread destruction caused by record Category 5 Hurricane Irma, which struck the BVI on 6 September 2017 and was followed by Hurricane Maria just over a week later. The hurricanes knocked out 80 per cent of homes and businesses and caused losses of £3.6 billion to the Islands' gross domestic product. The fact that new company incorporations continued apace in the months immediately after the hurricanes (indeed, company incorporations in Q4 2017 increased by 12 per cent quarter-on-quarter during Q3 (8,538 compared with 7,639) and were up nearly 10 per cent on Q4 2016 (8,538 compared with 7,780)) demonstrated the jurisdiction's ability to overcome adversity and return to business as usual.

The BVI remains an attractive jurisdiction for incorporating vehicles to pool capital and to invest in a globally diverse range of markets. According to the United Nations, the BVI was the ninth-largest recipient of foreign direct investment and the seventh-largest source of outward flows in 2015, which emphasises the important role of BVI companies in international investment flows.

Many multinational companies listed on the world's major stock exchanges, including the London, New York and Hong Kong main stock exchanges, use BVI companies in their group structures, whether as subsidiaries or joint ventures or as vehicles for acquisitions, with one study finding that every company listed on Hong Kong's Hang Seng Index that has ties to the BVI has on average 35 BVI companies attached to it.

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1 Richard May is the managing partner of the BVI office of Maples and Calder and Richard Spooner is a partner at Maples and Calder (Hong Kong) LLP.
4 See footnote 2.
5 Ibid.
Given the huge number of BVI companies on the international stage, it is perhaps inevitable that they appear in a very diverse range of industries, from mining and natural resources to technology, media and telecommunications, and that they are used in an equally diverse range of jurisdictions.

Because BVI companies are used in a wide variety of industries, across a wide variety of regions around the world, this renders the jurisdiction less susceptible to global M&A trends; furthermore, the sheer volume of active BVI companies ensures that there continues to be a regular flow of M&A transactions involving such companies.

In addition, because of their high level of corporate flexibility, BVI companies are frequently used to structure transactions. For example, a BVI company can merge with one or more BVI companies or foreign companies, and the surviving company to the merger may be the BVI company or the foreign company. This provides great flexibility for structuring M&A and cross-border deals.

The BVI is internationally recognised as having a cooperative regime in relation to the exchange of information for law enforcement, regulatory and tax transparency purposes, and has a highly developed regulatory regime, including with respect to anti-money laundering. The BVI is listed as 'largely compliant', along with the United Kingdom and the United States, by the OECD Global Forum on Tax Transparency and Exchange of Information. The government has implemented the US Foreign Account Tax Compliance Act (FATCA), the UK FATCA and the OECD’s Common Reporting Standard, of which it was an early adopter, and has signed numerous bilateral tax, law enforcement and regulatory information exchange agreements, including tax information exchange agreements with the United States, the United Kingdom, France, Germany, China and India, as a result of which the BVI is on the Financial Action Task Force and OECD white lists. It has also adopted measures similar to the European Union Savings Directive. Under its various information exchange obligations, the government and its agencies regularly cooperate with law enforcement, regulatory and tax authorities to supply information to those authorities to assist them with legitimate and lawful enquiries. The BVI is a full member of the International Organization of Securities Commissions, and the BVI regulator, the Financial Services Commission (FSC), adheres to international regulatory standards on matters, including anti-money laundering and regulator-to-regulator cooperation.

The BVI has been at the forefront of global transparency initiatives, and in July 2017 implemented the Beneficial Ownership Secure Search system (BOSSs), which allows for the exchange of certain beneficial ownership information required under the Anti-Money Laundering Regulations and AML Code of Practice with UK law enforcement agencies – the information accessed through the system is verified for accuracy by regulated corporate service providers and available to the British authorities upon request, an approach that is based on effectiveness, adherence to all international standards as defined by the Financial Action Task Force (FATF) and in finding the appropriate balance between privacy and transparency. Adoption of the BOSSs puts the BVI in a very small minority of countries globally, and ahead of a large number of G20 countries and EU Member States.

On 1 May 2018, the UK’s House of Commons adopted an Amendment to the UK’s proposed Sanctions and Anti-Money Laundering Bill which, if implemented as drafted, would permit the UK government by 31 December 2020 to prepare a draft order in Council that will force all British Overseas Territories, including the BVI, to adopt public beneficial ownership registers. Understandably, this has been met with consternation by the BVI financial services industry and the BVI government, which are united in the view that verifiable
private registers searchable by appropriate tax authorities and law enforcement agencies, as recognised by the FATF, remains the more effective approach in this area. Between now and the end of 2020, the government and the governments of the BVI and other British Overseas Territories are expected to continue discussing these issues with the United Kingdom while assessing their options in relation to the Amendment.

II GENERAL INTRODUCTION TO THE LEGAL FRAMEWORK FOR M&A

M&A in the BVI are governed primarily by the BVI Business Companies Act, as amended (Companies Act), which is the primary company law statute in the BVI, or by common law. BVI companies are incorporated or registered under the Companies Act.

The predominant type of corporate entity involved in private acquisitions as a target, buyer, seller or guarantor is a company limited by shares, whether privately held (e.g., a group company or an investment holding company) or a listed company.

Many M&A transactions are structured as straightforward sales and purchases of shares in BVI companies, in respect of which no mandatory requirements are imposed by the Companies Act, and there are no other specific statutes or government regulations concerning the conduct of such transactions, so buyers and sellers are generally free to contract as they wish as regards the terms for sale and purchase. BVI law does not impose any restrictions on transfers of shares in a BVI company, and indeed the Companies Act expressly provides that, subject to any limitations or restrictions on the transfer of shares in the BVI company’s memorandum or articles of association, a share in a BVI company is transferable. Accordingly, transfers of shares will be subject to any restrictions or other provisions (e.g., rights of first refusal, drag-along and tag-along rights) in the BVI company’s memorandum and articles of association.

In addition, the memorandum and articles of association may give the directors of a BVI company a right to refuse transfers of shares. In the absence of any provision in the memorandum and articles of association that permits them to do so, the directors may not pass a resolution refusing or delaying the registration of a transfer of shares, and the company is obliged on receipt of an instrument of transfer to enter the name of the transferee of the share on the register of members. Needless to say, these provisions are almost always overridden by the provisions of the memorandum and articles of association. The usual requirement under the Companies Act for shares to be transferred by way of a written instrument is disapplied (subject to the company’s memorandum and articles of association) for any shares of a BVI company that are listed on a recognised stock exchange.

The transfer of a registered share is effective when the name of the transferee is entered in the register of members and the entry of the name of a person in the register of members as the holder of the share is prima facie evidence that legal title in the share vests in that person. Registered shares may not be transferred by delivery of the share certificate relating to that share. The use of bearer shares is theoretically possible but is highly restricted, and bearer shares are now very rarely encountered in international corporate transactions.

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6 Section 52 of the Companies Act.
7 Sections 54(4) and (5) of the Companies Act.
8 Section 54(8) of the Companies Act.
9 Section 42 of the Companies Act.
In addition to straightforward sales and purchases of shares in BVI companies, acquisitions may be structured as statutory mergers or consolidations. Statutory mergers are a long-standing feature of BVI company law and are one of the most common methods of structuring a complex acquisition or business combination, including, for example, ‘going-private’ transactions to acquire the shares of BVI companies listed on the US stock exchanges.

The Companies Act permits a BVI company to merge or consolidate with one or more other constituent companies. Each constituent company may be a BVI company or a foreign company incorporated in a jurisdiction outside the BVI, provided that this is permitted by the laws of that jurisdiction. To be effected, the merger or consolidation must be authorised both by the board of directors and by a resolution of the shareholders of each constituent BVI company, and the threshold for shareholder authorisation (subject to any contrary provision in the BVI company’s memorandum and articles of association) is a simple majority of those shareholders who attend and vote at a general meeting of the shareholders, or by way of a written resolution passed by shareholders with a majority of the voting rights. (Unlike the law of some other jurisdictions, BVI law does not impose a requirement for a merger or consolidation to be approved by a super-majority of shareholders.) Provided that the requisite board and shareholder authorisations are obtained, and all other procedures set out in the Companies Law are complied with, no court order or approval is required for the statutory merger or consolidation to become effective, and the terms and conditions of the merger or consolidation will be binding and effective upon all shareholders regardless of whether or not they voted in favour of the resolution to authorise the merger or consolidation.

However, shareholders have the right to dissent from the merger or consolidation, in which case the dissenters will have the right to be paid in cash the fair value of their shares, as agreed with the company or, if agreement cannot be reached within the statutory time frame, as appraised by independent appraisers. This can be a factor if the offer involves a share-for-share swap as opposed to a cash buyout, or if the bidder anticipates issues with minority shareholders.

In a tender offer, private contractual acquisition or public takeover, in which control of the majority of the voting equity is required, there is a statutory ‘squeeze-out’ mechanism available where the relevant statutory thresholds are met. Where a bidder has acquired 90 per cent or more of the votes of the shares in a BVI company (plus, if applicable, 90 per cent of the votes of the shares of each class of shares entitled to vote as a class), it can direct the BVI company to compulsorily redeem the shares of the remaining minority shareholders at a redemption price and in such manner as stipulated by the BVI company, and thereby become the sole shareholder. Minority shareholders have the right to dissent from the compulsory redemption, and while this will not prevent their shares from being so redeemed, it will entitle them to payment of the fair value of their shares (determined in the same manner as for statutory mergers discussed above).

10 Section 179 of the Companies Act.
11 Section 176 of the Companies Act.
Plans of arrangement\textsuperscript{12} and schemes of arrangement\textsuperscript{13} may also be appropriate methods of effecting M&A of BVI companies in certain circumstances:

\textit{a} A plan of arrangement includes amendments to the memorandum or articles of association, company reorganisations or reconstructions, domestic mergers or consolidations, separations of two or more businesses carried on by a company, asset or share exchanges, company dissolutions or any combination of the foregoing.

\textit{b} A scheme of arrangement regulates compromises or arrangements proposed between a BVI company and its creditors or members, or any class of either.

Both plans of arrangement and schemes of arrangement require approval by an order of the court.

A scheme of arrangement must be approved by a majority in number representing 75 per cent in value of the creditors or class of creditors, or members or class of members, as the case may be, present and voting at a meeting. The principal benefit of a scheme is that if all the necessary majorities are obtained and hurdles cleared, and the court approves the scheme, then the terms of the scheme become binding on all members of the relevant class or classes of shareholders or creditors, whether or not they received notice of the scheme, voted at the meeting, voted for or against the scheme, and changed their minds afterwards.

The consents for approval of a plan of arrangement may be determined by the court, and are therefore less rigid than the prescribed majorities required for a scheme of arrangement. However, it should be noted that the court may order dissenters’ rights to apply to a plan of arrangement, but not to a scheme of arrangement. For schemes of arrangement, no dissenters’ rights apply, but the key challenge is achieving the high approval majorities required of each class of shareholder.

The BVI does not have a takeovers code that applies to offers or takeover bids in respect of BVI companies, or any other non-statutory rules or codes of conduct relating to M&A transactions involving BVI companies, whether privately held or publicly listed.

Acquisitions of BVI companies that are regulated entities in the BVI may be subject to additional statutory requirements. For example, there are change-of-control rules that apply to entities regulated by the FSC under relevant financial services legislation, including, for example, companies conducting investment business or companies that are regulated funds and that are regulated under the Securities and Investment Business Act 2010, companies conducting banking or trust business that are licensed under the Banks and Trust Companies Act 1990, and companies regulated under the Insurance Act, 2008.

\begin{itemize}
  \item \textsuperscript{12} Section 177 of the Companies Act.
  \item \textsuperscript{13} Section 179A of the Companies Act.
\end{itemize}
III DEVELOPMENTS IN CORPORATE AND TAKEOVER LAW AND THEIR IMPACT

The Companies Act was amended by the BVI Business Companies (Amendment) Act 2015, which came into force on 15 January 2016, alongside certain provisions relating to the Register of Directors of BVI Companies, which came into force on 1 April 2016. The amendments were intended to provide greater flexibility and certainty for those operating or doing business with BVI companies, but the amendments do not affect Part IX of the Companies Act (with one exception, as discussed below), which contains the main provisions dealing with M&A transactions (including mergers, consolidations, compulsory redemptions, plans of arrangement and schemes of arrangement, all discussed above).

Nevertheless, there are certain amendments that may be relevant to M&A transactions, particularly those involving a BVI company whose shares are listed on a recognised stock exchange:

a a BVI company listed on a recognised stock exchange is no longer obliged to keep a register of members containing the information required under the Companies Act, and instead the register of members may contain such information as may be provided by the BVI company’s memorandum and articles of association or by a resolution of its members. The intention is to allow listed companies the flexibility to operate in accordance with the rules and practices of the relevant stock exchange; and

b shares of a BVI company that are listed on a recognised stock exchange may now be transferred without the need for a written instrument of transfer, and these shares may instead be transferred in accordance with the relevant stock exchange rules and other applicable laws. In essence, this change allows for the ‘paperless’ transfer of listed shares in accordance with the procedures of the relevant stock exchange.

The one amendment made to Part IX of the Companies Act was to expand the scope of the ‘arrangements’ that may be the subject of a plan by moving away from a comprehensive list of transactions that may be effected by way of a plan of arrangement to an open definition. The BVI plan of arrangement regime has not been frequently used to date, but recently publicised plans have demonstrated the potential uses of the regime; for example, the potential to achieve a demerger, which is itself not available as a statutory occurrence in the BVI, although it should be noted that the courts resist the use of plans that would be confiscatory in their effect on shareholders.

Court guidance is evolving on the approach to appraising fair value on the exercise of dissent rights. Recent court guidance suggests that a discount for a minority holding may or may not be appropriate depending on the circumstances.

An important innovation was introduced by the Registry of Corporate Affairs in the BVI on 1 December 2015, when it commenced a ‘premium service’ under which it will guarantee a four-hour turnaround for certain transactions submitted to the BVI Registry, including (of relevance to M&A transactions) registration of statutory mergers. Any merger submitted to the BVI Registry through the premium service (and upon payment of the relevant fee) by 6pm (BVI time) is now guaranteed a same-day response. This service has been welcomed by the industry, and is particularly valuable in acquisitions involving listed BVI companies.
IV FOREIGN INVOLVEMENT IN M&A TRANSACTIONS

M&A transactions involving BVI companies are almost always cross-border transactions that involve foreign players. Typically, a BVI company is used as an asset holding company and the parties involved in buying or selling shares in the entity or its assets are not located in the BVI. The commercial activities, business and assets of a BVI company are also unlikely to be in the BVI. As a result, it is usual for onshore counsel in the relevant jurisdiction or jurisdictions for the parties involved, or possibly the location of the assets to be acquired, to dictate the governing law of the transaction and to prepare the commercial documents. A share purchase agreement can provide for a foreign governing law, and it is unusual for a share purchase agreement to be governed by BVI law. If a foreign governing law is selected, there are no BVI law provisions that would apply automatically, except that legal title to shares in a BVI target company will pass only when the register of members is updated.

The BVI is the world’s largest offshore domicile for companies. Consequently, it is not surprising that BVI companies appear in deals originating from all regions of the world, with deals continuing to emanate from North and South America, Europe, Asia-Pacific and Africa. The BRICS economies (Brazil, Russia, India, China and South Africa) continue to strongly support BVI M&A activity.

Asia continues to have a pre-eminent role. It is estimated that almost two-fifths of all currently active BVI companies are owned and operated from Asia and, in particular, from China, and the BVI has developed a significant market share in the pre-initial public offering (IPO) and private equity space where Asian entrepreneurs have, with both domestic and international investors, used BVI companies as the conduit through which to fund and invest in businesses across the region. In China, the substantial balance sheets of Chinese state-owned banks have been driving M&A activity in China, and Chinese lenders are expected to continue to have a key role in driving M&A financing activity in Asia.

BVI companies are attractive vehicles for raising financing for business purposes. Banks and other financial institutions, when lending monies to BVI company-owned businesses, are familiar with and take comfort from a number of key features of the BVI legal system, not least its public security registration system, its recognition of foreign law remedies for security interests created over the shares of a BVI company and its creditor-friendly insolvency regime. In addition, many listed companies in Asia use BVI companies (as issuers) when seeking to raise debt financing via bond issuances.

Ultimately, many of these pre-IPO structures will result in either a trade sale (and exit for investors) or a listing of the BVI company on an international stock exchange. There are BVI companies listed on all major international stock exchanges, including the Stock Exchange of Hong Kong, NASDAQ, the New York Stock Exchange, the TSX, the London Stock Exchange (LSE) and LSE’s AIM Exchange.

V SIGNIFICANT TRANSACTIONS, KEY TRENDS AND HOT INDUSTRIES

In February 2017, MegaFon, a major Russian telecommunications company that is listed on the London Stock Exchange, acquired a controlling stake in Mail.Ru Group (a BVI company also listed on the London Stock Exchange that is one of Russia’s largest internet and social media groups) from USM Holdings, MegaFon’s controlling shareholder, for US$740 million.
In February 2017, 76.1 per cent of the issued shares of Road Town Wholesale Trading Ltd, a BVI-based retail and wholesale conglomerate, was acquired by a wholly owned subsidiary of The North West Company Inc, a Canadian multinational grocery and retail company, for a purchase price of approximately US$32 million, making it one of the largest-ever M&A transactions involving a company operating and trading domestically in the BVI.

In March 2017, Permira, the global private equity firm, acquired Tricor Holdings Limited, a BVI company and a leading provider of integrated business, corporate and investor services in Asia Pacific, from The Bank of East Asia and NWS Holdings for a consideration of US$800 million.

In May 2017, Unilever NV acquired assets and shares in the personal and home care brands of Quala Inc’s eight BVI subsidiaries (Aromatel Brands Inc, Aromatel South Inc, Ego Brands Inc, Ego South Inc, Fortident Brands Inc, Fortident South Inc, Savital Brands Inc and Savital South Inc), strengthening Unilever’s footing in Latin America. Quala is a business with a strong presence in 10 countries in Latin America, and its personal care and home care portfolio includes leading local brands Savital/Savilé (haircare and skin cleansing), eGo (male haircare and styling), Bio-Expert (haircare), Fortident (oral care) and Aromatel (fabric conditioners).

In May 2017, Three UK, Britain’s fourth largest mobile group, acquired the BVI company Transvision Investments Limited from PCCW for £300 million. Transvision is the parent company of UK Broadband Limited, which delivers broadband services in London through its fixed wireless network, operating under the brand ‘Relish’.

In June 2017, BVI-based LabTech Investments, a property and technology company, acquired the remaining stake that it did not already own in MarketTech Holdings (a Guernsey-based company that was listed on the London Stock Exchange but de-listed as part of the transaction), which manages a large portion of London’s Camden Market, in a transaction that valued MarketTech at £892.5 million.

In August 2017, Pacific Special Acquisition Corp (a BVI company listed on NASDAQ and a special purpose acquisition company) completed its acquisition of Borqs International Holding Company, a Cayman Islands company headquartered in China and a leading global provider of smart connected devices and cloud service applications for the ‘Internet of Things’. Under the terms of the merger, Pacific acquired the entire issued share capital of Borqs by way of a Cayman Islands statutory merger, in consideration for which Pacific issued shares to the shareholders of Borqs. At the closing of the merger, Pacific, as holding company of the new group, changed its name to Borqs Technologies, Inc and has retained its listing on NASDAQ under its new name.

In August 2017, Chinese ride-hailing giant DiDi Chuxing made an undisclosed investment in Careem Inc, the BVI-incorporated Dubai-based ride-sharing platform that had achieved a US$1 billion valuation earlier in the year. The deal includes a strategic collaboration with DiDi Chuxing and is DiDi’s first collaboration in the MENA region.

In October 2017, EZCORP, Inc (listed on NASDAQ) acquired GuatePrenda – MaxiEfectivo, a business that owns and operates 112 pawn shops in Guatemala, El Salvador, Honduras and Peru. The acquisition was structured as the purchase by one of EZCORP’s subsidiaries of all the shares of Camira Administration Corp, a BVI holding company, from seller Black Icebreaker Corporation (also a BVI company), for a purchase price of US$53.4 million.
In April 2018, Polymetal International plc (listed on the London Stock Exchange) completed its acquisition of a 50 per cent stake (thereby bringing its ownership to 100 per cent) in the Prognoz Silver Mine in Russia, from Polar Acquisition Limited, a BVI company and the largest investment of Baker Steel Resources Trust Limited (also listed on the London Stock Exchange) for US$140 million, which was satisfied by the issue of shares in Polymetal.

VI FINANCING OF M&A: MAIN SOURCES AND DEVELOPMENTS

Given that M&A transactions involving BVI companies are almost always cross-border transactions, and that the parties involved in buying or selling shares in an entity or its assets are based in jurisdictions outside the BVI, these transactions will be financed outside the BVI. The BVI banking industry is not particularly well developed and is focused mainly on servicing the requirements of local businesses and retail banking rather than financing cross-border M&A transactions involving BVI companies.

VII EMPLOYMENT LAW

The majority of M&A transactions involving BVI companies relate to businesses located outside the BVI as, ordinarily, the BVI company is a cross-border asset holding company. It is very unlikely that the BVI company will take on any employees in the BVI. To the extent that any BVI company employs people outside the BVI, employment will almost always be governed by the local laws of the jurisdictions in which those employees are situated, and BVI employment laws will not be relevant.

In the unlikely scenario that a BVI company does have employees situated in the BVI, then the provisions of the Labour Code 2010 should be considered.

VIII TAX LAW

Companies incorporated or registered under the Companies Act are currently exempt from income and corporate tax. BVI companies and all dividends, interest, rents, royalties, compensation, other amounts paid by BVI companies to persons who are not resident in the BVI and any capital gains realised with respect to any shares, debt obligations or other securities of BVI companies by persons who are not resident in the BVI, are exempt from all provisions of the Income Tax Ordinance in the BVI.

No estate, inheritance, succession or gift tax, rate, duty, levy or other charge is payable by persons who are not resident in the BVI with respect to any shares, debt obligation or other securities of BVI companies.

All instruments relating to transfers of property to or by BVI companies, and all instruments relating to transactions in respect of the shares, debt obligations or other securities of BVI companies and all instruments relating to other transactions relating to the business of BVI companies, are exempt from payment of stamp duty in the BVI. (This assumes that the BVI company in question does not hold an interest in real estate in the BVI.)

There are currently no withholding taxes or exchange control regulations in the BVI that are applicable to BVI companies or their shareholders.

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IX  COMPETITION LAW

There is no relevant competition law legislation in the BVI that affects transactions involving BVI companies.

X  OUTLOOK

The BVI will continue to play a key role in the structuring of international and cross-border transactions. Sophisticated investors and professional parties are well aware of the many advantages provided by the use of BVI companies: the BVI's progressive corporate laws offer a corporate structure that adds value to cross-border corporate transactions, not only by providing tax neutrality, but also in terms of protecting the interests of investors, mitigating corporate risk and enhancing transaction certainty and success. Consequently, the BVI continues to maintain its reputation as a key jurisdiction of choice for international M&A.
Chapter 9

CANADA

Robert Yalden, Emmanuel Pressman and Jeremy Fraiberg

I OVERVIEW OF M&A ACTIVITY

After a sluggish start to 2016, Canadian deal-making increased through the latter half of 2016 and into 2017, buoyed by solid economic growth in Canada and the United States. The pace of activity saw 2,991 deals announced in 2017, an increase on the 2,685 announced deals in 2016. At the same time, the mixture of deals was evolving. The total transaction value of C$252 billion in 2017 was down 24 per cent from the 2016 level (C$331.5 billion), revealing a lower volume of mega-deals but a meaningful increase in activity in the mid-market.

The most active sector by deal count in 2017 was metals and mining, with 453 transactions announced. However, the utilities sector was the most vibrant when measured by deal value, representing some C$55 billion in transactions, largely due to several announced mega-deals. These included the C$22 billion acquisition of Calpine Corporation (America’s largest generator of electricity from natural gas and geothermal resources) by Energy Capital Partners and a consortium led by Canada Pension Plan Investment Board (CPPIB) and Access Industries, Hydro One’s C$6.7 billion acquisition of Avista Corporation, and the C$6.3 billion acquisition of an Asian wind and solar renewable energy asset portfolio from Equis Funds Group by a consortium led by Global Infrastructure Partners III in conjunction with the Public Sector Pension Investment Board (PSP) and CIC Capital Corporation.

The energy sector was also very active, with some 204 deals that included several mega-deals: for example, Cenovus Energy’s C$18 billion acquisition of ConocoPhillips assets that included a 50 per cent interest in the FCCL Partnership (a jointly owned oil sands venture operated by Cenovus) and Pembina Pipeline Corporation’s C$7.1 billion acquisition of Veresen. Other sectors that saw sustained activity were traditional pillars of the Canadian M&A market such as financial services and real estate, but there was also considerable activity in the increasingly vibrant information technology and healthcare sectors, as well as in the consumer staples sector.

Trends that are characteristic of M&A in Canada came into even sharper focus during 2017; for example, companies continued to be active in pursuing international expansion. Indeed, some 847 deals announced in 2017 involved outbound transactions, while there

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1 Robert Yalden, Emmanuel Pressman and Jeremy Fraiberg are corporate partners at Osler, Hoskin & Harcourt LLP. The authors would like to acknowledge the contributions of fellow partners Patrick Marley and Shuli Rodal. The authors (ex-Yalden) also wish to thank Robert Yalden for his invaluable contributions to our firm, his friendship and his partnership. After nearly 30 years, Robert is retiring to join the Queen’s University Faculty of Law as the inaugural holder of the Stephen Sigurdson Chair In Corporate Law and Finance.

2 Data on M&A activity cited in this chapter are sourced from Crosbie & Company Canadian M&A reports.
were 539 announced inbound deals. This ratio of 1.6 to 1 was somewhat higher than 2016. Notwithstanding the frequently expressed concern that Canadian companies are being acquired by non-Canadians, the reality is that for many years there have been meaningfully more outbound transactions than inbound, in particular, as measured by volume. Some of the drivers of this activity continue to be Canadian pension funds, as they remain active in leading large deals abroad for assets that offer exposure to stable returns. In addition to some of the examples listed above involving CPPIB and PSP, Quebec’s CDPQ partnered up in Q1 not only with Suez SA with respect to the C$4.5 billion acquisition of GE water, but also with KKR & Co to acquire USI Insurance Services from Onex Corporation for C$5.8 billion. In Q4 2017, CDPQ partnered with CKD Infraestructura to purchase a portfolio of renewable power generation assets in Mexico from Enel Green Power Mexico for C$1.7 billion.

Another trend that we flagged in the last edition of The Mergers & Acquisitions Review and that continued to play out in 2017 was the importance of mid-market M&A. As noted, much of the increase in the number of deals announced in 2017 was attributable to this slice of the market and there is every reason to believe that this will remain a fundamental feature of current Canadian M&A not only domestically but also internationally.

The end of 2017 and the beginning of 2018 saw a particularly interesting development in Canada, as the anticipated federal legalisation of recreational cannabis set off a flurry of deal-making. Companies already in the business of selling medically regulated cannabis scaled up in anticipation of a significantly expanded market, sometimes giving rise to hostile M&A (e.g., Aurora Cannabis Inc’s C$1.1 billion hostile-turned-friendly bid for Canimed Therapeutics Inc in November 2017 and Aurora’s announcement in May 2018 of a C$3.2 billion acquisition of MedReleaf Corp). At the same time, at least one sizeable company in the wine and spirits sector sought to gain a foothold in this nascent sector of the Canadian economy when Constellation Brands made its 9.9 per cent strategic investment in Canopy Growth Corporation for C$245 million.

II GENERAL INTRODUCTION TO THE LEGAL FRAMEWORK FOR M&A

Although M&A activity in 2017 involved a range of public and private company transactions, M&A regulatory developments were most prevalent in the public company context. In contrast, private M&A is predominantly the result of negotiated acquisitions governed by the terms of individual contracts. While contracts will necessarily vary with the circumstances of every transaction, in general, the overall framework of a negotiated acquisition agreement is consistent with that seen in other jurisdictions, such as the United States; accordingly, they will be familiar to many non-Canadian M&A practitioners.

While several different methods to acquire control of a Canadian public company exist, typically Canadian M&A transactions are consummated by way of a ‘takeover bid’ or a ‘plan of arrangement’.

i Takeover bid

A takeover bid is a transaction by which the acquirer makes an offer directly to the target company’s shareholders to acquire their shares. Although the board of directors of the target company has a duty to consider the offer and an obligation to make recommendations to its shareholders as to the adequacy of the offer, the takeover is ultimately accepted (or rejected) by the shareholders. Since the support of the board of directors is not legally required to effect
a takeover bid, as a practical matter a bid is the only structure available to effect an unsolicited or hostile takeover. The conduct and timing of a takeover bid, and the delivery and disclosure requirements of offer documents, are regulated by provincial securities laws.

A takeover is the substantive equivalent to a tender offer under US securities laws. There are, however, several key differences between the takeover bid and tender offer regimes. Among them, the determination of whether a takeover bid has been made is based on an objective, bright line test: unless exempted from the takeover bid rules, a formal takeover bid is required to be made to all shareholders when a person offers to acquire 20 per cent or more of the outstanding voting or equity securities of the target company. Moreover, where a bid is made for cash consideration or has a cash component, the bidder must make adequate arrangements prior to launching the bid to ensure that the required funds are available to make full payment for the target company’s shares. This means that financing conditions are not included in takeover bids in Canada.

Under Canadian law, all non-exempt takeover bids (including partial bids) are subject to the following requirements:

a. bids are subject to a mandatory minimum tender requirement of more than 50 per cent of the outstanding securities of the class that are subject to the bid, excluding those beneficially owned, or over which control or direction is exercised, by the bidder and its joint actors;

b. following the satisfaction of the minimum tender requirement and the satisfaction or waiver of all other terms and conditions, bids will be required to be extended for at least an additional 10-day period; and

c. bids are required to remain open for a minimum of 105 days, subject to two exceptions. First, the target issuer’s board of directors may issue a ‘deposit period news release’ in respect of a proposed or commenced takeover bid providing for an initial 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 minimum deposit period counted from the date that other bid is made. Second, if an issuer issues a news release that it has entered into an ‘alternative transaction’ – effectively 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 counted from the date that other bid was or is made.

ii Plan of arrangement

A plan of arrangement is a voting transaction because, unlike a bid, a meeting of the target company’s shareholders is called by the board of directors and held to vote on the proposed acquisition. An arrangement is governed by the corporation laws of the target company’s jurisdiction of incorporation, and requires the approval of the target’s board of directors and shareholders. It is the substantive equivalent of a scheme of arrangement under English law. Notably, unlike any other transaction structure, an arrangement is a court-supervised process and must be judicially determined to be ‘fair and reasonable’ to be approved by a court.

Arrangements are often a preferred transaction structure because of their substantial flexibility. In particular, arrangements are not circumscribed by the takeover bid rules or the structural parameters set by other forms of corporate transactions (e.g., amalgamations and capital reorganisations) and, importantly, arrangements facilitate structuring, strategic and tax-planning objectives by enabling an acquirer (and a target) to set out the precise series of steps that must occur prior to, and at the effective time of, an arrangement.
iii Other transaction structures

The other forms of M&A transaction structure that are occasionally used are a statutory amalgamation or a capital reorganisation (also governed by the corporation laws of the target’s jurisdiction of incorporation). An amalgamation is a close equivalent to a ‘merger’ under the state corporation laws in the United States. There is, however, no legal concept of a merger under Canadian corporate law (whereby one corporation merges into another, with the former disappearing and ceasing to have any legal identity, and the latter surviving and continuing in existence). Rather, under Canadian corporate law, the amalgamating corporations effectively combine to form a single corporation. The rights, assets and liabilities of each amalgamating corporation continue as the rights, assets and liabilities of the amalgamated corporation. A capital reorganisation involves an amendment to the share capital of the charter documents of a target company that results in a mandatory transfer of the target company’s shares to the acquirer in exchange for cash or shares of the acquirer.

iv Protection of minority shareholders in conflict of interest transactions

There is a significant number of public companies with controlling shareholders and corporate groups with multiple public company members. Transactions with controlling shareholders, directors or senior management, or involving members of the same corporate group, often raise conflict of interest concerns that require consideration where a related party has an informational advantage over other security holders. In response to this distinct feature of the Canadian corporate economy, securities regulators have established special rules applicable to insider bids, issuer bids (self-tender transactions) and certain types of related-party transactions and business combinations. These rules are designed to protect minority shareholders by requiring enhanced disclosure, minority shareholder approval and formal valuations for such transactions in certain prescribed circumstances.

In an important Staff Notice published on 27 July 2017, staff of the securities regulatory authorities in each of Ontario, Quebec, Alberta, Manitoba and New Brunswick (Staff) have indicated that they intend to subject material conflict of interest transactions regulated by Multilateral Instrument 61-101 Protection of Minority Security Holders in Special Transactions (MI 61-101) to greater regulatory scrutiny. Material conflict of interest transactions will now be reviewed in real time to assess compliance with the requirements of MI 61-101 and to determine whether a transaction raises potential public interest concerns.

Staff have also provided guidance regarding their expectations of enhanced disclosure and the active role to be played by special committees of independent directors.

Moreover, where a fairness opinion is obtained for a material conflict of interest transaction, Staff are requiring disclosure of the structure of a financial adviser’s compensation (but not the amount of the adviser’s fee) and the financial analysis underlying the opinion.

v Defensive tactics and shareholder rights plans

The most common defensive tactic available to Canadian companies is a shareholder rights plan or ‘poison pill’. Rights plans are well established in Canada and have many features in common with their US counterparts. Since they must be approved by shareholders within six months of adoption if they are to remain in place, institutional shareholders, proxy advisory...
firms and corporate governance advocates have had considerable influence over their terms, which have become fairly standardised in both form and substance. Although similar in form, Canadian pills are less effective and less durable than US pills, due in large measure to differences in the way disputes over their application have been litigated in the two countries.

In the United States, challenges to shareholder rights plans appear before the courts, which apply a directors’ duties analysis in determining whether a board can implement and maintain a plan. In Canada, the provincial securities regulators have typically exercised their jurisdiction to issue cease-trade orders to invalidate poison pills. The regulators have weighed the interest of shareholders in not being deprived of the ability to decide whether to accept a bid. Ultimately, it has been a question of when, not if, the pill should be struck down.\(^4\) This means that there have only been isolated occasions when a Canadian board of directors could ‘just say no’ for any significant length of time. Generally speaking, once a Canadian target company is put in play, a change of control transaction is very likely to be completed (either by the initial bidder or a white knight). As a consequence, the Canadian takeover bid landscape has historically been considered to be distinctly more ‘bidder-friendly’ than its US counterpart.

With the adoption of the new takeover bid regime in May 2016, which now provides for a 105-day deposit period as compared to the previous 35 days, it was expected that there would be fewer rights plan hearings. The lengthening of the bid period to 105 days was intended to give target board’s more time to respond to a bid and to provide greater timing certainty as compared with the previous regime, in which regulators were frequently called on to determine when a pill should be struck down. Accordingly, there is less of an incentive for issuers to adopt rights plans either ‘strategically’ at their annual meetings or ‘tactically’ in the face of a bid as compared with the previous regime.

As the amendments do not apply to exempt bids, there is still a role for rights plans in protecting target issuers against ‘creeping bids’, such as those made through the normal course purchase and private agreement exemptions, and to prevent hard lock-up agreements. Issuers may also attempt to adopt tactical ‘voting pills’ in proxy contests (e.g., a rights plan with a lower than 20 per cent threshold). As a result, a number of Canadian companies have continued to adopt or renew rights plans.

In December 2017, the Ontario Securities Commission and the Financial and Consumer Affairs Authority of Saskatchewan issued an order after a joint hearing that immediately cease-traded a tactical shareholder rights plan that a target had adopted in response to an unsolicited takeover bid. This represents the first ‘poison pill’ decision by Canadian securities regulators since the new takeover bid regime was adopted across Canada in May 2016. The decision suggests that tactical shareholder rights plans will be cease-traded if no auction or market canvass is under way. It remains to be seen whether strategic rights plans (i.e., ones that have received shareholder approval) will be allowed to remain in effect for longer periods, and whether tactical rights plans that are adopted in conjunction with the target running an

\(^4\) National Policy 62-202 – Defensive Tactics of the Canadian securities regulators provides, in effect, that it is not permissible for the board of directors of a target company to engage in defensive measures that have the effect of denying the shareholders the ability to decide for themselves whether to accept or reject a takeover bid, thus frustrating the takeover bid process. Accordingly, the securities regulatory response to a takeover bid is principally based on a shareholder primacy model, which does not typically defer to the business judgement of directors in considering whether certain defensive tactics are appropriate.
active sales process will be allowed to remain in place for any reasonable period. In any event, our expectation is that rights plans will not be permitted to remain in effect after a 105-day formal bid, absent unusual circumstances.

vi Stock exchange requirements

Most public companies are listed for trading on the Toronto Stock Exchange (TSX), which has its own rules that govern listed companies. Among other things, in a share-for-share transaction in which share capital of the acquirer is proposed to be issued to target company shareholders as acquisition currency, it is necessary to consider whether buy-side shareholder approval is required (in addition to the sell-side shareholder approval customarily required to be obtained in M&A transactions). Under the TSX rules, listed issuers are required to obtain buy-side shareholder approval for public company acquisitions that would result in the issuance of more than 25 per cent of the outstanding shares of the acquirer on a non-diluted basis. In calculating the number of shares issued in payment of the purchase price for an acquisition, any shares issuable upon a concurrent private placement of securities upon which the acquisition is contingent or otherwise linked must be included. Accordingly, the buy-side shareholder approval requirement is equally applicable in the context of a cash acquisition transaction if the cash is raised in a concurrent or linked private placement financing transaction.

III FOREIGN INVOLVEMENT IN M&A TRANSACTIONS

Canada views itself as generally open to foreign investment. While Canada continues to review on a mandatory basis certain foreign investments to ensure they are of ‘net benefit’ to Canada, the financial threshold for review has been raised significantly during the past few years, with the result that only a small number of large transactions will be subject to net benefit review. While a more restrictive approach applies in the case of proposed foreign investments that involve state-owned enterprises (SOEs), there has been some indication that the current federal government may be taking a less restrictive approach to foreign investment. However, there are important cases before the federal government that had not been decided at the time of writing.

With respect to foreign investment review, 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 likely to be of ‘net benefit’ to Canada.

The threshold for review of World Trade Organization (WTO) private sector direct investment in Canadian businesses outside the cultural sector is now C$1 billion, based on ‘enterprise value’. Further, as a result of the proclamation into force of the Canada–European Union Comprehensive Economic and Trade Agreement Implementation Act, the ‘net benefit’ review threshold is C$1.5 billion for investors from EU Member States and from other countries entitled to most-favoured-nation treatment pursuant to trade agreements with Canada.

The net benefit review threshold for non-WTO acquisitions, acquisitions involving SOEs and acquisitions of cultural businesses is based on asset book value. The current book value threshold applicable to direct non-cultural acquisitions by SOEs is C$398 million and the threshold for any direct cultural acquisitions and non-WTO acquisitions is C$5 million.
The ICA gives the government discretion in determining whether a foreign investor has a sufficient connection to an SOE such that it should be treated under the new SOE rules, and whether an investment will confer ‘control’ on an SOE based on indicia of ‘control in fact’.5

Enterprise value in the case of an acquisition of a publicly traded entity is determined based on the target’s market capitalisation, plus its total liabilities but excluding its operating liabilities and minus its cash and cash equivalents. Market capitalisation is to be calculated by using the average daily closing price of the target’s quoted equity securities on the entity’s principal market over the most recent 20 days of trading ending before the first day of the month that immediately precedes the month in which the application for review or notification is filed. In addition, if there are unlisted equity securities, the fair market value of such securities, as determined by the board of directors or other person authorised to make that determination, is to be included.

There are additional rules for private company acquisitions, partial acquisitions and asset acquisitions, each of which requires considerable valuation analysis. Direct acquisitions of Canadian businesses when the thresholds are not met, and indirect WTO investments, including by SOEs, are subject to notification only and are not subject to automatic review. These transactions may still be subject to review on national security grounds (see below). Indirect investments by non-WTO investors in non-WTO controlled targets or indirect acquisitions of cultural businesses by any investor are subject to review post-closing if the book value of assets is C$50 million or more (or C$5 million in certain cases).

In general, Canada has exercised restraint in disapproving foreign investment on net benefit grounds. Only two major transactions outside the cultural sector (the Alliant/MacDonald, Dettwiler case in 2008 and the BHP/Potash case in 2010) were disapproved after failing to meet the net benefit test under the ICA since its enactment in 1985. In each case, there were several specific and somewhat unique factors that are likely to have contributed to the outcome. However, both cases have made it clear that the ICA review process can become high-profile and politicised. Accordingly, it is important for foreign investors to carefully consider their strategies for communicating the benefits to Canada of proposed investments that are subject to the ICA.

SOEs continued to make significant cross-border investments in Canada. Chinese investment, both in terms of number of discrete investments and the aggregate enterprise value of those investments, was second only to investments from the United States in FY 2017. In terms of asset value of the investments, total cross-border M&A flows from China exceeded that of the United States.

In terms of investment by SOEs in high-profile and sensitive sectors and companies, there were clear indications from the previous federal government (in addition to the decision to preserve the lower review threshold) that a more restrictive approach would be taken, particularly in the case of proposed control investments by SOEs in the oil sands and in leading Canadian companies in other sectors. By contrast, there have been strong indications that the current Liberal government under Prime Minister Justin Trudeau is more receptive to SOE investment.

Several high-profile transactions from Chinese investors were reviewed and approved by the government in 2017. These include Anbang Insurance’s takeover of Retirement Concepts, which operates retirement homes in British Columbia, Alberta and Quebec.

Anbang, which is privately owned and one of China’s largest insurers, has faced questions in the United States relating to its ownership structure and possible ties to the government of China. The Canadian government approved the transaction as being of a net benefit to the Canadian economy. As discussed below, a greater receptiveness to Chinese investment has also been evident in the federal government’s approach to applying the national security provisions of the ICA. However, there are important cases before the federal government that are being closely watched, notably a proposed investment by CCCC International Holding Limited in Aecon Group Inc that has attracted considerable public attention and has not yet been decided.

In addition to the ICA regime for ‘net benefit’ review of certain foreign investments, the government has the right to review on a discretionary basis, and prohibit or impose conditions on, a broad range of investments by non-Canadians on national security grounds. This regime, in effect since 2009, puts the ICA on a similar footing with equivalent statutory provisions in many other jurisdictions, including the United States. The scope of foreign investments that may be subject to review on national security grounds is much broader than that subject to a ‘net benefit’ review. The test applied is whether an investment is ‘injurious to national security’.

The phrase ‘injurious to national security’ is not defined in the ICA. However, in December 2016, the government released Guidelines on the National Security Review of Investments under the Investment Canada Act. This is the first time the government has provided official insight into the national security process that has been in place since 2009. The National Security Guidelines adopt a broad approach, although they provide some useful insight into the types of investments that may give rise to national security concerns. They list nine factors the government considers when assessing whether an investment poses a national security risk:

- the potential effects of the investment on Canada’s defence capabilities and interests;
- the potential effects of the investment on the transfer of sensitive technology or know-how outside Canada;
- involvement in the research, manufacture or sale of controlled goods identified in the Defence Production Act (e.g., firearms, military equipment, weapons, aircraft and defence systems);
- the potential impact of the investment on the security of Canada’s critical infrastructure. ‘Critical infrastructure’ is broadly defined with reference to processes, systems, facilities, technologies, networks, assets and services essential to the health, safety, security or economic wellbeing of Canadians and the effective functioning of government;
- the potential impact of the investment on the supply of critical goods and services to Canadians, or the supply of goods and services to the government;
- the potential of the investment to enable foreign surveillance or espionage;
- the potential of the investment to hinder current or future intelligence or law enforcement operations;
- the potential impact of the investment on Canada’s international interests, including foreign relationships; and
- the potential of the investment to involve or facilitate the activities of illicit actors, such as terrorists, terrorist organisations or organised crime.
There is limited information on the transactions that are subject to review on national security grounds, although statistics released by the government indicate that full national security reviews remain rare.

The 2016-2017 Investment Canada Act Annual Report (Annual Report) includes statistics on the national security review process, providing insight into a process that has historically been opaque. The Annual Report indicates that national security reviews are rarely conducted, as only five of the 737 investments subject to at least notification under the ICA were formally reviewed for national security reasons in FY 2017. While very few transactions have been blocked, subject to commitments, or materially delayed because of national security concerns, it should be noted that these statistics do not reflect the full impact of the national security review process; for example, the statistics do not include potential transactions that were abandoned at an early stage because of concerns raised informally.

Further, experience shows that a larger number of investments are screened informally prior to determining that no formal national security review will be conducted. In some cases, this involves asking investors to provide additional information voluntarily about their businesses and activities. Accordingly, identifying potential issues in advance and, when appropriate, proactively addressing them, may help to clarify any issues and avoid delays in execution.

According to the Annual Report, the three most important factors that led to national security reviews in FY 2017 were the potential for transfer of sensitive dual-use technology or know-how outside Canada, the potential for negative impacts on the supply of critical services to Canadians or the government, and the potential to enable foreign surveillance or espionage.

In terms of action formally taken under the national security provisions, in October 2013, the government rejected Accelero Capital Holdings’ proposed acquisition of the Allstream division of Manitoba Telecommunications Inc, which represented the first transaction to be expressly disallowed on national security grounds since the creation of the national security regime in 2009. Since that time a number of national security reviews have been undertaken, with reports that investment restrictions and divestitures have been required in a small number of cases.

In 2015, a media report disclosed that a proposed investment by Chinese company Beida Jade Bird to establish an alarm manufacturing facility near a Canadian Space Agency facility was prohibited.

Later the same year, the government under Prime Minister Stephen Harper ordered the divestiture of ITF Technologies by Chinese company O-Net on the basis that it was deemed to be injurious to Canada’s national security. ITF operations include manufacturing and distribution of optical components and modules for the telecom market and producing high-power devices and sub-assemblies for the industrial market. O-Net challenged in Federal Court the government’s order-in-council, demanding that O-Net divest itself of ITF.

As noted, greater receptiveness to Chinese investment has been evident in the federal government’s approach to applying the national security provisions of the ICA. In November 2016, the federal government under Prime Minister Trudeau agreed to revisit the Cabinet order against O-Net issued by the previous Conservative government. On 27 March 2017, O-Net announced that the Cabinet had approved the acquisition, and it appears that an order imposing conditions was issued. The conditions imposed have not been disclosed and the unique facts of the O-Net transaction may limit its precedent
value. However, it does stand as another example of the government’s willingness to work with investors and find solutions in certain circumstances where a viable path to approval previously may not have been possible.

Hytera’s takeover of Norsat International (Norsat) is another recent high-profile example of Canada’s approach to investment from China. Norsat, based in Vancouver, produces satellite equipment and transceivers, including those for military applications. Hytera, a private Chinese firm, proposed a friendly takeover and, despite considerable criticism – including from the United States – the transaction was approved by the Canadian government. The approval was granted without a full national security review, instead requiring only a 45-day extension on the standard 45-day initial review period stipulated by the ICA. The lack of a full national security review, particularly in light of the government’s hesitation in the past to allow Chinese investors to acquire assets in sensitive industries, was a surprising development and was the subject of considerable media comment in Canada and the United States.

The government’s approach to investment from China continues to evolve, and it is still the case that certain types of investments would be expected to attract a high level of scrutiny. As noted, the proposed acquisition of Aecon is being closely watched.

IV Significant Transactions, Key Trends and Hot Industries

i Key sectors

The energy sector has witnessed a marked improvement in deal-making 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 in 2017 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 Francisco Partners’ acquisition of Sandvine.

In addition to energy and technology, the real estate, mining, utilities and healthcare sectors also contributed to Canadian M&A activity in 2017 and 2018 to date.

ii Significant transactions

The largest transaction involving a Canadian acquirer in 2017 was 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 involved the foreign sell-side party accepting 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 domestic transaction in 2017 was the all-stock merger of equals between Agrium and Potash (renamed Nutrien), which created 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, Ontario Teachers’ Pension Plan’s (OTPP) 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.

iii Cross-border inbound investment

Buyers from outside Canada are not uncommon, and inbound cross-border M&A, particularly from the United States, has traditionally been a significant source of M&A activity. There was considerable improvement during 2017 in that regard relative to 2016. The most significant inbound transactions included 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 US-driven, cross-border M&A flows, China and Europe contributed to M&A activity as illustrated by the C$2 billion proposed acquisition of Aecon Group by CCCC International Holding and the C$2.9 billion acquisition of Atrium Innovations by Nestlé Health Science SA from a group of private equity and pension funds.

iv Foreign Outbound Investment

Compared with the proliferation of foreign outbound M&A by Canadian strategic acquirers during 2015–2016, 2017 was 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 44 per cent of all transactions in 2017 involved a foreign target or buyer, with Canadian outbound acquisitions outnumbering foreign inbound acquisitions by a ratio of 1.6:1.

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 2017, transaction volume for deals under C$250 million represented roughly 90 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, 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 acquired General Electric’s water and process technologies business for approximately C$4.4 billion.
Canada

V FINANCING OF M&A: MAIN SOURCES AND DEVELOPMENTS

Canadian pension funds and the alternative lending arms of global private equity firms represent significant sources of capital and acquisition financing, and they remained major players on the global investment landscape in 2016 and early 2017. Importantly, the pension funds do not simply represent alternative financing sources of M&A activity. Rather, they have become Canada’s most significant participants in global private equity, by both investing and direct investing in infrastructure and real estate assets; for example, Caisse de dépôt et placement du Québec’s and CIC Capital Corporation’s C$2.3 billion acquisition of FONCIA Groupe SAS from Bridgepoint Advisers Limited and Eurazeo, CPPIB’s C$1.7 billion acquisition of Hotelbeds Spain, SLU from Tui Group in partnership with Cinven Limited, CPPIB’s C$3.2 billion acquisition of a 40 per cent stake in Glencore Plc’s agricultural products business and Alberta Investment Management Company’s, OTPP’s and OMERS’ C$3.8 billion acquisition of London City Airport Ltd. In general, Canadian credit markets continued to be relatively robust because of low interest rates, especially for investment grade debt issuers, with the result that acquisition financing is generally readily available. Moreover, the Canadian public equity and debt capital markets have traditionally been material sources of financing for large capitalisation M&A transactions.

VI TAX LAW

i Extension of reassessment period could impact scope of diligence

The 2018 Canadian federal budget proposed several tax measures, some of which could affect M&A transactions. The budget proposed to give the Canada Revenue Agency a three-year extension for reassessments in respect of income arising in connection with a foreign affiliate of a taxpayer (extending the total reassessment period to either seven or eight years). Previously the extended reassessment period only applied in respect of certain transactions involving the taxpayer and a non-arm’s length non-resident person. This change could alter the scope of due diligence that is completed in respect of M&A transactions by extending the scope of taxation years that should be reviewed as part of the diligence process.

ii Attorney–client privilege in the transactional context

The Canadian Federal Court of Appeal released the Iggillis Holdings Inc and Ian Gillis v. Minister of National Revenue (2018 FCA 51) decision (Iggillis) that confirms certain key features of the Canadian attorney–client privilege, and overturns a troublesome lower court judgment that curtailed the scope of attorney–client privilege in the transactional context.

Generally, communication between an attorney and a client in Canada that entails the seeking or giving of legal advice where that advice is intended to be confidential is subject to attorney–client privilege. This privilege belongs to the client and, generally, can be waived only by the client. The courts have also accepted that by divulging privileged information to a third party, a client may waive the attorney–client privilege against everyone; in other words, the divulged information is no longer subject to attorney–client privilege. The Canadian courts have generally agreed that there is no waiver of attorney–client privilege if information that is subject to attorney–client privilege is shared in confidence with a party that has a common interest in completing a transaction (common interest privilege).

The lower court in Iggillis relied on certain US jurisprudence to reject the notion that common interest privilege has a place in Canadian law. The Canadian Federal Court
of Appeal unanimously overturned the lower court’s decision, finding that the sharing of information (in that case a tax planning memorandum), in confidence, with other parties that have a common interest in completing the transaction would not result in a waiver of attorney–client privilege.

### iii General
It continues to generally be desirable for Canadian corporations to be acquired through a Canadian acquisition company, rather than having a non-resident acquire the Canadian corporation directly. In particular, this may assist in maximising the amount of cross-border paid-up capital (PUC) of the Canadian parent company that may be distributed to its non-resident shareholders free of Canadian withholding tax. Maximising PUC also assists in maximising the available borrowing room under Canada’s 1.5:1 debt-to-equity thin capitalisation rules, which can allow increased related party debt without triggering a denial of interest deductibility (or deemed dividend withholding tax). Subject to a set of detailed rules, use of a Canadian acquisition company may also make it possible to combine the Canadian acquisition company with the acquired Canadian corporation to increase or ‘bump’ the tax cost of subsidiary shares following the combination as an amalgamation or wind-up.

### iv International
In an effort to address treaty abuse in its tax treaties, Canada signed the OECD’s Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (MLI). Canada intends to complete its domestic ratification process in 2018. As a result, it is expected that the MLI’s ‘principal purpose test’ will apply to limit access to various tax treaty benefits (after Canada’s relevant treaty partners also complete their domestic ratification processes).

### VII COMPETITION LAW
Canada’s competition law merger review regime is, to a large extent, aligned with its US counterpart. Subject to certain exceptions, the Competition Act requires parties planning to undertake certain types of transactions that affect businesses with assets or sales revenue in Canada (even if only indirectly as a result of a transaction occurring principally outside Canada) to file a pre-merger notification with the Competition Bureau prior to completing a transaction. In general, a transaction is notifiable where both the party size and transaction size thresholds are exceeded:

- **a** The ‘party size’ threshold is exceeded if the parties to the transaction, including affiliates, have assets in Canada with an aggregate gross book value that exceeds C$400 million, or aggregate gross revenues from sales in, from or into Canada that exceed C$400 million.
- **b** The ‘transaction size’ threshold is exceeded, if, for an acquisition of assets in Canada of an operating business, the aggregate value of those assets, or the gross revenues from sales in or from Canada generated from those assets, exceed C$92 million; or if, for an acquisition of voting shares of a corporation, the aggregate value of the assets in Canada of the corporation, or the gross revenues from sales in or from Canada generated from those assets, exceed C$92 million.
If the transaction is an acquisition of shares, an additional threshold requires that the voting interest of the purchaser post-transaction exceeds 20 per cent for a public company and 35 per cent for a private company (or 50 per cent if the lower threshold is already exceeded).

Upon receipt of the parties’ filing, the Competition Bureau will conduct a substantive merger review to determine whether the proposed transaction will be ‘likely to prevent or lessen competition substantially’. The transaction may not be completed until the expiry of a 30-day waiting period, following which the parties can close, provided the Commissioner of Competition has not exercised his or her discretion to extend the waiting period by requiring the notifying parties to supply additional information (a supplemental information request (SIR)). Upon the issuance of an SIR, the waiting period stops until a complete response has been submitted. Once the response to the SIR is submitted, a further 30-day period starts to run and the parties can close their transaction following its expiry, unless the Commissioner challenges the transaction or obtains an injunction to prevent or delay closing, or the parties have agreed otherwise. The issuance of an SIR is typically reserved for transactions between competitors when there is a serious concern about a potential prevention or lessening of competition.

The Competition Act also provides for a procedure pursuant to which transactions that do not give rise to significant substantive merger issues may be exempted from the pre-merger notification requirements and from substantive review. This procedure allows the Commissioner to issue an advance ruling certificate in cases where he or she is satisfied that there are not sufficient grounds on which to seek an order from the Competition Tribunal in respect of a transaction.

The Commissioner has a general discretionary right to review (and challenge) on substantive competition law grounds any merger, including mergers that do not meet the thresholds for mandatory pre-merger notification, until one year after closing (unless this discretionary authority has been relinquished, which is rare). If the Commissioner challenges a transaction, the Competition Tribunal may make an order prohibiting a merger, dissolving a completed merger or requiring other remedial action, such as divestitures.

VIII OUTLOOK

There was a significant increase in the volume of M&A activity during 2017, and the early part of 2018 suggests that this upward trend is likely to continue in the short term. It bodes well for the year ahead that aggregate deal value remains at near-record levels, thanks to a number of large mega-deals, but the fact that a strong, resurgent mid-market is once again the driving force behind Canadian deal-making is an equal reason for optimism. Despite this positive momentum, much will depend on whether the outbound deal-making that drove M&A activity in the 2015–2017 period will continue throughout 2018, and whether changes on the international political scene, such as Brexit negotiations in the United Kingdom and negotiations concerning NAFTA with a protectionist administration in the United States, ultimately cool this important source of Canadian M&A.

The outlook for domestic deal-making is more certain. It has increased again in the first quarter of 2018, and the transaction volume of 834 announced deals is the highest level for a given quarter in six years. We anticipate that buoyant equity markets and continued low borrowing costs will help market conditions in Canada remain very attractive for domestic buyers, and so we expect to see more corporations seeking M&A opportunities in furtherance of strategic growth throughout 2018.
I OVERVIEW OF M&A ACTIVITY


The three main types of entity used in the Cayman Islands are the exempted company, the exempted limited partnership and the limited liability company (LLC). During 2017, formation activity increased significantly – 11,138 exempted companies (2016: 9,812), 3,774 exempted limited partnerships (2016: 3,277) and 711 LLCs (2016: 205) were incorporated or registered in the Cayman Islands; with 83,675 exempted companies (2016: 80,658), 22,346 exempted limited partnerships (2016: 20,122) and 889 LLCs (2016: 192) being active as at 31 December 2017.3

II GENERAL INTRODUCTION TO THE LEGAL FRAMEWORK FOR M&A

The key sources of regulation of M&A in the Cayman Islands are the Companies Law (2018 Revision) (Companies Law) and common law.

The Companies Law includes provisions permitting mergers and consolidations between one or more companies, provided that at least one constituent company is incorporated under the Companies Law. The Limited Liability Companies Law (LLC Law), discussed further below, also provides for a similar framework for Cayman Islands LLCs.

Mergers, amalgamations and reconstructions by way of a scheme of arrangement approved by the requisite majorities of shareholders and creditors, and by an order of the Cayman Islands court under Section 86 or 87 of the Companies Law, are still available for complex mergers (and are mirrored in the LLC Law). The Companies Law provides a limited minority squeeze-out procedure (which, again, is mirrored in the LLC Law).

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1 Suzanne Correy and Daniel Lee are partners at Maples and Calder.
3 Cayman Islands Registrar of Companies and Registrar of Exempted Limited Partnerships annual statistics.
The Cayman Islands does not have a prescriptive set of legal principles specifically relevant to ‘going private’ and other acquisition transactions (unlike other jurisdictions such as, for example, Delaware). Instead, broad common law and fiduciary principles will apply.

While there are no specific statutes or government regulations concerning the conduct of M&A transactions, where the target company’s securities are listed on the Cayman Islands Stock Exchange (CSX), the CSX Code on Takeovers and Mergers and Rules Governing Substantial Acquisitions of Shares (which exists principally to ensure fair and equal treatment of all shareholders) may apply.

### III DEVELOPMENTS IN CORPORATE AND TAKEOVER LAW AND THEIR IMPACT

#### i LLCs

In June 2016, the LLC Law came into force creating a new Cayman Islands vehicle: the LLC. This vehicle takes its inspiration, in part, from the Delaware LLC. Its flexible nature means that it is well-suited to a broad range of general corporate and commercial applications. The introduction of the LLC has further strengthened the Cayman Islands’ position as the domicile of choice for offshore investment funds and corporate structuring vehicles.

An LLC is essentially a hybrid vehicle, combining certain characteristics of a Cayman Islands exempted company with those of a Cayman Islands exempted limited partnership. In developing the vehicle, certain Delaware concepts were taken into consideration and adapted, where appropriate, to mesh with Cayman Islands law and concepts. An LLC is a body corporate with separate legal personality, like a Cayman Islands exempted company, but without the constraint of having share capital.

Equivalent to the Delaware statute, the LLC Law provides a set of default rules as to how an LLC operates. However, the members of an LLC are free to legislate their own arrangements in the vehicle’s LLC agreement (the constitutional document of the LLC), which is not publicly filed.

Generally, the liability of a member of an LLC is limited to the amount a member has contractually agreed to contribute to the LLC. There is a limited statutory clawback, which applies only if a member receives a distribution when the LLC is insolvent and the member has actual knowledge of the insolvency at the time the distribution is made.

There is great flexibility in how LLCs are managed. They may be governed by the members themselves or appointed managers who need not be members (such as a board of managers). Unless otherwise expressly specified in the LLC agreement, the default duty of care in managing an LLC is to act in good faith. This duty may be expanded or restricted, but not eliminated, by the express provisions of the LLC agreement. In an M&A context, we consider this feature may be of particular interest for management buyout investors who may wish to have the right to appoint a representative as a director or manager of that vehicle. In a traditional exempted company, any investor representative (in a company context, as a director) has a duty to act at all times in the best interests of the company when participating in company decisions: the representative cannot solely consider the interests of the investor that has appointed him or her (to do so would expose him or her to potential personal liability). Contrast this with an LLC, where the members have the freedom to contractually agree in the LLC agreement the duty of care that the managers of the LLC owe.

Although dependent on the required structuring for particular deals, we anticipate that the vehicle will be used in a broad range of corporate and commercial applications, including
acquisition and joint venture structures, acting as corporate blockers and holding vehicles, as preference share issuing vehicles (in a venture capital financing arrangements), employee incentive vehicles and in structured finance transactions.

ii Merger regime and dissenting rights

Since its introduction in 2009, the merger regime of Part XVI of the Companies Law has become a popular tool for facilitating mergers involving Cayman Islands companies. Under this regime, two or more companies may merge, with their property and liabilities vesting in one of them as the surviving company.

Similar to other jurisdictions with equivalent regimes, the Companies Law provides for a right of dissenting shareholders to object to a merger and be paid a payment of the fair value of their shares upon their dissenting to the merger if they follow a statutory procedure. If the dissenting shareholders and the relevant company are unable to agree in accordance with the statutory procedure, the Grand Court of the Cayman Islands is required to determine the fair value of the shares, and a fair rate of interest, if any, to be paid by the company upon the amount determined to be the fair value.

These rights of a dissenting shareholder are not available in certain circumstances; for example:

- to dissenters holding shares of any class in respect of which an open market exists on a recognised stock exchange or recognised inter-dealer quotation system at the relevant date; and
- where the consideration for such shares to be contributed are shares of the surviving or consolidated company (or depositary receipts in respect thereof), are shares of any other company (or depositary receipts in respect thereof) that is listed on a national securities exchange or designated as a national market system security on a recognised inter-dealer quotation system, or are held of record by more than 2,000 holders.

The last few years have seen a significant increase in the volume of dissent actions in the Cayman Islands, with 16 separate petitions having been filed since the beginning of 2016. A number of these actions appear to be driven, at least in part, by arbitrage investors, purchasing positions in companies particularly with a view to exercising dissent rights. It remains to be seen whether this trend continues, including in light of recent rulings both in the Cayman Islands (including those described below) and elsewhere (particularly in Delaware). It also remains to be seen whether this level of dissenter activity leads to a re-emergence of schemes of arrangement, being the way in which most takeovers and take-privates were structured in the Cayman Islands prior to the introduction of the merger regime. Although schemes of arrangement involve court supervision, higher requisite majorities and generally higher deal costs, they do not involve dissenter rights or any other ‘cash out’ or ‘fair value’ option.

In 2017, the Grand Court ruled on only the second merger fair value appraisal that has gone to trial in the Cayman Islands. The decision in Re Shanda Games Limited advances the case law on the Cayman Islands merger regime following the 2015 decision in Re Integra Group (Maples and Calder acted for the successful dissenting shareholders in both cases). These decisions of the Court set out important guidance as to how, if a shareholder has dissented to a statutory merger, the ‘fair value’ of the dissenter’s shares will be determined. The following guidance can be taken from the Court’s decisions:

- Fair value is the value to the shareholder of his or her proportionate share of the business as a going concern: it is a value that is ‘just and equitable’ and provides adequate
compensation consistent with the requirements of justice and equity. Fair value does not include any premium for forcible taking of shares. In determining fair value, neither the upside nor downside of the transaction being dissented from should be taken into account (for example, any costs savings obtained by a company going private).

Assessing fair value is a fact-based exercise that requires an important element of judgment by the court.

If a company’s shares are listed on a major stock exchange, this does not mean that a valuation methodology based upon its publicly traded prices is necessarily the most reliable. Whether this valuation methodology is appropriate will depend on whether there is a well-informed and liquid market with a large, widely held, free float.

The date for determining fair value was the date on which the shareholders approved the transaction: this was the date on which the offer could be accepted. Importantly, the Court concluded that dissenting shareholders could not take advantage of the cost savings going forward as a result of the merger. The Court’s view was that dissenting shareholders should not benefit from any enhancement in the value of their shareholding attributable directly to the transaction from which they have dissented.

Interestingly, in reaching its decisions in both Integra and Shanda, the Court took into account guidance concerning similar statutory merger processes that exist in the States of Delaware and Canada. In view of the litigious nature of United States M&A, there is a significant volume of case law on this topic in Delaware. We believe this may be the first time the Grand Court has specifically considered Delaware precedent.

The decision in Shanda was recently the subject of an appeal. Although the Court of Appeal affirmed most of the conclusions below, significantly it reversed the Grand Court’s position on minority discount. Both Integra and Shanda had followed Delaware and Canadian authority on this point, holding that in a fair value appraisal the dissenters’ shares were to be valued as a proportion of the value of the whole company, not as a block of shares offered for sale, such that there was no applicable ‘minority discount’. The Court of Appeal took a different view, and followed what it considered to be the public policy reflected in English case law, to the effect that ‘it was not unfair to offer a minority shareholder the value of what he possesses, i.e., a minority shareholding. The element of control is not one which ought to have been taken into account as an additional item of value in the offer of these shares’. The Court of Appeal held that Section 238 of the Companies Law requires fair value to be attributed to what the dissenters actually possess: if it is a minority shareholding, it is to be valued as such, and if the shares are subject to particular rights or liabilities or restrictions, the shares are to be valued as subject to those rights or liabilities. This question of minority discount is the subject of a further appeal to the Privy Council.

A series of decisions culminating in the Court of Appeal’s ruling in Re Qunar Cayman Islands Limited affirmed that the Court has jurisdiction to make an interim payment order after a dissent petition is filed but before the trial, meaning that a dissenting shareholder may be entitled to receive an interim payment effectively at the outset of the proceedings. In many cases this has equalled the merger consideration, on the basis that the company has admitted that this reflects fair value (albeit, this does not necessarily follow). However, the question of what the Court should and should not take into account when being asked to exercise this discretion has not been fully tested, and remains the subject of debate.
In a separate decision in *Re Qunar*, reversing earlier Grand Court decisions, the Court of Appeal affirmed the availability of documentary discovery from dissenters, both as to their own valuation analysis and as to their trading history in the company's shares.

### iii  Global transparency

Already recognised by the Organisation for Economic Co-operation and Development (OECD), the International Monetary Fund (IMF) and other international bodies for its transparency and standards being consistent with those of other major developed countries, the Cayman Islands is acknowledged as a first-class jurisdiction for conducting international business. The government has also now implemented or confirmed a number of further transparency steps it is willing to take, including:

- the introduction in July 2017 of a beneficial ownership register regime, discussed further below;
- a willingness to commence discussions with those jurisdictions that are participating in the G5 initiative (for the exchange of beneficial ownership information with law enforcement agencies) on entering into bilateral agreements with the Cayman Islands, similar to the beneficial ownership regime now in place with the United Kingdom;
- the repeal of the Confidential Relationships (Preservation) Law and its replacement by the Confidential Information Disclosure Law, which offers more understanding and definition with regard to the mechanisms in place for sharing confidential information with the appropriate authorities;
- acknowledging privacy as a basic human right, introducing new data protection legislation (which will be on a par with what is in place in the European Union);
- abolishing bearer shares (completed in May 2016); and

These measures demonstrate the Cayman Islands’ continued efforts to comply with and promote transparency through close collaboration and compliance with the relevant global regulatory bodies, tax authorities and law enforcement agencies in line with international standards, while simultaneously respecting the legitimate right to privacy of law-abiding clients.

The Cayman Islands has agreements to share tax information with authorities in more than 90 other countries, including the United States under the Foreign Account Tax Compliance Act, and is in the ‘early adopter’ group for the Common Reporting Standard, the OECD’s global tax information exchange standard.

In July 2017, the Cayman Islands introduced a new beneficial ownership register regime (the BOR Regime). Exemptions mean that certain Cayman Islands companies and LLCs are not in scope of the regime. If a company or LLC is in scope, it must take ‘reasonable steps’ to identify its beneficial owners and certain intermediate holding companies, and to maintain a beneficial ownership register at its registered office in the Cayman Islands with a licensed and regulated corporate service provider.

This register must generally record details of the individuals who ultimately own or control more than 25 per cent of the equity interests, voting rights or rights to appoint or remove a majority of the company directors, or LLC managers, together with details of certain intermediate holding companies through which such interests are held.
The corporate service providers must facilitate access to information extracted from the register through a centralised IT platform operated by a competent authority designated by the government. The information will not be held on a central register by either the government or the competent authority, nor will it be publicly accessible or searchable. Only Cayman Islands and UK authorities will have rights to request information, and then only as individual (and not automatic) requests. The information on the beneficial ownership register can already be requested by UK authorities under existing information exchange gateways, so in essence the new regime merely seeks to streamline the process to provide for quicker and more discrete search accessibility.

Legislation introduced at the end of 2017 now requires that Cayman Islands companies and LLCs that are exempt from the BOR Regime make a filing to that effect with their corporate services provider in the Cayman Islands.

IV FOREIGN INVOLVEMENT IN M&A TRANSACTIONS

The vast majority of M&A activity involving Cayman Islands entities concerns foreign businesses and investors as a result of the offshore nature of the jurisdiction. These businesses and investors are based in a broad range of international jurisdictions.

A large number of M&A deals are still originating from the United States, while European deals continue to feature and Asian-related transactions continue to grow.

As at the end of 2016, according to statistics published by the United States Securities Exchange Commissions, there were 700 ‘foreign companies’ (i.e., non-United States issuers) listed on the New York Stock Exchange and NASDAQ, of which 103 were Cayman Islands issuers, far ahead of any other traditional ‘offshore’ jurisdiction. Only Canada had more companies traded on the main US public markets than the Cayman Islands.

The Asian growth can be evidenced by the popularity of the Cayman Islands exempted company as a listing vehicle in Asia: as at the end of 2017, 843 of the 1,794 companies listed on the Main Board of the Hong Kong Stock Exchange were Cayman Islands exempted companies.4

The Cayman Islands continues to be an attractive jurisdiction for the structuring of offshore transactions for a number of reasons, including:

- the speed with which vehicles can be established (usually within one business day), and without the need for any prior governmental approvals;
- the laws of the Cayman Islands are substantially based upon English common law and a number of ‘key’ English statutes. This gives Cayman Islands law and the legal system a common origin with those of many of the jurisdictions of its users, including the United States;
- the Cayman Islands has a modern and flexible statutory regime for companies, limited partnerships and LLCs;
- as described further below, the Cayman Islands has no direct taxes of any kind;
- the lack of exchange control restrictions or regulations; and
- there is no requirement that a Cayman Islands entity should have any local directors or officers. Nor is there any requirement for local service providers (except that for funds regulated under the Mutual Funds Law, where there is a requirement for their audited accounts to be signed off by a local firm of auditors.)

4 HKEx Fact Book 2017.
As discussed in Section III.iii, the Cayman Islands is recognised by the OECD, the IMF and other international bodies for its transparency and standards consistent with those of other major developed countries.

V SIGNIFICANT TRANSACTIONS, KEY TRENDS AND HOT INDUSTRIES

The merger regime of Part XVI of the Companies Law continues to be a popular tool for facilitating mergers involving Cayman Islands companies, and we continue to see listed companies being the subject of ‘take-private’ transactions led by private equity and management in addition to traditional strategic corporate acquisitions. The merger regime has also proven to be a popular mechanism for business combinations for special purchase acquisition vehicles.

Deals of note announced or closed during 2017 that involved Cayman Islands vehicles included:

- the US$4.3 billion take-private of NYSE-listed education business Nord Anglia Education, Inc by the Canada Pension Plan Investment Board and Baring Private Equity Asia;
- the US$10 billion acquisition of Worldpay, the payments business, by Vantiv;
- the US$8 billion acquisition of the Formula One motorsports business by Liberty Media Corporation from a consortium led by CVC Capital Partners;
- the US$2.9 billion acquisition of insurer Ironshore by Liberty Mutual Insurance from Fosun International; and
- investment in SharkNinja, the household cleaning and kitchen small appliances business, by CDH Investments.

VI FINANCING OF M&A: MAIN SOURCES AND DEVELOPMENTS

As a leading jurisdiction for the establishment of private equity funds, it is perhaps unsurprising that a significant number of Cayman Islands M&A deals are also financed by private equity. Traditional sources also continue to be a key provider of finance for mergers and acquisitions involving Cayman Island entities, a standout example being the US$15 billion in secured financing provided by a consortium of banks to Avago Technologies Limited and its associated entities in connection with its US$37 billion acquisition of Broadcom Corporation, the combined entity forming the third-largest US semiconductor maker by revenue after Intel Corp and Qualcomm Inc.

VII EMPLOYMENT LAW

A range of legislation and licensing requirements apply to companies seeking to carry on local business in the Cayman Islands and employ local personnel. In view of the nature of offshore business, the vast majority of Cayman entities do not have employees in the Cayman Islands, and these requirements are therefore often not relevant to Cayman Islands M&A deals.

Employment standards in the Cayman Islands are currently governed by the Labour Law (2011 Revision) (Labour Law), the Health Insurance Law (2018 Revision) and ancillary regulations (Health Law), the National Pensions Law (2012 Revision) (Pensions Law), and the Workmen’s Compensation Law (1996 Revision) and ancillary regulations. These laws establish minimum employment standards, but do not preclude an employer from setting conditions that are above the minimum.
The Labour Law includes provisions dealing with probation periods, employment termination, public holiday pay, sick leave, compassionate leave, maternity leave, severance pay and unfair dismissal.

The Health Law requires that health insurance cover is provided to employees, their uninsured spouses and children. The Pensions Law requires an employer to provide a pension plan or to make a contribution to a pension plan through an approved pension provider for every employee who is between 18 and 60 years old (an employer is not required to provide a pension plan for non-Caymanian employees who have been working for a period of nine months or less).

VIII TAX LAW

i Cayman Islands taxation

The Cayman Islands has no direct taxes of any kind: no income, corporation, capital gains, withholding taxes or death duties. Under the terms of relevant legislation, it is possible for all types of Cayman vehicle – companies, unit trusts, limited partnerships and LLCs – to register with and apply to the government for a written undertaking that they will not be subject to various descriptions of direct taxation, for a minimum period, which in the case of a company is usually 20 years, and in the case of a unit trust, limited partnership and an LLC, 50 years.

Stamp duty may be payable in connection with the documentation executed in or thereafter brought within the jurisdiction of the Cayman Islands (perhaps for the purposes of enforcement). In most cases, this duty is of a relatively de minimis fixed amount except in limited circumstances, such as when security is being granted over property in the Cayman Islands.

ii Automatic exchange of information legislation

The Cayman Islands has signed an inter-governmental agreement to improve international tax compliance and the exchange of information with the United States (the US IGA). The Cayman Islands has also signed, with more than 90 other countries, a multilateral competent authority agreement to implement the OECD Standard for Automatic Exchange of Financial Account Information – Common Reporting Standard (CRS).

Cayman Islands regulations have been issued to give effect to the US IGA and CRS. Cayman Islands ‘financial institutions’ are required to comply with the registration, due diligence and reporting requirements of these regulations, except to the extent that they are able to rely on certain limited exemptions.

IX COMPETITION LAW

There is no specific anti-competition legislation that is relevant to Cayman Islands M&A. Given the offshore nature of Cayman Islands M&A, competition law issues are usually a question of the relevant onshore jurisdictions where the underlying businesses that are the subject of the M&A are based.
X OUTLOOK

Of the corporate executives and private equity investors responding to a recent Deloitte survey, 75 per cent expected deal activity to increase in 2017, with 76 per cent of the responding private equity investors – a significant source of deals for the Cayman Islands – expecting that they will close a greater number of deals in 2018. We anticipate that 2018 will be a strong year for Cayman Islands M&A.

The existing legal framework of the Cayman Islands, together with the continued focus on being at the forefront of global compliance developments and the ability to deliver new legal initiatives (such as the new Cayman Islands LLC), will continue to ensure that the Cayman Islands remains the offshore jurisdiction of choice for global M&A transactions in future years.

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Chapter 11

CHINA

Wei (David) Chen, Yuan Wang and Kai Xue

I OVERVIEW OF M&A ACTIVITY

It has been a tumultuous year for Chinese outbound investment as a result of the deterioration of economic relations between China and the United States. On 6 July 2018, the trade war commenced with US$34 billion in tariffs and retaliatory tariffs imposed on each other’s merchandise. While tariffs are the centrepiece of the clash, the expected passage of upgraded investment review legislation in the United States with the intent to curtail investment by China will take its toll in the long term.

Overall in 2017, there was a drop of 42 per cent in outbound M&A by Chinese buyers in 2017 compared to 2016, from US$208.7 billion to US$121.4 billion, according to Thompson Reuters. The slump was expected as policies enacted at home at the end of 2016 slowed down the breakneck pace of outbound M&A growth in previous years. Also, owing to investment prohibition by the United States that have stopped Chinese acquisitions, deal flow to the United States slowed dramatically and has all but ceased as of publication in 2018.

As regards domestic regulation, a new approval framework for outbound investment was promulgated. A reorganisation of anti-monopoly enforcement has merged the responsibility of three agencies who had split roles into a single anti-monopoly enforcement agency. A bright spot is the rapid opening up of the financial sector for companies in securities, funds, futures and life insurance.

II GENERAL INTRODUCTION TO THE LEGAL FRAMEWORK FOR M&A

There is no unified M&A law governing all M&A activities. Rather, specific M&A activities are subject to different sets of laws and regulations depending on the type of buyer, the target and specific legal issues implicated in the deal. Foreign investment in certain industries requires approval from the competent regulatory body (e.g., investment in banking is overseen by the China Banking and Insurance Regulatory Commission).

i Inbound M&A

In the context of inbound M&A, the laws and regulations applicable to foreign investment in China will generally apply.

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China

Investment vehicles

China recognises a wide range of business vehicles. The three basic forms are the limited liability company, the company limited by shares and the partnership. A business establishment that is the result of foreign investment will generally be referred to as a foreign invested enterprise (FIE).

The most common forms of FIEs are:

a. joint ventures (JVs) between domestic and foreign partners, including equity JVs and cooperative JVs;

b. wholly foreign-owned enterprises;

c. foreign-invested holding companies;

d. foreign-invested companies limited by shares (FICLS); and

e. foreign-invested partnerships.

Foreign Investment Industry Catalogue

The Foreign Investment Industry Catalogue serves as the main legal basis under which the government regulates foreign investment industry entry into China. It is therefore the starting point for considering the extent to which the industry of a target of an inbound M&A transaction is open to a foreign investor.

In the current Catalogue, which became effective on 28 July (Catalogue 2018), industries are categorised as ‘encouraged’ or subject to ‘special foreign investment access administrative measures’ (the Negative List). The Negative List contains all restrictive measures on foreign investments outside free trade zones (FTZs). Investments subject to the Negative List are further divided into two subcategories: ‘restricted’ or ‘prohibited’. Restrictive measures on investments are typically structured as either limits on the equity interests a foreign investor can hold (i.e., some sectors require Chinese JV partners, and in some cases it is mandated that the Chinese JV partner holds a majority equity interest), or senior executives are mandated to be Chinese. Industries categorised as ‘prohibited’ are not open to foreign investment.

The Negative List approach is a simplified process whereby foreign investments in industries categorised as ‘restricted’ or ‘prohibited’ are subject to approval or denial. Otherwise, industries not on the Negative List will only need to go through record-filing procedures, rather than the case-by-case approval needed under earlier versions of the Catalogue (see below for more on record filing). In accordance with the law, all market participants may enter the relevant industries or businesses not included in the Negative List on an equal basis.

There are also generally applicable investment restrictions limiting the activities of both domestic and foreign investors (e.g., the operation of theme parks, the construction of golf courses and the gaming industry).

Record-filing system

In parallel with adoption of the Negative List, a uniform record-filing administration system was implemented to replace case-by-case approval under the Ministry of Commerce (MOFCOM) for investments in industries not on the Negative List. In general, the establishment of and most changes to existing non-Negative List FIEs, including transformation of non-FIEs into FIEs through an acquisition, strategic investment by foreign investors in listed companies, merger or other method, is under the purview of record filing. However, exceptions include transactions on the radar of antitrust or national security review. Also not eligible for record filing are ‘affiliated acquisitions’, namely the acquisition of domestic entities through overseas entities that are established or controlled by affiliates of the target.
China

A strategic investment in a listed company not on the Negative List by a foreign investor is eligible for record filing. This is worthy of note since investments of this type are still subject to a number of legal requirements; however, it is commonly understood that the requirements – including qualification, lock-up period and shareholding ratio of foreign investors – may have been lifted (see ‘Inbound M&A transaction involving A-shares listed companies’, below).

All record filings are required to be carried out via a uniform online platform, largely eliminating the uncertainty of different interpretations by local officials.

Nationwide and FTZ negative lists
The Negative List is applicable nationwide for investments outside FTZs. For investments within FTZs, a separate negative list is implemented under the Special Administrative Measures for Foreign Investment Access to Pilot Free Trade Zones (the FTZ Negative List). The latest revision of the FTZ Negative List became effective on 30 July 2018. It halves the number of listed restrictions and eases shareholding ratios in a number of categories.

Regulators in public statements in April 2018 gave positive signals about the parallel development of a Negative List (nationwide) and a FTZ Negative List, with the latter continuing to enjoy greater openness.

In some sectors (e.g., finance, where there is a substantial similarity between the Negative List and the FTZ Negative List in restrictions, such as shareholding limits), companies operating in the FTZs can still enjoy more flexibility in their day-to-day operations. For example, FTZs in Shanghai, Guangdong, Tianjin, Fujian, Chongqing have simplified procedures for controlling foreign capital. Foreign-invested companies in these FTZs enjoy expedited processing in opening a foreign currency account and receiving payment in a foreign currency.

As for the number of FTZs, this still stands at 11 locations. That number has not increased recently and it is the stated policy of MOFCOM to de-emphasise expanding the number of FTZs but rather to focus on improving the quality of existing FTZs. MOFCOM has indicated it will deepen liberalisation in existing FTZs through concentrating on promoting openness in the areas of finance, education, culture, medicine and general manufacturing.

M&A regulations
Inbound M&A transactions by foreign investors are primarily governed by the Regulations on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors (M&A Regulations)\(^2\) developed by MOFCOM.

The M&A Regulations mainly concern:

\(a\) the acquisition of equity interest in and assets from Chinese domestic enterprises;

\(b\) the establishment of offshore vehicles for the purposes of listing Chinese assets through an offshore initial public offering;

\(c\) the establishment of FIEs by offshore entities set up or controlled by Chinese domestic enterprises and Chinese residents; and

\(d\) the swapping of shares between a foreign company or its shareholders and the shareholders of a Chinese domestic enterprise.

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\(^2\) As last amended on 22 June 2009.
The M&A Regulations also provide detailed procedures and rules regarding the acquisition of domestic companies by foreign investors, including approval procedures, acquisition prices and terms of payment. However, they are not comprehensive and do not apply to the following inbound M&A transactions by a foreign investor:

\[\begin{align*}
  a & \text{ acquisitions of the equity or subscription of a capital increase of an existing FIE (covered by regulations on equity changes of the investors of FIEs);}^3 \\
  b & \text{ mergers between or acquisitions of a domestic enterprise through an existing FIE (the ambit of regulations for mergers and divisions of FIEs and reinvestment by FIEs);}^4 \text{ and} \\
  c & \text{ acquisitions of a domestic limited liability company and the transforming of the same into an FICLS (governed by regulations on the establishment of an FICLS).}^5
\end{align*}\]

If a foreign investor’s acquisition of a domestic enterprise has a bearing on national security, the acquisition may also be subject to a national security review by a ministry-level co-chaired committee, generally involving MOFCOM, the National Development and Reform Commission (NDRC) and, if necessary, other governmental regulators.

**Acquisition of state-owned assets or equity**

Inbound M&A transactions aimed at acquiring state-owned assets or equity are subject to a rather complex legal regime and strict supervision by the Chinese authorities, including the State-owned Assets Supervision and Administration Commission of the State Council (SASAC). In general, sales of state-owned assets or state-owned enterprises (SOEs) (with few exceptions) must be approved by SASAC (or its provincial and local counterparts) or by the relevant SOEs that are empowered with approval authority. Acquisitions of state-owned assets or SOEs are also subject to a mandatory appraisal conducted by a qualified appraiser and, as a general principle, the actual transfer price for the state-owned assets or equity shall not be less than 90 per cent of the value determined by the appraiser, except if a price lower than the 90 per cent threshold is approved by the competent authority.

**Inbound M&A transactions involving A-shares listed companies**

PRC domestic stock exchange-listed companies currently issue two classes of shares, namely:

\[\begin{align*}
  a & \text{ A-shares, which are yuan-denominated shares reserved for Chinese investors, qualified foreign institutional investors (QFIIs), yuan-qualified foreign institutional investors (YQFIIs) and qualified foreign strategic investors; and} \\
  b & \text{ B-shares, which are yuan-denominated shares traded in foreign currency (in US dollars on the Shanghai Stock Exchange and in Hong Kong dollars on the Shenzhen Stock Exchange) and available for purchase by both Chinese and foreign investors.}
\end{align*}\]

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3 Mainly, Certain Regulations on the Change of Investors’ Equities in Foreign Investment Enterprises promulgated by the former Ministry of Foreign Trade and Economic Cooperation (predecessor of MOFCOM) and State Administration for Industry and Commerce on 28 May 1997.
5 Mainly, Provisional Regulations on the Establishment of Foreign Invested Companies Limited by Shares as last amended on 28 October 2015.
To qualify as a foreign strategic investment in a domestic-listed company, a foreign investor needs to purchase at least 10 per cent of the A-shares of a listed company, by way either of a private placement or a share transfer, and generally be subject to a three-year tie-in period and other prescribed conditions.

In addition, to purchase through QFIs or YQFIs, or through qualification as a strategic investment, a foreign investor may acquire A-shares indirectly through an existing FIE that holds or is eligible to hold A-shares of a listed company.

ii Outbound cross-border investments

A new regulatory regime for outbound investments, Administrative Measures for Outbound Investments by Enterprises (the Outbound Investment Circular), came into effect on 1 March 2018, specifying filing or approval requirements for outbound investments. The main gist of the Outbound Investment Circular is the application of a framework of filing or approval requirements on both direct and indirect outbound investments based on the sensitivity of a project. The Outbound Investment Circular issued by the NDRC cements the build-up of regulatory policy changes since late 2016 when authorities adopted practices to curb outbound investment in sensitive sectors. It also builds on the Guidelines on Further Guiding and Regulating the Directions of Outbound Investments issued in August 2017 (the Outbound Investment Guidelines), which divided types of outbound investments into the categories of ‘encouraged’, ‘restricted’ and ‘prohibited’.

The Outbound Investment Circular also has the important consequence of bringing under regulatory coverage the sponsorship of, or investment in, offshore investment funds with outbound investments by Chinese entities, including offshore entities controlled by Chinese companies or individuals. This puts indirect investments under the purview of outbound approval regulation by the NDRC. Previously, if funds were transferred offshore for an indirect investment, the transaction, although subject to domestic foreign exchange regulations, was outside the regulatory approval of the NDRC.

Under the previous regulatory framework, it was necessary to file a project information report for projects exceeding US$300 million before ‘carrying out any substantive work’. This ‘small pass’ requirement at the early stage of a project has been eliminated. Approval, filing or reporting requirements under the NDRC under the new framework are timed at completion (financial closing).

NDRC

The approvals and registrations for outbound investment must be obtained or conducted through the NDRC, MOFCOM and the State Administration of Foreign Exchange (SAFE). For SOEs, there are additional reporting obligations and a required approval from SASAC (not covered in detail here).

The starting point is to determine the proper regulatory obligation before the NDRC. Approval of a project before financial closing by the national level NDRC is required for sensitive projects. However, for a non-sensitive project undertaken by a non-central state-owned enterprise worth over US$300 million, a filing with, rather than approval from, the national level NDRC is necessary. For non-sensitive projects under US$300 million, conducting a filing is necessary with the provincial level NDRC. For indirect, non-sensitive investments made through an offshore investment fund that exceeds US$300 million in value,
a report to the NDRC must be submitted before the financial closing; for such projects below US$300 million, there is no reporting requirement. The applications for filing, approval and reporting are done through the NDRC’s online platform.

Sensitive projects are outbound investments to sensitive countries or in sensitive sectors. The 2018 Catalogue of Sensitive Industries for Overseas Investment defines sensitive sectors as industries listed as restricted under the Outbound Investment Guidelines (i.e., real estate, hotels, cinemas, entertainment, sports clubs), news media, among others. Sensitive host countries are those that do not have diplomatic relations with China (i.e., 17 countries and the Vatican recognise Taiwan), are at war, or barred by international treaties agreements or treaties to which China is a party.

**MOFCOM**

Following the execution of the definitive transaction agreements, an ‘application form of outbound direct investment’ should be submitted online to MOFCOM. The application package includes the application form, transaction agreements, the business licence of the buyer, an export permit for products or technologies (if applicable) and a statement from officers of the companies warranting the veracity of the proposed outbound investment. MOFCOM approval is typically received within 10 to 15 business days of the date on which the application satisfies the filing requirements, and culminates in the issuance of an enterprise overseas investment certificate.

**SAFE**

After obtaining an enterprise overseas investment certificate from MOFCOM, an application of ‘foreign exchange registration on outbound direct investment’ is made to a commercial bank under the supervision of SAFE, which will include the business licence of the buyer and the enterprise overseas investment certificate, with a statement of foreign exchange funding sources. Following submission, an overseas investment foreign exchange registration certificate will be issued to the buyer.

**III DEVELOPMENTS IN CORPORATE AND TAKEOVER LAW AND THEIR IMPACT**

- **2018 amendment to the Negative List**

The new Negative List 2018 came into effect on 28 July 2018, while the Encouraged Industries List under Catalogue 2017 remains unchanged. As well as renewal of the Negative List, limitations on foreign ownership have been removed in a large number of sectors, including manufacturing (e.g., new energy cars) and agriculture (e.g., wholesale rice markets). The opening up of the financial sector is the most anticipated (see below).

The liberalisation in 2018 further builds on the major steps that became effective in July 2017, when restrictions were removed in rail transportation equipment manufacturing, motorcycle manufacturing, fuel ethanol production and oil processing, services in relation to road passenger transport, credit enquiry and rating firms, among other sectors.
Opening up of the financial sector to foreign investment

In 2018, a number of laws and measures eased restrictions on foreign investment in the financial sector or made commitments to further liberalise based on a set timetable. Major steps include the following:

a In Catalogue 2018, the cap on foreign ownership in companies in securities, funds, futures and life insurance is increased to 51 per cent and all limits on ownership by foreign investors are due to be removed in 2021.

b The removal of restrictions on the business scope of jointly funded securities companies by the end of 2018.

c The removal of restrictions on the business scope of foreign-invested insurance brokerage companies.

SIGNIFICANT TRANSACTIONS, KEY TRENDS AND HOT INDUSTRIES

End of Chinese M&A in the United States and amendments to the CFIUS

The Trump administration has called for an amendment to the statute authorising the Committee on Foreign Investment in the United States (CFIUS), which oversees foreign investment review on national security grounds, with the goal of further tightening the screening of Chinese investment. Since the second term of the Obama administration, the CFIUS has aggressively blocked proposed Chinese deals, particularly in semiconductors (see subsection ii). Chinese acquisitions in the United States have come to a screeching halt in 2018 and the CFIUS amendment could calcify this state of affairs. As at the end of June 2018, announced deals in the United States by Chinese buyers totalled only US$1.6 billion; that is down from nearly US$60 billion in announced deals in 2016.

The CFIUS has broad authority to disallow or impose remedial measures on acquisitions in which a foreign buyer achieves control of a US business determined by the committee to threaten US national security. The Foreign Investment Risk Review Modernization Act (FIRRMA) is an amendment to the CFIUS currently wending its way through US Congress that would expand CFIUS jurisdiction to include non-controlling transactions. Chinese investment is the primary concern driving the proposed legislation. As at July 2018, the US Senate and House of Representatives have passed different versions of FIRRMA Bills. Both versions would update many areas of CFIUS law, including bringing coverage of acquisitions of US critical technology or critical infrastructure companies in the Senate version or, in the House version, singling out buyers from a ‘country of special concern’ (i.e., countries like China that are subject to US export controls). The differences will need to be ironed out but the updated legislation is expected to pass later in the year. Further impetus has been given to passing the Bill with President Trump’s personal support. In July 2018, the President considered issuing an emergency order to implement China-specific investment restrictions. He decided not to take action under his presidential authority but in remarks expected FIRMA to be passed to take on the role of targeting investment by China.

In practice, the harsh approach of the CFIUS towards Chinese deals under both the Trump and Obama administrations would not be distinguishable from the effect of proposals for updating the CFIUS since Chinese deals in the United States have all but vanished. However, the expected passage of the amendment to the CFIUS is more durable than policy changes within an administration and are likely to have long-term damage on Chinese investment in the United States.
ii Trump–Obama continuum in blocking Chinese semiconductor M&A

The Obama administration had strongly discouraged Chinese buyers from semiconductor investments, denying several large proposed deals. The transactions were either prohibited outright by the CFIUS or the threat of CFIUS denial alone was enough to persuade sellers from entering into deals with Chinese buyers.

In 2016, the US$3.3 billion sale of Lumileds, a semiconductor division of Philips, to a consortium including Chinese buyers was blocked. Also that year, Fairchild Semiconductor refused a Chinese buyer’s offer for fear of CFIUS interference. (Coincidentally, a proposed deal for Fairchild Semiconductor by Fujitsu in 1988, during a period of American anxiety over soaring Japanese economic competitiveness, led to the passage of the Exon-Florio Amendment, an update to the CFIUS that brought the process into the contemporary era.) In the waning days of the Obama administration in December 2016, the CFIUS blocked the proposed purchase by a Chinese buyer of Aixtron SE, a German semiconductor company that had some assets in the United States. The entire deal became unviable because of the disallowed sale of the US assets.

Under the Trump administration, the CFIUS has continued to block Chinese semiconductor investments. In 2017, the sale of Lattice Semiconductor to a Chinese buyer was denied. In 2018, Broadcom’s bid for Qualcomm was blocked by the CFIUS. This was particularly notable since Broadcom is a Singaporean company. The CFIUS justified blocking the sale by claiming to fear underinvestment by Broadcom in Qualcomm after the acquisition, making the target company uncompetitive in the face of future Chinese competition. The justification given by the CFIUS is remotely tied to concerns about US national security and illustrates the lengths to which the Trump administration will go to intervene in semiconductor deals as part of a policy of economic confrontation with China.

V FINANCING OF M&A: MAIN SOURCES AND DEVELOPMENTS

Since late 2016, policymakers have sought to reduce the outflow of capital from China through stricter screening implemented by the NRDC, MOFCOM and SAFE. In response to the effect of these policies on curtailing financing for outbound M&A, Chinese investors developed alternative modes of fundraising to minimise domestic regulatory scrutiny, including the use of:

a a guarantee or security structure in which a Chinese onshore entity or individual grants a guarantee or security for a debt owed to an offshore creditor by an offshore debtor – usually a subsidiary or controlled entity of the guarantee or security provider;¹⁰

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10 Known as neihaowaidai.
China

b cash collateral to domestic banks for issuing standby letters of credit or bank guarantees to overseas lenders;

c loans advanced by foreign lenders to overseas Chinese investors’ subsidiaries secured by assets located outside China; and

d equity and debt issuance in overseas markets.

Private equity has a major role in outbound M&A. While overall there was a 42 per cent drop in outbound M&A by Chinese buyers in 2017 compared to 2016, there was a fall of only 9 per cent in private equity investment in mainland outbound M&A, from US$37.4 billion to US$34.1 billion in the same period.11

VI EMPLOYMENT LAW

M&A transactions have triggered labour disputes or strikes leading to collective labour arbitration, hindering the completion of deals.

Labour relations are established in the form of employment contracts and, barring any change to the subject qualification of an employment contract,12 labour relations are usually not affected. According to Article 40 of the Labour Contract Law and Article 26 of the Labour Law, a target has the right to terminate an employment contract if a material change in the objective circumstances relied upon at the time of conclusion of the contract renders it impossible for the seller to perform and, after consultation, the employer and the employee are unable to reach an agreement on amending the employment contract. As such, unless the M&A transaction leads to a ‘material change of the objective circumstances’ or the ‘subject qualification’ of the seller being eliminated, the seller does not hold a unilateral right to terminate the employment contract.

Whether an M&A transaction has caused a change in either condition depends to a large extent on the type of transaction. In general, a share acquisition does not affect the change of the legal subjects of the parties. Nor is it a ‘material change of the objective circumstances’ to the employment contract, so this type of transaction has no basis in providing the seller with the unilateral right to terminate the employment contract. In the case of an asset acquisition or business reorganisation, if it involves a transfer of assets, then this may constitute a ‘material change of the objective circumstances’ and the seller may unilaterally terminate employment contracts with employees.

Even though there is a right to unilaterally terminate an employment contract, the seller must still hold good faith negotiations with the employee to work out a comparable position before exercising termination. If the employment contract is terminated, the seller must provide severance based on the number of years of employment. In the case of large-scale layoffs of employees, sellers must carry out negotiations with the employees’ labour union and the local government to formulate a plan that includes providing advance notice to the employees.

11 Source: Thomson Reuters.

12 According to the relevant provisions of the Labour Contract Law, an enterprise with the subject qualification of labour and employment means it is established in the territory of PRC, has not been declared bankrupt according to law, and no business licence has been revoked, been ordered to close, been revoked or been decided to be dissolved ahead of schedule.
VII TAX LAW

The State Administration of Taxation (SAT) levies enterprise income tax (withholding tax) of 10 per cent on the taxable income obtained by non-resident enterprise (NRE) transferors through cross-border M&A. In 2017, owing to an increase in the auditing of NREs, disputes with the SAT regarding the interpretation of tax rules have grown.

SAT Announcement (2017) No. 37 (which replaced the original Circular (2009) No. 698) and Circular (2009) No. 59 together constitute the overall framework of the rules regarding the treatment of taxable income for NREs in M&A transactions. However, the issuance of Announcement (2017) No. 37 has not completely resolved disputes in terms of tax collection and enforcement on NRE in cross-border M&A transactions, which has required the SAT to publish guidance announcements to further amend and explain Circular No. 59 and Announcement (2017) No. 37.

VIII COMPETITION LAW

After sweeping changes were enacted in March 2018, the anti-monopoly enforcement functions of three agencies (the Anti-Monopoly Bureau of the Ministry of Commerce, the Price Supervision/Inspection and Anti-Monopoly Bureau of the National Development and Reform Commission, and the Anti-Monopoly and Anti-Unfair Competition Bureau of the State Administration of Industry and Commerce) were consolidated under the control of the State Administration for Market Regulation (SAMR), including the role of reviewing for merger control.

M&A transactions meeting statutory thresholds and circumstances constituting a ‘concentration of undertakings’ (i.e., an acquisition of control over a target) are subject to the merger control provisions of the Anti-Monopoly Law. If in the preceding financial year, (1) the combined global turnover of the undertakings (i.e., the buyer or the target) exceeds 10 billion yuan, and the turnover from the PRC of each of at least two of the undertakings exceeds 400 million yuan, or (2) the combined turnover from the PRC exceeds 2 billion yuan and the turnover from the PRC of each of at least two of the undertakings exceeds 400 million yuan, then the transaction must obtain clearance from the relevant Anti-Monopoly Law enforcement agency.

In 2017, 400 applications were received, of which 353 were accepted – 344 of those were cleared. Seven applications were approved with conditions, a new high under the Anti-Monopoly Law. The percentage of (non-simple cases) increased significantly, to 30 per cent from 21.4 per cent in 2016. However, the average time for acceptance and clearance shortened by 14.2 per cent and 8 per cent respectively, and 97.8 per cent of the simple cases were cleared at the first stage (30 calendar days following acceptance of the application).

13 The following types of transactions are generally eligible for the simple application procedure: (1) horizontal mergers in which the combined market share of the parties is less than 15 per cent; (2) vertical mergers and conglomerate mergers in which each party’s market share is less than 25 per cent; (3) acquisitions of shares or assets of a non-Chinese company that does not conduct economic activities in China; (4) the establishment of a non-Chinese joint venture that does not conduct economic activities in China; and (5) changes in control of a joint venture whereby the joint venture becomes controlled by one or more of the previously jointly controlling parents.
MOFCOM has strengthened enforcement to ensure compliance with filing requirements. In 2017, six applications were published by MOFCOM for failure to file and obtain clearance before closing. Punishment amounts to fines of no more than 500,000 yuan, though MOFCOM has the authority to go further and order the unwinding of a transaction or divestiture of certain businesses or assets.

IX OUTLOOK

The poor state of economic relations between China and the United States could deteriorate with a worsening trade war and economic confrontation. Under these circumstances, the prospects for a recovery in Chinese investment in the United States are dim. The enactment of hard-line CFIUS reforms are likely to have a lasting negative effect, shutting down Chinese investment in the United States in the long term.

As China continues to grow as a significant capital exporter, investment will go to destinations outside the United States. In the first half of 2018, a trend has emerged of Chinese buyers looking to Europe, with a 39 per cent increase in announced deals compared to 2017. State-backed investment funds organised to promote the Belt and Road Initiative (BRI), the Xi administration’s signature economic initiative to enhance economic links between Eurasian countries, will spur state-owned companies and funds, and private investors to act as consortiums for making investments in BRI countries.

Domestically, regulatory changes in clearing categories from the Negative List and scrapping restrictions, particularly in the financial sector, should be attractive to foreign investors.
Chapter 12

COLOMBIA

Juan Manuel del la Rosa, Alexandra Montealegre and Lina Téllez

I OVERVIEW OF M&A ACTIVITY

Notwithstanding currency and economic volatility, and political turmoil, Latin America remains an attractive target for acquirers, particularly from the European Union and North America, which were the top bidders by volume and value respectively during FY 2015 and Q1 2016. During 2016, M&A activity decreased in Colombia because of the expectations of the new tax reform, the peace process with the Revolutionary Armed Forces of Colombia (FARC) and falling oil prices; however, M&A activity both in Colombia and in the region was expected to increase throughout 2017. Compared to the first quarter of FY 2016, the transactional market in the region grew by 4.38 per cent and deal-making was expected to continue increasing during the second semester of 2017.

The Cross-Border M&A Index published by Baker McKenzie set forth the following highlights for the region during the first quarter of 2017:

a a total of 71 cross-border inbound deals into Latin America worth US$6.4 billion;
b a total of 15 cross-border outbound deals from Latin America worth US$4.6 billion;
c the intra-regional deal-making value saw a 46 per cent increase quarter on quarter globally; and
d globally, there were 1,238 cross-border deals worth US$331.2 billion, a 23 per cent decrease in volume and a 16 per cent decrease in value compared to Q4 2016.

Colombia in particular remains one of the most economically and politically stable countries in Latin America, and is an increasingly attractive place for foreign companies to do business. Currently, Colombia holds second place within the region as the country that has moved most capital to date in 2017. So far, transactions have reached US$10.796 million, which represents an increase of 266 per cent compared to the same period in 2016, mainly because of the purchase by Avolon Holdings of the airplane lease business unit from CIT Group.

Regarding the number of transactions that have taken place, 29 were reported in the first quarter of 2017, representing a 37 per cent drop compared to Q1 2016, when 49 transactions

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1 Juan Manuel del la Rosa is a partner and Alexandra Montealegre and Lina Téllez are associates at Baker McKenzie. The information contained in this chapter is correct as at August 2017.
4 www.ttrecord.com/es.
took place. Nevertheless, according to a recent Ernst & Young publication, 73 per cent of surveyed companies are expecting to pursue acquisitions in the next 12 months, and 86 per cent of the surveyed companies have between one and three deals in the pipeline.

Some of the factors ensuring the continuing success of M&A activity in Colombia are as follows:

- lower valuations because of strong foreign currency exchange as compared to Colombian pesos have made targets cheaper;
- adherence to key international treaties;
- buyers interested in acquiring distressed assets;
- the favourable regulatory environment, including a flexible foreign investment regime;
- well-established orthodox financial management practices;
- low inflation;
- strong rule of law;
- foreign asset management willing to invest in infrastructure projects in Colombia;
- having the biggest infrastructure programme in Latin America, at 16 trillion pesos;
- implementation of peace agreements; and
- global economic recovery, which is enhancing expectations of growth.

II GENERAL INTRODUCTION TO THE LEGAL FRAMEWORK FOR M&A

The Colombian Commercial Code is the principal legal framework that sets forth the legal vehicles that are available to foreign investors in Colombia and the rules related to corporate governance of the Colombian companies, such as quorums, veto rights, fiduciary duties of boards of directors and legal representatives, and general rules applicable to foreign investors that are aiming to conduct businesses in Colombia.

Acquisitions of public companies (public takeovers) have special regulations under Colombian law, and are regulated primarily by, inter alia, Law 964/2005, which is the general statute regulating the Colombian securities market, and Decree 2555/2010, which regulates public takeovers.

In addition, for acquisitions in certain sectors, such as the financial industry, private surveillance and security services, telecommunications and healthcare, certain special regulations may apply, and approval from the relevant industry regulator is required.

Nevertheless, many features of Colombian M&A are familiar to global businesses and are common with international standards of other jurisdictions, especially to New York law standards and styles. In the past, the common law contractual model has influenced the way that acquisitions agreements are drafted and negotiated in Colombia.

It has become common in the legal market that shareholders’ agreements, asset purchase agreements and share purchase agreements in Colombia are drafted in a manner similar to customary New York law-governed agreements, and that they have provisions in common. The increasingly sophisticated M&A market in Colombia is another trend and reason for foreign investors to have confidence in the Colombian market.

There follows a brief description of key provisions that are frequently incorporated into Colombian agreements that are common to New York-style provisions.

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First, purchase price adjustments are common, including working capital adjustments and cash-free, debt-free adjustments. As for representation and warranties, materiality qualifiers are frequently seen but are often not quantified.

Second, with respect to ancillary agreements, escrow agreements have become increasingly common, as have non-compete agreements, which now regularly include non-solicitation clauses for the protection of employees and existing commercial relations. By contrast, holdback provisions are less common (although they are becoming increasingly more common depending on the target).

Third, in connection with indemnity provisions, limitations of liability (caps) are typically heavily negotiated and may vary depending on the risk level of the target, although they typically range between 15 to 20 per cent of the purchase price and regularly apply to representations and warranties. Carveouts to the cap are generally accepted for fraud, fundamental representations (such as capitalisation, due authority and organisation, and ownership of the shares or quotas), and it has become increasingly common to leave FCPA or anti-bribery representations uncapped, especially when private equity funds are involved in deals. Additionally, baskets and de minimis are becoming widely accepted, while deductibles are less so.

Finally, the Colombian Arbitration Statute\textsuperscript{8} sets out provisions for domestic and international arbitration. International rules are based on the UNCITRAL Model Law. With respect to dispute resolutions, Colombian law allows a choice of governing law as long as disputes under the agreement are validly referred to international arbitration (this requires a significant connection with a jurisdiction other than Colombia, such as a party incorporated abroad); as regards litigation or arbitration choices, arbitration is usually preferred.

It is common to undergo an arbitration proceeding according to the Bogotá Chamber of Commerce rules, while in larger deals, arbitration under International Chamber of Commerce rules is chosen, and litigation will normally be held in a venue that is considered neutral. Nevertheless, when the assets of a deal are located in Colombia (for instance, in Bogotá), it is increasingly common that the international arbitration is seated in Bogotá. The advantages to this are that an award issued within an international arbitration seated in Bogotá is treated as a national award and is enforceable without any recognition procedure. By contrast, when the award is issued outside Colombia, recognition is required prior to enforcement. When an international party is involved in the deal and assets are located in Colombia, it is also possible to have Bogotá as the venue and for the hearings to be held in a neutral place.

In connection with shareholders’ agreements under Colombian law, provisions for minority right protections, such as the appointment of members of boards of directors, information rights, veto rights with respect to certain matters, the appointment of executive officers of the company, pre-emptive rights and tag-along rights, are commonly negotiated. In addition, it is very common that controlling shareholders negotiate strongly for drag-along rights and to control of the day-to-day management of the company.

In the past, the enforceability of tag-along rights and drag-along rights under Colombian law were widely discussed, as it was not clear among arbitrators, judges and legal academia. Nowadays, according to a thesis by the Superintendence of Corporations and the flexibility of the simplified stock corporation form, these rights are increasingly common under Colombian shareholders’ agreements.

\textsuperscript{8} Law 1563 of 2012.
Finally, purchasers are realising that the real challenge when acquiring a new business only starts when the deal closes and they are focusing more on how to derive value from their acquisitions. If the existing and target businesses operate in the same or complementary fields, the acquirer almost always wants to integrate the two businesses to save costs and develop synergies. It is important to plan for post-acquisition integration well in advance of closing.

In connection with regulatory changes relating to the financial crisis, see Section III.

### III DEVELOPMENTS IN CORPORATE AND TAKEOVER LAW AND THEIR IMPACT

#### i Tax reform

The Colombian tax system underwent a large-scale reform in 2016 as part of the efforts to lower fiscal debt and improve credit ratings. This included relevant changes to certain corporate income tax and individual income tax provisions.

The reform in force as of 2017 includes the following key changes, which are particularly important in the M&A area:

- **Corporate tax:** lower rates, but new tax on dividends and surcharge;
- **Adoption of the IFRS rules;**
- **Personal tax:** a new system with rates set by types of income;
- **Rationalisation:** taxes including CREE (a fairness tax) and wealth tax were removed;
- **Inclusion of special rules designed to prevent tax avoidance;**
- **Extension of the statute of limitations with respect to tax returns and assessments;**
- **Tax benefits for taxpayers who increase their investments in hydrocarbons and mining exploration; and**
- **Goodwill is no longer amortisable.**

#### Dividends tax

The reform also introduced a new tax of 5 per cent for dividends paid to non-resident individuals and entities out of taxed profits at the corporate level and of 35 per cent for dividends paid out of untaxed profits at the corporate level, plus an additional 5 per cent.

#### Capital gains tax and income tax rate

The reform introduced a reduction of the rate of capital gains tax from 33 to 10 per cent, and a reduction of the corporate income tax rate from 33 to 25 per cent applicable to Colombian entities and non-Colombian entities earning taxable income through a branch or a permanent establishment. Non-Colombian entities earning taxable income without having a permanent establishment or a branch in Colombia are subject to income tax at rates from 33 per cent.

Companies operating under the free zone regime will be subject to a 20 per cent rate of corporate income tax.

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10 The rate is 5 per cent for dividends paid to non-residents out of taxed profits at the corporate level. If dividends are paid out of untaxed profits at the corporate level, the rate is 35 per cent plus an additional 5 per cent tax on the distributed dividend (net of the 35 per cent initial tax).
Mergers and spin-offs
Before the previous tax reform dated 2013, mergers (acquisitive and reorganisational mergers) and spin-offs were not subject to income tax. Certain requirements now need to be met for mergers and spin-offs to be tax-neutral.

Goodwill
The tax reform included a provision that goodwill is no longer subject to amortisation. Prior to the tax reform, under a share purchase agreement, goodwill was amortisable provided that taxed dividends were derived by the taxpayer, and under an asset purchase agreement, goodwill could be subject to amortisation against the taxable income triggered by such assets. In both cases, the amortisation period was five years.

Currently, goodwill is not subject to amortisation under either a share agreement or an asset deal because it is considered as a tax cost of the shares or assets, respectively. Therefore, investors cannot amortise goodwill, and might only apply the higher cost of the shares when they are transferred, or, in the case of assets, through a higher depreciation rate, the latter bearing in mind that the depreciation's useful life is significantly increased, and therefore the depreciation quotas are considerably reduced.

VAT
VAT applies at a rate of 19 per cent on:

- the import or sale of tangible goods;
- the assignment of rights on intangible assets solely associated with industrial property;
- the provision of services on national territory or from abroad; and
- the circulation, sale or operation of games of chance.

Anti-avoidance rules
Pursuant to the tax reform, the following special rules were designed to prevent tax avoidance in relation to:

- tax havens and preferential regimes;
- ultimate beneficial owners and common reporting standards;
- controlled foreign corporations;
- tax abuse; and
- omitted assets or non-existent debts.

Statute of limitations for assessments and collections of tax returns
The tax reform extended the statute of limitation period from two to three years, and extended the statute of limitations of tax returns reporting net operating losses from five to six years. Transfer pricing returns are subject to a statute of limitations of six years.

Adherence to international treaties
Colombian companies and individuals may benefit from reduced tax rates under double taxation treaties in force with the following countries: Canada, Chile, the Czech Republic, India, Korea, Mexico, Portugal, Spain and Switzerland.
ii New hydrocarbons regulation

To boost the oil and gas industry in Colombia, on 19 May 2017, the Colombian National Hydrocarbons Agency (ANH) enacted Agreement No. 02 of 2017, which overruled the former regulation (Agreement No. 004 of 2012) governing the allocation of rights to explore and exploit hydrocarbons through the awarding of exploration and production (E&P) contracts, and the rules governing the performance of the same contracts.

The new regulation includes a number of novel provisions aimed at promoting hydrocarbons E&P activities given the current crude prices environment worldwide and in the region. The regulation allows ANH to accept guarantees that differ from the traditional stand-by letters of credit. This constitutes a very beneficial alternative for parties interested in participating in processes for the award of E&P contracts, since new products that ensure compliance with the obligations found under different types of contracts are being offered in the market at prices significantly lower and with fewer risks than those related to stand-by letters of credit.

iii Foreign exchange rules

Following the government’s issuance of Decree 119 of 2017 (Decree), the Colombian Central Bank issued, on 26 July 2017, the secondary legislation implementing the Decree, which introduces important changes concerning the applicable foreign exchange procedures to increase Colombia’s competitiveness in foreign markets, internationalise the domestic economy and increase the investment of Colombians abroad. The new regulation, which is related to the foreign capital investment regime in Colombia and other provisions on international foreign capital investment, sets forth the following relevant changes:

a it modifies the time limit for investors to register their foreign investment before the Central Bank (previously, the time limit was 12 months, which was reduced to six months for investments);

b it introduces the possibility to register investments (from foreign capital in Colombia and vice versa) that are carried out by virtue of any legal act, contract or operation (i.e., different from those carried out with foreign currency) at any time, meaning that the limitations on how contributions are made have been substantially simplified; and

c it sets forth that advances for future capital investments will be treated as foreign indebtedness transactions that have to be registered as such before the Central Bank.

IV FOREIGN INVOLVEMENT IN M&A TRANSACTIONS

In 2016, the following jurisdictions were key players in Colombian M&A: the European Union (especially Spain), Canada, Brazil and the United States. Regarding the main transactions that took place in 2016, the following rank among the biggest: Brookfield Asset Management’s purchase of 57.6 per cent as a controlling stake in power generator Isagen for 6.49 billion pesos; the capitalisation of Viva Malls, the largest vehicle for the operation and

development of malls in Colombia, by Fondo Inmobiliario de Colombia and Grupo Exito for US$265 million; and the investment of US$60 million by TV Azteca’s shareholders in Azteca Comunicaciones Colombia.

The United States, Canada, Chile and Spain were key players in Colombia during the first semester of 2017. Some of the major transactions were related to the technology, oil and gas, electric energy and services industries. The following industries have also become attractive to investors: mass consumer goods, retail, finance, construction and health.

Some of the deals that have taken place in 2017 to date include the following:

- Avalon Holdings’ purchase of an airplane lease business unit from CIT Group for US$10.796 million;
- Grupo Argos’ purchase of 30 per cent of the shares in Opain SA for US$160 million;
- Orinoquia Capital Ltd’s acquisition of Canadian energy company PMI Resources Ltd. The value of the transaction was US$33,898,500;
- Unilever’s purchase of Latin American consumer goods company Quala’s personal care line;
- the investment of Grupo Pegasus, Axon and others in the Colombian start-up Mercadoni for US$6.2 million;
- the purchase by investment fund Ashmore of a toll road concessionaire for US$42 million; and
- Prestasalud’s acquisition of Cafesalud EPS, the largest health insurer in Colombia, and of the shares of Estudios e Inversiones Médicas – Esimed SA (for US$500 million).

V SIGNIFICANT TRANSACTIONS, KEY TRENDS AND HOT INDUSTRIES

i Infrastructure

Because of the infrastructure boom in Colombia, as seen in the Fourth Generation (4G) road infrastructure programme, which involves 47 projects spanning 8,000 kilometres of roadway, the expansion and modernisation of ports and railways, and the renovation of the country’s airports, these fields are seeing a considerable amount of M&A activity.

In 2016 and the first quarter of 2017, there has been M&A activity related to the sale of the participation interests of some of the concessionaires of the 4G infrastructure projects. The main reasons for these sales related to a lack of financing and resources for concessionaires to perform their projects and make capital contributions, as well as their need to find new partners to diversify risk. We expect this trend to continue during the second semester of 2017.

In addition, the US-based asset management firm BlackRock launched a US$280 million infrastructure debt fund for investments in roads and other infrastructure

projects in Colombia. According to the global director of BlackRock Infrastructure Debt, Erik Savi: ‘Colombia represents an important investment opportunity that is evolving rapidly for investors that are seeking high quality infrastructure assets.’

In July 2017, the National Infrastructure Agency (ANI) awarded the Cúcuta–Pamplona highway to Sacyr, a Spanish developer. This project requires investments of US$1.5 billion for construction and more than US$538 million for maintenance during the concession. The ANI also announced plans for the modernisation and expansion of Cartagena’s airport, Rafael Nuñez, and presented plans for the creation of an international airport in Buenaventura, Valle del Cauca. Because of these trends, we expect M&A infrastructure activities will continue to grow in Colombia.

ii Technology and venture capital

The number of venture capital transactions in Latin America reached a record of 197 in 2016. Technology investments and transactions are becoming new trends in Colombian M&A activity owing to sustainable tech start-ups in promising large markets, such as in the case of Mercadoni, a Colombian grocery delivery app, which received one of the largest Series A rounds in Latin America and one of the biggest capital investments seen for an app in Colombia. According to the Latin American Private Equity and Venture Capital Association: ‘Mercadoni’s new funding round is a testament that in LATAM, despite the low level of development of mid-stage tech investments and the current challenging macroeconomics, sustainable new companies in promising large markets keep flourishing.’

iii Funds

Private equity funds have been key and rising players in Colombian industry. They have become a vital instrument for the development of the country’s businesses as they move around US$9.4 million of funds, of which a significant part has been invested in 500 Colombian companies. According to the Colombian Private Equity Association, there are more than 50 equity funds in the country, and it should be noted that Advent International Corporation, Brookfield Asset Management, Southern Cross Group, Victoria Capital, Ashmore and Terranum Capital Latin America Real Estate Fund II have consistently been major players within the industry.

VI FINANCING OF M&A: MAIN SOURCES AND DEVELOPMENTS

The Colombian peso has sustained substantial devaluation in the past couple of years. This has made foreign purchasers more cautious with respect to obtaining indebtedness denominated in foreign currency. However, the Central Bank has decided to allow Colombian banks to lend...
pesos to foreign borrowers, so there may be a better match between their peso-denominated revenue stemming from their Colombian assets and the indebtedness they incur to purchase such assets.

In international financing, we have also noted lighter sets of covenants more similar to those associated with balance sheet lending than those associated with structured finance. However, this may have been because of very strong sponsors on the acquisition side.

VII EMPLOYMENT LAW

i Recent developments

Labour matters have also been subject to change as a result of the tax reform. The Parafiscal and Pension Management Unit (UGPP), the public entity in charge of monitoring companies to ensure that they comply with their social security contributions, was granted additional powers, including the ability to grant amnesty to those companies in breach of the social security legal dispositions. The main changes are as follows:

a Administrative processes brought forward by the UGPP might be subject to termination by mutual agreement or settlement, provided that specific requirements are met.

b Companies in breach of their social security obligations that have not yet been audited by the UGPP can amend mistaken payments and benefit from a reduction of 70 per cent of the default interest incurred by their wrongful payments in the following subsystems: health, risk and payroll taxes. However, pensions are not subject to these deductions.

ii Legislation relevant for M&A

Labour legislation relevant for M&A in the Colombian jurisdiction varies depending on whether a transaction is conducted as an asset transfer or as a purchase of the shares. When a business is acquired by means of a stock purchase agreement, the transaction will not involve a change of employer. Therefore, employees and their conditions, benefits and entitlements are unaffected.

However, if a deal is structured as an asset deal that involves the transfer of personnel, and if the parties involved in the transaction do not previously assign or terminate their employment agreements, this would be considered to be an employer substitution. Pursuant to Colombian law, this would operate automatically upon the execution of the asset purchase agreement and the transfer of personnel.

The main effects under Colombian law of the employer substitution are the following: 24

a employment agreements of employees are not modified, suspended or terminated, and all risks, duties and liabilities will be transferred to the buyer;

b the buyer must therefore match the salaries and benefits the employees are already receiving;

c if the incoming employees have enjoyed different employment benefits compared with those of the purchaser’s existing employees in similar job roles, the purchaser might be forced to match these by offering all employees the most favourable conditions (unless otherwise agreed with all the employees, both old and new);

d all employees’ seniority must be preserved for all legal purposes;

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the pension liability of the seller will be transferred to the buyer; and

the former and new employers would be considered jointly and severally liable for all labour obligations relating to the existing employment agreements at the time the employer substitution takes place, and the new employer will be responsible for the obligations that come into effect after the substitution occurs. If the new employer assumes payments regarding labour obligations that the old employer was forced to recognise, then the new employer can recover them from the old employer, unless agreed otherwise.

VIII TAX LAW

See Section III.i.

IX COMPETITION LAW

i Recent developments

There have been developments in competition law as a result of the Odebrecht scandal. In 2001 and 2006, Odebrecht paid bribes to obtain the award of public bidding processes related to the 4G infrastructure projects. As a consequence of these actions, in a historic decision, the Colombian Superintendence of Industry and Commerce (SIC) ordered the termination of the concession agreement for the Ruta del Sol, which had been awarded to Odebrecht under conditions of bribery.

The SIC’s decision25 established that awarding a concession agreement for the construction of a public road, in this case the Ruta del Sol, under conditions of bribery violates free economic competition, which is a right protected by the Colombian Constitution (Articles 88 and 333). In the resolution, the SIC set out that:

[i]n order to restore free economic competition within the market, the SIC has ordered the ANI to structure and initiate a new public tender that guarantees free economic competence, through the transparent participation of the various agents of the market, for the conclusion of a new concession agreement, that at least guarantees the execution in its integrity of the Concession Agreement Ruta del Sol, and avoid that these works remain inconclusive.26

A decision of this kind creates an important precedent regarding the constitutional right to free economic competition in Colombia, and the sanctioning powers of the SIC and its zero tolerance policy regarding corrupt practices.27

ii Competition law relevant for M&A

The Colombian competition regime regulates and prohibits trade arrangements, business practices and M&A activities that restrict competition.28 The SIC has wide powers to

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25 Resolution No. 5216 dated 16 February 2017, issued by the Colombian Superintendence of Industry and Commerce.
26 Ibid.
investigate companies, and can impose significant fines for restrictive trade practices. It also has powers to block mergers, and can impose fines for failure to obtain clearance for mergers that require the filing of an authorisation before the SIC.

Pursuant to Colombian law, a transaction needs full clearance from the SIC when the combined value of the operational turnover and assets of the parties to a merger exceed the legal threshold. The threshold is updated annually, and as of 2017 is US$15,263,110. Any transaction resulting in an economic concentration in at least one market in Colombia, either between parties engaged in the same economic activity (horizontal effects) or in the same value chain (vertical effects), are subject to merger control regulations. The concept of economic concentration is broad, and includes mergers, acquisitions, joint ventures, other forms of company associations or corporate grouping, and even exclusive distribution agreements.

If the combined market share of the parties is below 20 per cent, a simplified notification procedure is available that provides implied approval within 10 business days of the filing before the SIC. If the combined market share of the parties is above 20 per cent, the full clearance process will need to be followed.

Parties need to submit information about a merger, including evidence that the market share is below 20 per cent, with their application. The SIC has 10 business days to approve the application or determine that the transaction needs to go through the full clearance process. The implied approval granted under this procedure can be challenged at a future date by the SIC if it later considers that the parties were not eligible. The SIC has a term of up to five years from the filing date to review and challenge the notice.

X OUTLOOK

Although there was a tax reform only recently, there has been speculation regarding a further tax reform for 2018 or 2019. Some of the arguments that have been given for considering this are as follows:

- it has been argued that additional funds will be necessary to finance post-conflict programmes now that the peace treaty between former guerrilla group FARC and the government has been signed;\(^29\)
- the National Association of Financial Institutions considers that a tax reform is necessary to achieve another collection point of gross domestic product before October 2018 to ensure that the country does not lose its level of investment;\(^30\) and
- considering that the current president, Juan Manuel Santos, will be leaving office in August 2018, it is likely that his successor will propose a tax reform during his or her first year of presidency, as has been customary in the past.

Notwithstanding the above, no formal law project has been presented to Congress to address any possible new tax reform. For now, companies and individuals are adjusting to the regulations that became enforceable in 2017.

Chapter 13

COSTA RICA

John Aguilar Quesada and Marco Solano

I  OVERVIEW OF M&A ACTIVITY

Costa Rica is a development success story in many respects. There has been steady economic expansion for more than a quarter of a century, and a stable democracy has been in place since 1949, allowing the country to enjoy growth for several years thanks to a strategy of outward-oriented growth based on openness to foreign investment and gradual trade liberalisation.

Costa Rica is also a global leader with regard to its environmental policies and accomplishments, which have helped the country to build its green trademark by promoting forest and biodiversity conservation, and the use of renewable energy sources.

The Costa Rican Investment Promotion Agency (CINDE) is a private, non-profit and non-political organisation appointed by the government to promote foreign investment. It has attracted more than 200 companies since it was formed more than 30 years ago, including worldwide leaders such as Intel, Hewlett-Packard, Procter and Gamble, to name but a few. More recently, Amazon, McKinsey & Co and Microsoft have announced that they intend to expand their operations here.

The Social Progress Imperative global index ranked Costa Rica 28th of 128 countries in 2017. Of the 22 countries in Latin America included in the report, Costa Rica ranks second after Chile (25th overall) as the countries with the greatest social progress in the region, well ahead of some of the major regional players.2

According to the ‘Global Competitiveness Report’ of the World Economic Forum, Costa Rica was catalogued as an economy transitioning from Stage 2 (efficiency-driven economies) to Stage 3 (innovation-driven economies). The country was ranked 47th of 138 on the Global Competitiveness Index for 2017 – second in Latin America after Chile, and ahead of Panama and Mexico compared with 2016.3

Costa Rica’s gross domestic product (GDP) per capita has tripled since 1960, and its growth averaged 4.5 per cent between 2000 and 2013, as compared to the regional average of 3.8 per cent for the same period. According to World Bank information, the country’s GDP in 2016 was US$57.44 billion, with economic growth of 4.3 per cent. Inflation for 2016 was at 2.3 per cent.

Costa Rica’s economy is predominantly services-based. The services export industry includes business process offshoring (BPO), information technology offshoring and shared services. BPO itself covers a wide range of services. There are many large corporations with

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1 John Aguilar Quesada and Marco Solano are partners at Aguilar Castillo Love.
2 Data from www.socialprogressimperative.org.
3 Data from http://reports.weforum.org/global-competitiveness-index/competitiveness-rankings/.
BPO operations in Costa Rica, including Hewlett-Packard, Intel, Bridgestone, Amazon, Procter and Gamble, Western Union, Emerson Electric and IBM. Some companies combine BPO services with manufacturing or repair facilities. Costa Rica’s economy also has a thriving medical device manufacturing industry that includes Baxter, Covidien, Abbot, Boston Scientific, Allergan and St Jude Medical.

Exports in 2016 grew by 7.5 per cent, as compared with 2015. According to data from the World Bank, exports of goods and services in Costa Rica represent 32 per cent of the country’s GDP. In 2016, exports to European and Asian countries thrived, with the European Union market experiencing a growth of 15 per cent, while exports to European countries grew by 24 per cent and to Asian countries by 5.3 per cent.

In 2016, 41 per cent of exports from Costa Rica were to the United States of America, followed by Nicaragua (6 per cent), the Netherlands (6 per cent), Panama (6 per cent), Belgium (5 per cent) and Guatemala (5 per cent).

The Costa Rican M&A market was equally as active in 2017 as in 2016 (based on data available at the Commission for Competition Promotion (Coprocom)). Consumer and service sectors were the main drivers.

During 2017, multinational firms continued to purchase medium-sized companies to position themselves in the Central American market. There were also cases of local and Central American groups buying competitors to strengthen their market presence. Transactions during 2017 continued to focus on medium-sized enterprises.

II GENERAL INTRODUCTION TO THE LEGAL FRAMEWORK FOR M&A

Costa Rica is a civil law country. Case law is only relevant in the interpretation of the law.

The Commerce Code (Law No. 3284 of 30 April 1964) regulates mercantile (commercial) companies in general. From a corporate law standpoint, M&A are contemplated in the Commerce Code.


Chapters 3, 6 and 7 of the first book of the Commerce Code regulate the two most common corporate forms: corporations and limited liability companies. These chapters include company acquisition-related regulations, but there is no specific ‘acquisition’ title or chapter. The regulations mainly concern the transfer of shares or equity participations and associated requirements.

The purchase of ongoing businesses is different from a company acquisition, and is regulated in Chapter 3 (Title 1) of the second book of the Commerce Code (Articles 478 and 489). Chapter 3 establishes requirements for the transfer of ongoing businesses, including publication (for three consecutive days) in the official newspaper and giving notice to the enterprise’s creditors so that they have an opportunity to oppose the acquisition or exercise their rights for a period of 15 days. Payment of the purchase price, according to Article 480, is not to be made before the 15-day period expires and until liquidation of accounts payable is made. Escrow of funds is commonly used for this purpose.

If the formalties established in Chapter 3 are not met, the transaction will be absolutely void (for any eventual rights of third parties or creditors of the acquired ongoing business) and payments made to the creditor will not be considered valid.
Regarding mergers, Chapter 10 of the first book of the Commerce Code, ‘Mergers and transformations’, includes a very basic set of regulations regarding the legal nature of a merger and the formal requirements to complete it. Merging entities may either form a new company or be merged via ‘absorption’ (acquisition), in which only one of the entities survives.

From a corporate law standpoint, the requirements to complete a merger are simple: a pre-merger project or agreement, approval via extraordinary shareholders’ meetings (of all entities involved) and publication of an extract of the merger approval in writing or in a deed in the official newspaper. The merger will be effective a month after its publication and registration if no third party opposes it. In principle, recordable assets will be transferred to the resulting or surviving entity.

Competition law requirements to complete mergers, company acquisitions and purchases of ongoing businesses are described in the next section.

III DEVELOPMENTS IN CORPORATE AND TAKEOVER LAW AND THEIR IMPACT

As indicated, Costa Rican competition law is set out in the CR-LPC.

Preliminary merger control for transactions of a certain volume (over a threshold of US$15 million) or of special relevance to the national market is mandatory.

A merger or an acquisition may be considered a ‘concentration’ under Article 16 of the CR-LPC, so even though parties are free to consolidate a merger or an acquisition, they are required to file a notification or previous communication to the Coprocom if meeting the criteria established in the CR-LPC.

Merger and acquisition control in Costa Rica uses a short authorisation proceeding. If the preliminary merger control notice is not sent, the Coprocom may challenge a merger proven to qualify as a concentration by opening a penalising proceeding.

Mergers or acquisitions involving regulated entities (banks, public companies, financial entities, pension funds, companies managing funds of third parties and insurance companies), in addition to the previous communication to the Coprocom, must obtain the applicable approvals of the Securities Supervisory Agency (SUGEVAL), the Private Pension Funds Supervisory Agency (SUPEN), the General Insurance Supervisory Agency (SUGESE), the General Telecommunications Supervisory Agency (SUTEL) or the Financial Entities Supervisory Agency (SUGEF), as appropriate.

According to the amended version of Article 16 CR-LPC, a concentration is defined as a:

 […] merger, sale of business premises, or any other act or contract by which companies merge, form partnerships, acquire shares, share equity, form trusts, merge or combine management, representation or general assets; made between competitors, suppliers, customers or other operators who have been independent in respect to each other, and result in the acquisition of economic control by one over the other or others, or in the formation of a new economic agent under joint control of two or more competitors, and any transaction in which any natural or legal person, public or private, acquires control of two or more independent economic agents, actual or potential competitors.
The enactment of the Tax Collection and Management Act and the General Tax Procedure Regulations are discussed below. Although specific merger and acquisition regulations are not contained in either set of Regulations, there are indirect applications or consequences to mergers, company acquisitions and the purchase of ongoing businesses.

IV FOREIGN INVOLVEMENT IN M&A TRANSACTIONS

Acquisitions, expansions and ventures took place in Costa Rica in several sectors during 2017. While US companies and European multinationals were the main participants, Latin American groups were also involved.

Costa Rica continues to pursue high-quality foreign investment. CINDE and Procomer lead Costa Rica’s investment promotion efforts. CINDE has focused on creating clusters of related businesses, successfully targeting potential investors in the areas of medical devices, services (shared services, BPO, global in-house centres) and advanced manufacturing.

V SIGNIFICANT TRANSACTIONS, KEY TRENDS AND HOT INDUSTRIES

The following is a summary of relevant 2017 transactions, expansions and projects in Costa Rica:

<table>
<thead>
<tr>
<th>Acquirer</th>
<th>Transaction</th>
<th>Target(s)</th>
<th>Sector</th>
</tr>
</thead>
<tbody>
<tr>
<td>HAPP Investors Ltd</td>
<td>Acquisition</td>
<td>SHI Hospitality Holdings Costa Rica</td>
<td>Tourism</td>
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<td>Petróleos Delta CR SA</td>
<td>Acquisition</td>
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<td>Consumer</td>
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VI FINANCING OF M&A: MAIN SOURCES AND DEVELOPMENTS

Acquisition financing is available for transactions. The most common funding structures, regardless of the acquirer, are bank lending, corporate debt, capital increases (private placement of shares of stock), and securitisations or security trust agreements.4

Withholding taxes are an important issue to take into account in establishing funding structures and schemes, as these may apply if interest is paid to a bank domiciled abroad.

M&A financing has mainly come from abroad. As has traditionally been the case, M&A are still financed in the acquirer’s market, or through regional or global banks. However, regional banks are becoming more involved in M&A transactions.

VII EMPLOYMENT LAW
No recent relevant amendments or modifications to Costa Rican labour regulations affecting mergers or acquisitions have been issued. The only applicable regulation in the Code of Labour Law is still the employer substitution rule, according to which both parties involved in an acquisition (or employer substitution) will be jointly liable for six months after the substitution is completed or verified regarding employees’ termination rights and benefits. Once this period expires, the new employer remains solely liable for termination rights and benefits.

VIII TAX LAW
Except for a few exceptions discussed below related to tax auditing, the tax system has not been recently amended. The country’s tax regulations establish that residents and corporations are taxed only for income earned in Costa Rica. The following is a summary of the main applicable taxes.

i Income tax
This applies to individuals as well as legal entities for income originating from a Costa Rican source. Taxable income is based on net income. Capital gains are generally not subject to income tax, except when the transfer activity is regular or when transferring assets that were subject to depreciation. In the latter case, the applicable rate is 30 per cent on the capital gain. Withholding taxes apply, inter alia, to dividends (15 per cent), interest (15 per cent), royalties (25 per cent) and fees (25 per cent).

ii Annual property tax
Property tax is rated at 0.25 per cent of the value of a property, and may be paid annually, by semester or by quarter depending on the procedures established by the local government (municipality).

iii Transfer taxes
There is a 1.5 per cent real property transfer tax and a 2.5 per cent vehicle transfer tax. This tax is based upon the higher of the registered value or the deed value at the time of sale.

iv Stamp duty
This applies to all contracts and agreements at a rate of 0.5 per cent of the documents’ economic value.

v Sales tax
This is imposed on certain taxable transactions at a rate of 13 per cent and is paid monthly.

After the enactment of the Tax Collection and Management Act in October 2012, the General Tax Procedure Regulations were approved. Although specific mergers and acquisitions regulations are not contained in the General Tax Procedure Regulations, the Regulations are broad and complex, and they contain stricter rules and new capacities for the Tax Administration that should orient acquisition or merger processes during due diligence and implementation.
The rule contained in the amended Code of Policies and Procedures Tax is that assets will be subject to the companies’ enforceable tax debts even after a transformation, merger or company acquisition process, or the transfer of ongoing businesses. For assets to be subject to the companies’ enforceable tax debts after a transformation, merger, acquisition process or the transfer of ongoing business process, the debt has to be enforceable prior to the process.

Also important to take into account is that the Tax Collection and Management Act also imposes transfer tax (as described above) on ‘indirect transfers’ (when a company holds real properties and vehicles, and the company is transferred to new group of shareholders as a whole). In principle, transfer tax does not apply to mergers: the application of transfer tax has not been yet been interpreted by the Tax Administration in connection with acquisitions.

No other recent relevant amendments or modifications to the Costa Rican tax regulations affecting mergers or acquisitions have been issued.

IX  COMPETITION LAW

As outlined in Section III, Costa Rican competition law is set out in the CR-LPC. Mergers, company acquisitions or the purchase of ongoing businesses may be interpreted by the Coprocom as a ‘concentration’ under Article 16 of the CR-LPC, so preliminary merger control for transactions of a certain volume or special relevance is mandatory.

Other agencies may also exercise control over mergers, acquisitions or other relevant transactions in connection with public companies, financial entities, pension funds, companies managing funds of third parties and insurance companies, based on the regulations issued by the National Council of Supervision of the Financial System (CONASSIF). These agencies are SUGEVAL, SUPEN, SUGESE, SUTEL and SUGEF.

X  OUTLOOK

Costa Rica has continued to experience economic growth during the past year. The country presents an attractive combination of skills and opportunities, and attracts export and services-oriented foreign investment. Its attractiveness has started shifting to emerging areas such as, inter alia, IT, knowledge processes, finance and accounting, which require sophisticated skills and technological infrastructure.

Experts consider recent developments in the Costa Rican services market to be part of its natural evolution. Other developments include the establishment of shared service centres and manufacturing facilities outside the Greater Metropolitan Area, as well as the establishment of energy, infrastructure and tourism projects, creating continuous M&A opportunities for sophisticated investors and investment banking firms.

Costa Rica continues to evolve as a destination for investors with strong promotion and protection programmes and friendly policies. Even though the size of the Costa Rican and Central American market is not as significant as other countries in Latin America, in terms of retail operations, its pursuit of growth will continue drawing multinationals that feel comfortable with the above-mentioned mixture of skills and opportunities.

I OVERVIEW OF M&A ACTIVITY

During the past few years, we have seen important M&A taking place. Several cross-border M&A have also had an impact in the Dominican Republic, as discussed further below. In both scenarios, the M&A occurred in different and significant sectors of the economy.

Like the rest of the world, the financial crisis has affected the Dominican economy; however, major foreign investments continue to develop and grow in the Dominican Republic, which are consistent with the recent level of M&A activity in the country.

II GENERAL INTRODUCTION TO THE LEGAL FRAMEWORK FOR M&A

M&A deals occur through a merger by incorporation of a new entity) or absorption of one or more of the companies merged), a share transfer or an asset purchase.

Law No. 479-08 of General Companies and Limited Liability Individual Enterprises was enacted in December 2008 and later modified by Law No. 31-11 (the Companies Law). This statute repealed the provisions effective until the current date of the Commercial Code regarding companies (Articles 18 to 64 inclusive), introduced important legal modifications concerning the incorporation, life and dissolution of companies, and, in addition to the existing corporate vehicles, introduced three new corporate vehicles: limited liability company (SRL), limited liability individual enterprise (EIRL) and simplified company (SAS).

Moreover, Chapter IV of the Companies Law provides a definition for the term ‘merger’ and establishes a process for its fulfilment from a corporate standpoint. It defines a merger as a transfer made by one or more companies of their assets and liabilities, either to an existing company or to a new one, whereby the shareholders of the company that makes the transfer receives shares in the company or companies that receive the assets and liabilities, and, eventually, a liquid amount that cannot exceed one-tenth of the nominal value of the shares.\(^2\)

The merger must be approved by a shareholders’ extraordinary meeting of all the companies involved, and will entail the following consequences: the dissolution without liquidation of the companies that disappear, and the transfer of all their assets and liabilities in the state that they are in on the date of final completion of the transaction to the beneficiary companies. Simultaneously, the shareholders of the disappearing companies become shareholders in the recipient companies. When a new company is incorporated as a

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1 Georges Santoni Recio is a partner, Mónica VillafañA Aquino and Laura Fernández-Peix Pérez are senior associates at Russin, Vecchi & Heredia Bonetti.
2 Article 382 of the Companies Law.
result of a merger, its by-laws must be approved by an extraordinary general meeting of all the companies that will cease to exist, and the new company must confirm and acknowledge those approvals. The companies involved must execute a merger agreement.

Before the approval of the merger, the companies involved in the transaction must appoint one or more commissioners, who must render a written report with the particulars of the merger, and who shall verify that the value attributed to the shares of the participating companies are adequate and that the rate of change is equitable. Additionally, the report must include the estimated value of in-kind contributions and particular advantages, if there are any. The report will be made available to the shareholders prior to the meeting, and must be taken into consideration during the meeting before the approval of the merger.

Commissioners must have a bachelor’s degree in accounting, business administration, finance or economics, and at least three years’ experience in their profession. There are certain conditions that prohibit individuals from being appointed as commissioners:

a. conviction for criminal offences or bankruptcy (fraudulent or not) by an irrevocable judgment;

b. disbarment, by virtue of a judicial or administrative decision, from the practice of commercial activities;

c. public officers with duties related to the activities of the company;

d. the founders, in-kind contributors, beneficiaries of particular advantages, directors of the company or its subsidiaries and their relatives up to the fourth degree;

e. directors (and their spouses) of other companies that own one-tenth of the paid capital of the company in question; and

f. any individual (or his or her spouse) who directly or indirectly receives a salary or compensation from the company for undertaking permanent activities different from those assigned to the commissioner.

Commissioners may require the delivery of all useful documents related to the merger from all the companies involved, and will provide the necessary confirmation of their content. Likewise, depending on the types of companies involved, the boards of directors of the companies must render a written report on the merger project.

Within 30 days of the execution of the merger agreement, the companies involved in the process must file it along with the meeting minutes that approved the agreement before the corresponding chamber of commerce. Additionally, an extract with the main terms of the merger agreement must be published in a newspaper with national circulation.

In contrast, a shareholders’ meeting is not always required when an acquisition is made through an assets purchase; this will depend on the types of assets being purchased and the by-law requirements. If a company is selling all its assets, a shareholders’ meeting must approve the sale. Nonetheless, the law and principles that govern the agreement itself will be those of the Civil Code. Notwithstanding this, the parties are free to choose the jurisdiction that will govern the agreement.

Regarding acquisitions made by share transfer, depending on the type of entity that is selling the shares and the provisions of the by-laws, existing shareholders may have the right of first refusal or right of first offer and, in some cases, tag-along rights. The Companies Law governs shared transfers.

Law No. 141-15 on the restructuring and liquidation of companies and merchants (the Restructuring Law) was enacted on 12 August 2015 and came into effect in February 2017. Its Ruling for application was also enacted in February 2017. Under the Restructuring Law,
any company or merchant in cessation of payments over a certain period, or if at least one of the other scenarios provided in Article 29 of the Law occurs, the affected party or the debtor can request the restructuring of the company. If the formalities for requesting a restructuring process have been met, a verifer will be appointed who will confirm whether there are grounds for the debtor to undergo a restructuring process. If so, a conciliator will be appointed, and the process should end in a restructuring plan that is approved between the majority (60 per cent or more) of the acknowledged and registered creditors and the debtor. If it is not feasible for the debtor to undergo a restructuring process, the liquidation of the company could be ordered by a court. If this occurs, a liquidator will be appointed and will perform all actions related to the sale of the company as a whole (running business) or the company’s assets. Once a restructuring request has been filed at court by the debtor, or the debtor has been notified by the creditor or creditors of a filing at court of a restructuring request, the debtor must inform the court and the verifier, among other actions, of any act that represents a direct or indirect merger of the debtor.

III DEVELOPMENTS IN CORPORATE AND TAKEOVER LAW AND THEIR IMPACT

Regarding takeover provisions, the Companies Law provides that in every company, except limited liability companies (LLCs), any shareholder (individual or legal entity) that achieves a participation of more than 10 per cent of the voting shares must notify the company, via a bailiff’s act, within a 15-day period counted from the acquisition of shares that amounted to 10 per cent or higher, indicating the number of shares owned and the votes it has in a shareholders’ meeting. LLCs are excluded from this requirement, presumably because the Law specifically provides for their shareholders and the company itself rights of first refusal, whereas in other companies those provisions are only in place if they are included in the company’s by-laws. Thus, because of its intuitu personae nature, an LLC always knows the intention of its shareholders to transfer shares in advance, and the number of shares being transferred, and can therefore take action on the transaction should it wish to do so.

The Law also provides that a corporation cannot have investments in another company if the latter holds 10 per cent or more of the capital of the former. Likewise, there is a similar provision for any other type of company that has a corporation among its shareholders.

Even though Law No. 249-17 on Securities regulates the stock market and the Companies Law provides certain provisions applicable to corporations whose shares are publicly traded, to date there is not a single company that is publicly traded; thus, the probability of a hostile takeover occurring on a Dominican company is very remote.

3 This will vary depending on the obligation that was unpaid; for example, two months of employees’ salaries, or payments overdue to a creditor or creditors for 90 days.
IV FOREIGN INVOLVEMENT IN M&A TRANSACTIONS

The vast majority of M&A transactions that have occurred in the Dominican Republic have been from foreign investments and from different countries. As a result of the financial crisis, the number of business synergies, mergers and consolidations keep increasing as a way to cope with the difficult economic conditions.

Banking institutions, both local and foreign, have a prominent influence on M&A transactions.

V SIGNIFICANT TRANSACTIONS, KEY TRENDS AND HOT INDUSTRIES

The number of M&A has risen during recent years. While there might not be a significant difference in the volume of the transactions taking place, the settlement of transactions and the high-profile entities that have merged or that have been acquired have increased exponentially.

The most relevant mergers and acquisitions during the past few years are as follows:

a in 2015:
• in late 2015, an important French company in the airport management industry obtained all the shares of the local company that runs and operates six international airports in the Dominican Republic. The deal contemplated a transition period that ended in March 2016; and
• a major Spanish hotel group acquired another hotel chain that has two hotels in the Dominican Republic;

b in 2016:
• a French group acquired the majority (70 per cent) of a fund that owns approximately 130 petrol stations throughout the Dominican Republic from a US parent company;
• a Japanese company acquired 50 per cent of the shares of a local cigar company. The deal is said to have amounted to around US$14 million; and
• an American hotel group acquired a hotel group that had several hotels in the Dominican Republic. The deal was concluded in September 2016;

c in 2017:
• a Spanish hotel group acquired three hotels in the Dominican Republic for approximately US$100 million. The deal was concluded in December 2017;
• a Japanese company, the leader in the sanitary industry, acquired a local factory in the same market. The deal was announced in November 2017;
• a Lithuanian airline that owned 65 per cent of the shares of a Dominican airline sold its shares in June 2017; and
• other M&A deals mainly happened abroad but affected the Dominican Republic: for example, a Dutch–British multinational signed an agreement to acquire the personal care and house cleaning line brands from a Colombian multinational, both of which have a presence in the Dominican Republic; and

d to date in 2018:
• the largest Brazilian company in the brewery industry increased its ownership (to 85 per cent) in the main local brewery by acquiring an additional 30 per cent of the shares. The deal is said to have amounted to around US$926.5 million. The deal was announced at the end of last year and finalised at the beginning of 2018.
VI FINANCING OF M&A: MAIN SOURCES AND DEVELOPMENTS

Typically, M&A are financed through loans, which are guaranteed by assets of the buying company, or one or more of its subsidiaries, debt finance or private equity funds.

When financed through loans, several banks are usually involved in the lending. In the case of Dominican banks, solvency ratio restrictions are determined by Monetary and Financial Law No. 183-02, which places certain boundaries on the lending bank with regard to the amount that can be lent to a single entity or economic group. Moreover, while Dominican banks are participants in the financing of different mergers taking place in the Dominican Republic, the main lenders are almost always foreign banks, particularly US banks.

As indicated above, when a bank grants a loan, usually certain assets of either the parent company or one or more of its subsidiaries are given in guarantee. If the assets placed in guarantee are located in the Dominican Republic, depending on the type of assets, there are filings and recording processes to be fulfilled. Typically, tangible assets (such as machinery, equipment, vehicles) are given in chattels without loss of possession, as governed by Law No. 6188 of Agriculture Foment. There are certain formalities and restrictions surrounding chattels without loss of possession; for example, the borrower cannot grant a chattel over assets that have already been pledged unless the previous lender renounces its rights. In addition, the contract must be executed before a justice of the peace or a notary public, and it must be recorded by the justice of the peace of the domicile of the borrower in order to make it opposable to third parties, and in this way safeguard the privilege that the creditor is entitled to with the subscription of this type of contract. Furthermore, if the assets are vehicles, in addition to the chattel without loss of possession recordation, a transfer opposition is recorded before the Tax Office to avoid the transfer of the registration of the vehicles.

When the guarantee is real estate property, it must be recorded before the corresponding title registry of the real estate property, and a 2 per cent lien over the value of the property must be paid to the Tax Office.

Furthermore, local financing institutions typically require that the borrowing company executes a promissory note, which is a form of security that is invested by the prerogatives provided for by Article 545 of the Civil Procedural Code, and it will be considered a title of enforcement, without the need for a court ruling, in the event of the debtor's default. The promissory note has very specific and mandatory rules as to the form of the document, and must be drawn up by a local notary public. Among the requirements of the promissory note are that it must be in Spanish, and be validated and executed by the borrower in the presence of a notary public. Stamp tax and recording fees apply.

Regarding debt finance, since the acquirers are mainly foreign, the bonds and other forms of securities are rarely placed in the Dominican Republic. However, if a public offer is made in the Dominican Republic, then Dominican law, as per the terms of Securities Law No. Law 249-17, will govern it.

Private equity as a financing method, from both local and foreign sources, is growing steadily.

Finally, considering how volatile the local currency is, foreign currency, mainly the US dollar, is used for any financing options.
VII EMPLOYMENT LAW

Employment is governed by the Labour Code, which was enacted on 29 May 1992.

The relevant matters to consider in a merger transaction with regard to employees are labour contingency (severance), acquired rights and joint liability.

Dominican laws are very protective of employees’ rights, and the lawfully provided severance payment derived from the unilateral decision of an employer to terminate a labour contract can be quite high. Because of this, in some mergers, the labour contingency at the time of the merger is deducted from the price.

In accordance with Articles 76, 79, 80, 184, 203, 221 and 223 of the Labour Code, the severance payment and other benefits to be paid to an employee upon liquidation (when the employer unilaterally terminates a contract without justified cause) comprise:

a advance notice: this is the notice of termination of the contract. The number of days in advance on which the employee must be notified of the termination of his or her contract will vary depending on the length of time that the employee has worked for the company. If this period is one year or more of continuous work, the advance notice will be of 28 days. If the company fails to give this advance notice, then it must pay the employee 28 days’ salary;

b severance: the payment of an amount equal to 21 days’ salary for each year of service given;

c any outstanding wages;

d holidays, if the employees have not taken their holidays during the past year;

e a proportion of the Christmas salary, depending on the date of the termination; and

f a portion of the company’s profits in the past year, if applicable.

The severance amount to be paid, and any other benefits related to it, are made proportionally to the amount of time the employer has worked in the company, which means that until the labour contract is terminated, and the employees are paid, the amount to be paid in connection with severance and employees’ acquired rights will increase over time.

On the other hand, the acquired rights of employees are those benefits given to them in addition to those lawfully provided for: for example, life insurance policies, petrol payments and funeral expenses. Any modification or elimination of the acquired rights of employees constitutes a breach of the terms of the labour contract, which entitles the employee to dismissal with just cause and triggers the severance compensation indicated above.

Finally, the third scenario (joint liability) refers to the shared responsibility that is created when a company, a branch or an agency thereof is transferred or assigned, or employees are transferred to other companies,4 including those rights and obligations of the employees that have been the subject of a lawsuit and are pending verdict, and in no case will void the acquired rights of the employees, whereby the new employer is jointly liable with the substituted employer for all the obligations resulting from the labour contracts or the law before the date of substitution.

In that vein, in an acquisition by share transfer, all the employees’ acquired rights must be preserved, because the company continues its operation without there being any change in

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4 This occurs, for example, when the employees of the company that ceases to exist work for the surviving or new entity created.
the terms of employment. Likewise, in a merger by absorption, the surviving entity assumes all the labour liabilities of the company that ceases to exist; if a new company is created, it assumes the liabilities of the companies that cease to exist.

In an asset purchase acquisition where there is no transfer of employees, in principle there are no labour liabilities to consider. However, if an employee transfer takes place, or a company sells all its assets to another company and the first one terminates the labour employment with the employees who are then hired by the company that purchased the assets within a period of less than two months, it can be presumed that the seniority of the employee continues in the labour contract with the buying company, and as such the employee will have the legal remedies to oblige the companies to comply with Dominican law. Nonetheless, the severance payment paid by the company that sold the assets may be deducted from future severance payments made by the acquiring company to the employees.

VIII TAX LAW

The fiscal impact of a merger is covered mainly by the Tax Code, the Ruling for the application of Title II of Income Tax enacted by Decree No. 139-98 and Decree No. 408-10 of Business Reorganisation.

Prior to going through the merger process, and as per the terms of Article 94 of Decree No. 408-10, it is mandatory to inform the Tax Office of the intention to merge and request its approval to proceed with the merger.

Mergers, as stated in the above-cited three legal texts, are considered to be a form of reorganisation of companies, and as such the results that could arise as a consequence of the reorganisation are not taxed, and the rights and fiscal obligations that correspond to the entities that are reorganised will be transferred to the continuing entities. Notwithstanding, Article 287, Paragraph III of the Tax Code states that the losses that come from other entities as a result of a reorganisation process are not tax-deductible.

It is also important to note that the surviving entity in a merger, or the new entity created as a result of the merger, is liable for the obligations and taxes owed by its predecessor and for the penalties for the infringements of the companies that have ceased to exist, and it cannot oblige another entity to assume them.

On the other hand, acquisitions either by share transfer or by asset purchase are taxable transactions, with consequences for both parties (buyer and seller).

If a company decides to purchase the assets of an entity, to avoid acquiring the liabilities, it would have to pay the corresponding taxes for all the assets, and the tax rate to be applied to the transfer would depend on the type of asset that is being transferred. The tax on the transfer of real estate property amounts to 3 per cent of the sale price of each property or of the value of the property registered in the records of the Tax Office, whichever is higher. The same principle applies to the transfer of vehicles, but the tax rate here is 2 per cent. In both scenarios, the tax described lies on the buyer.

Even if the buyer does not acquire the shares of the business, in some scenarios the Dominican Tax Code holds him or her jointly liable (before the Tax Administration) for certain tax payments of the seller, such as those that affect the assets acquired, proportionally to the tax debt of the seller, and VAT taxes that are paid by the seller but collected by the buyer to be paid to the Tax Administration. In addition, if the buyer acquires what the Tax Administration defines as a ‘permanent establishment’, the Tax Administration could hold the buyer jointly liable for all the tax obligations of the contributor (seller).
For the seller, the corresponding taxes that arise out of the transaction are paid on the yearly income tax, and will be the difference between the acquisition price (adjusted by inflation) and the sale price if it is a real estate property. For other types of tangible assets, the seller will pay income tax on the difference between the book value of the asset and the sale price. In both cases (sales of real estate property and sales of tangible assets), the tax rate is 27 per cent.

The purchase price (except when transferring real estate property or shares) should also include 18 per cent VAT for the sale of assets (other than real estate) that must be reported, collected and paid by the seller.

With regard to the transfer of shares, the seller is the one who bears the tax burden. In accordance with Article 289 of the Tax Code, the capital gain tax, which applies currently at a rate of 27 per cent, applies to sales, swaps and other allocation acts of capital assets, such as share transfers, in which the applicable tax is calculated by deducting from the price or the value of the transfer of the shares the cost of its acquisition adjusted by inflation (as per the multiplying factor published yearly by the Tax Office).

Moreover, Norm 07-2014, issued by the Tax Office, allows the Tax Office to estimate a minimum transfer value (sale price), regardless of the transfer value that the parties agree to in the agreement (sale price), and it takes into consideration the equity of the company whose shares are being transferred by dividing the result of the values for the paid-in capital, admitted reserves, accumulated benefit or losses at the time of the sale, revalorisation of the company equity and the surplus from the number of shares transferred. With this reasoning, the Tax Office determines whether there has been a capital gain or loss.

Norm 07-2011 issued by the Tax Office also requires that any company that acquires shares withholds 1 per cent of the price paid to the seller for the purchase of the shares regardless of whether the seller is an individual, a legal entity, a resident or a foreign national. Said payment is credited to the tax on capital earnings that has to be paid by the seller, generated on the occasion of the sale, if applicable.

IX COMPETITION LAW

On 16 January 2008, the Dominican Republic enacted Law No. 42-08 on the Defence of Competition. This Law prohibits the abuse of a dominant position and disloyal acts, such as agreements between competitors’ market players, and promotes free competition. However, it does not regulate the concentration of capitals between the different players in a market.

Notwithstanding the above, several regulated markets require the authorisation of certain government dependencies, such as:

a Telecommunications: Law No. 153-98 and the Rules of Free and Loyal Competition of the Telecommunications Market require that any transfer, assignment, lease or grant of the right to use any title or lien granted on concessions or licences must be carried out with the previous authorisation of the Dominican Institute of Telecommunications (Indotel). In that vein, the sale or assignment of shares resulting in the loss by the seller or transferor of social control will require the authorisation of Indotel. Furthermore, mergers and market concentrations in telecommunications are expressly subject to the previous approval of Indotel, which can challenge a transaction or request and instruct correction measures in order for the transaction to be within the boundaries of the Law and the Rules.
Banking: Monetary and Financial Law No. 183-02 requires that the authorisation of the Monetary Board is acquired in advance, as per Articles 9 and 35 of the Law, in cases of mergers, share transfers of 30 per cent or more of the paid-in capital, absorption, and substantial asset and liabilities transfers of any financial intermediation entity. The authorisation of the Monetary Board is also required in advance for currency exchange institutions.

Securities: as per the terms of Articles 386 and 157 of the Companies Law, a corporation that had ventures in the securities market must submit the merger agreement to the Securities Superintendence, which will accept or reject the project within 15 days. The merger agreement is submitted for the approval of the bondholders’ meeting, unless the companies involved allow that the bondholders can be offered a refund as the sole requirement. Moreover, Securities Law No. 249-17 sets out several provisions to avoid concentration.

Insurance: Articles 174 to 184 of Dominican Insurance and Bonds Law No. 146-02 allow insurance and reinsurance companies to merge between each other with the previous authorisation of the Dominican Insurance Superintendence. The Superintendence can also recommend that an insurance company merges if the financial statements or the verifications made by the Superintendence reflect that the insurance company is not in a position to guarantee the fulfilment of its obligations before the insurers.

Electricity: Paragraph II of Article 12 of the Ruling for the Application of the Electricity General Law No. 125-01, enacted by Decree No. 555-02, states that the Electricity Superintendence, before authorising the transfer of generation concessions, mergers or sales of shares where generation companies are involved, must investigate whether the petitioners, either by themselves or through related parties, are owners of generation centres with a total capacity that represents, in its opinion, a significant percentage of the maximum demand of the national interconnected electric system that, in accordance with the criteria established by the National Commission of Energy, constitutes a threat to free competition in the electric wholesale market. Article 82 of the Law establishes a similar prohibition on the transfer of concessions of generation and distribution.

Pension funds: Article 93 of Law No. 87-01 of Social Security and Article 50 of Decree No. 969-02 that establishes the Pension Ruling, require that the merger is approved by the Pension Superintendence before completing matters of common law, and in that sense, a meeting approving a merger project together with the merger plan must be submitted. The Superintendence can require amendments to the merger project or reject it.

Health risk administrators: similarly to pension funds as described above, Article 153 of Law No. 87-01 of Social Security states that health risk administrators and the National Health Insurance Scheme must obtain the express authorisation of the Health and Labour Risks Superintendence before merging with another entity.

X OUTLOOK

Significant modifications to the Labour Code and Civil Code are being discussed, which could affect certain aspects of M&A. However, it is not known when these modifications to the existing laws, and the enactment of new laws, will be approved by Congress, considering that some Bills have been submitted for years.
Chapter 15

ECUADOR

Fabricio Dávila Lazo

I OVERVIEW OF M&A ACTIVITY

During the past year, the Ecuadorian economy has attracted foreign direct investment (FDI) at a level well below that of the rest of the countries in the region; the FDI registered by the Central Bank of Ecuador totalled US$560.6 million, which reflects a decrease of 27 per cent compared with direct foreign investment received in 2016. The four main countries from which Ecuador receives foreign investment are China, Spain, the United States and the Netherlands, which account for around 80 per cent of the flows.

During the years 2013 to 2017 inclusive, FDI, both in domestic companies and in branches of foreign mercantile companies in the country, reached a total of approximately US$3.78 billion, an annual average of US$755.26 million. During the past year, the sector that received the most FDI was manufacturing, with an investment inflow of approximately US$151 million.

In recent years, Ecuador’s FDI has represented less than 1 per cent of gross domestic product. In comparison, other countries in the region have been receiving an average of four times more direct foreign investment.

According to information provided by the Superintendency of Companies, there were 33 mergers and 13 splits or demergers in 2017. So far in 2018 there have been nine mergers and four splits or demergers. However, this data is not complete because not all acquisitions require prior approval from the Superintendency of Control of Power of Market, and also because in many cases the acquisitions are of shares and not mergers proper.

The Ecuadorian government that came into power in May 2017 has been working on policies to improve openness to FDI. At the end of December 2017, for example, the government defined the promotion of investments as key State policy, for which President Lenin Moreno created, through Executive Decree 252, the Strategic Committee for the Promotion and Attraction of Investments.

On 2 April 2018, President Moreno presented the general outline of his economic plan, which consists of four main axes and 14 measures. The most important of these in relation to mergers and acquisitions are measures 6, 7 and 8, which are intended to grant income tax and foreign exchange tax benefits for new investments. The government will work on a new regulatory framework to encourage the financing of investment credits by international banks; this will undoubtedly help reactivate the local mergers and acquisitions market. The government will also seek to rationalise both the costs of stock transactions

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and the statute that holds the shareholders of a company responsible for the actions of the administrator, all as a means of strengthening the stock market. These measures would help strengthen the concept of limited liability in mercantile companies – a key concept that was harmed by the abusive application of the Organic Law for the Defence of Labour Rights, the negative impact of which was notorious in the stock market.

The Central Bank of Ecuador expects the economy to grow by 2 per cent. For its part, the Community of Latin American and Caribbean States (CELAC) has predicted that economic growth in Brazil will trigger regional growth and estimates a 1.3 per cent growth for Ecuador. It is to be expected that this growth will have a positive impact on the M&A market.

II GENERAL INTRODUCTION TO THE LEGAL FRAMEWORK FOR M&A

Depending on the type of company and the sector of the economy in which it operates, different regulations will apply to a merger. The Companies Law, the Organic Law of the Internal Tax Regime and its regulations apply to all merger and acquisition processes. Depending on the volume of the operation and the industry or sector, the Organic Law for the Regulation and Control of Market Power may also apply.

The Companies Law is the main statute that regulates mergers and acquisitions. Two types of mergers exist in Ecuador: (1) when two or more companies join to form a new one that acquires its rights and obligations (Article 347 of the Companies Law); and (2) when one or more companies are absorbed by an existing one.

In a merger, tangible or intangible assets can be transferred at their book value or at their market value. The market value of the tangible and intangible assets is determined by a shareholders’ meeting, based on an independent appraisal.

Generally, a merger involves the following steps:

a publication of the call for extraordinary general shareholders’ meetings for both the absorbed and the absorbing entities;

b holding the shareholders’ meetings to issue resolutions regarding the merger of the company, in the case of the absorbing entity, and the dissolution, in the case of the absorbed entities. The shareholders approve the merger and the amendment of the by-laws;

c filing the public deed of merger before the Superintendency of Companies, Securities and Insurance (SCSI), which will include the approved merger balance sheet;

d an opposition period (six working days) starting with the publication of announcements for three consecutive days, to allow for the opposition of any party that might consider itself affected by the dissolution;

e registration of the SCSI’s Merger Approval Resolution at the Mercantile Register and annotations with the notaries;

f other publications and actions related to the finalisation of the approved dissolution;

g cancellation of the absorbed entity’s tax identification number and its registrations at other government agencies; and

h other publications and actions related to the finalisation of the approved merger, including updating the information regarding the absorbing entity’s capital at the Internal Revenue Service and other government agencies.
The acquisition of an existing business can be done as follows:

a acquisition of the shares (in the case of a corporation or public limited company) or share interests (in the case of a limited liability company); or

b acquisition of business assets and liabilities.

If stocks are listed on the stock market, then they can only be negotiated in the stock exchange through brokers. The only exceptions are the transfer of shares made by virtue of mergers, demergers, inheritance, legacies, donations and liquidations of community properties or de facto business association.

Traditionally, the Company Law did not contemplate the possibility of establishing additional limits to the trading of shares. However, since the amendment of the Company Law by the Organic Law for the Reactivation of the Economy of 28 December 2017, now the shareholders of a company can enter into shareholder agreements establishing additional conditions for the transfer of shares.

The second option – the acquisition of business assets and liabilities – may or may not generate the payment of various taxes. For example, if what is acquired is real property, the operation will be highly taxed by municipal and state taxes. On the other hand, if the operation only involves movable property and intellectual property rights, it will not be taxed.

In general terms, unless a shareholder agreement is in place, a transfer of non-listed shares must comply with the Companies Law, as follows:

a The assignee must receive the stock certificates that contain the shares being transferred, with the respective assignment signed by the assignor. The assignment notice can be delivered in a separate document, attached to the stock certificate.

b Both the assignor and the assignee must inform the legal representative of the local company whose shares are being transferred about the respective share transfers, by means of a joint communication signed by both, or through separate communications.

c The legal representative of the local company must register the respective share transfers on the company's shares and shareholder ledger.

d The local company's legal representative must electronically notify the SCSI about the share transfers that have been carried out.

e The local company must issue new stock certificates at the request of the assignee. For that purpose, the stock certificates that are transferred shall be handed in for their annulment. The assignee can also choose not to request the issuance of new stock certificates and to keep the assigned stock certificates.

f Compliance with the applicable rules for the declaration and payment of income tax on the transfer of shares or participations.

g When Ecuadorian residents and effective Ecuadorian beneficiaries make direct or indirect disposals through non-resident companies, they must declare the income obtained, the expenses attributable to said income and the profits or losses produced by said operations.

h In the case of operations carried out by non-residents of Ecuador, it is the substitute’s obligation, namely the company whose shares are being negotiated, to declare and pay the income tax for the sale of shares.
When a purchaser of shares or rights representing capital is a tax resident in Ecuador and at the same time a withholding agent, he or she is liable for withholding tax on the payment he makes.

The lack of presentation of this information (or the presentation of erroneous data) is be sanctioned with a fine of 5 per cent of the real value of the transaction.

The share participations issued by limited liability companies are not freely assignable or transferable as is the case for stocks issued by corporations. They can be transferred to another partner in the company or to third parties only with the unanimous consent of the partners. The transfer must be executed through a public deed and registered in the company’s ledger.

III DEVELOPMENTS IN CORPORATE AND TAKEOVER LAW AND THEIR IMPACT

On 28 December 2017, the Organic Law for the Reactivation of the Economy was enacted, which includes certain measures to reactivate the economy. In the corporate sphere, the procedure for the transfer of the legal domicile of a foreign company to Ecuador was introduced; the law also expressly established the validity of the shareholders’ agreements that establish conditions for the transfer of shares. Before this legal reform, there was no uniform view regarding the validity and enforceability of these kinds of agreements.

IV FOREIGN INVOLVEMENT IN M&A TRANSACTIONS

Buyers in the process of acquiring companies in Ecuador are often subsidiaries of foreign companies. Many of the large transactions that take place in Ecuador are financed by the purchasers or by foreign banks; it is not common for local banks to be involved in M&A processes.

In the World Bank’s publication Doing Business 2018, Ecuador is ranked as the 118th country of 190 economies as regards the ease of doing business. Foreign investors often struggle with bankruptcy proceedings, for instance, which can be complex and lengthy.

Players in markets such as food, animal products, agricultural goods, banks and insurance companies, beer and beverage industries, cement and steel producing companies, have been the main recipients of foreign investment through M&A transactions in the recent past. During the past year, manufacturing was the sector that received the most foreign investment.

V SIGNIFICANT TRANSACTIONS, KEY TRENDS AND HOT INDUSTRIES

The most significant transactions during the past few years include the following:

a Tevcol purchased the assets of the securities transport unit of the G4S Group.

b Grupo Familia, through its subsidiary Productos Familia Sancela of Ecuador SA, acquired 100 per cent of the shares of Industrial Papelera Ecuatoriana SA (Inpaecsa) for approximately US$36 million.

c Coveris Holding SA acquired 50 per cent of the remaining shares in the company Chemplast del Sur SA. This operation required the authorisation of the Superintendency of Market Power Control.
d Compañía de Petróleos de Chile Cope SA, through its subsidiary Organización Terpel SA, acquired the lubricants and fuels business of Exxon Mobil Ecuador.

e Zurich Insurance Group signed an agreement with QBE Insurance Group Limited to acquire the operations of the latter in Argentina, Colombia, Ecuador, Brazil and Mexico for US$409 million.

f Nestlé SA acquired the majority in the social capital of the company Terrafertil.

g InRetail Perú Corp acquired the pharmaceutical distributor Quicorp SA for US$583 million.

h Corporación Multiinversiones acquired 50 per cent of the shares held by a group of investors in the company Procesadora Nacional de Alimentos Pronaca CA.

i The company Dicomtriz SA acquired the Amazonas Gas Station for US$10,561,332 million.

j On 24 August 2017, the sale of the production plant of Ambev Ecuador SA, a subsidiary of AB InBev, to the Ecuadorian consortium CEREC Holding Company SA was approved by the Superintendency of Market Power Control (SCPM) as part of the divestment process that AB InBev must complete for its global merger with SABMiller.

VI FINANCING OF M&A: MAIN SOURCES AND DEVELOPMENTS

There are several ways to finance mergers and acquisitions. However, what is most common in Ecuador is that the finance comes from abroad or a company’s own funds; local banks are not active participants in these operations. It is possible that with the announcement of the government’s economic plan and the laws that are scheduled to be sent to the National Assembly, foreign banks will have a greater role in M&A operations.

VII EMPLOYMENT LAW

M&A operations generate labour issues that must be addressed during negotiations. If the transaction is made through the purchase of the shares, there is no change of employer and the working relationship is maintained with the employees. If after the purchase the buyer terminates the contracts of certain workers, the company is obliged to provide compensation in the form of severance payments.

On the other hand, if the transaction is made through the acquisition of assets or business units of a company, Article 171 of the Labour Code comes into effect, and the buyer must assume the responsibility of its predecessor as employer with respect to the workers at the business unit. Note that if a worker decides not to continue the employment relationship with the new employer, the employer must compensate him or her with a severance payment.

Finally, in merger processes, all labour contracts are maintained and the absorbing company will be the new employer of the workers of the absorbed company. If two merging companies are liquidated and a new company is created, the new company will be the new employer of the workers of the two companies that have merged.

Generally, once an employment agreement is terminated unilaterally by the employer, a severance payment is due to the employee. The amount of the severance payment will depend on the last compensation and the seniority of each employee.

Another important aspect regarding employment legislation is that there are specific contractual modalities that apply for certain industries, such as banana production, tourism and floriculture.
VIII TAX LAW

Nearly all payments made by corporations and individuals are subject to withholdings on account of taxes. The payer is responsible for withholding the appropriate amount, providing tax withholding certificates to the payee, filing a report of withholdings, and paying the amounts withheld within the following month. Payments made abroad – with some exceptions, such as dividends and interests – are subject to withholding at a rate of 25 per cent pursuant to Article 39 of the Internal Tax Regime Law. For instance, royalties paid abroad are subject to a withholding of 25 per cent unless they are reduced under a tax treaty or increased to 35 per cent if the recipient is in a tax haven or low-tax jurisdiction.

Dividends paid to a resident or non-resident corporation from another resident corporation out of profits that have been subject to corporate income tax are exempt, provided that the recipient does not reside in a low-tax jurisdiction or in a tax haven; otherwise, a withholding of 10 per cent has to be made.

Payments made abroad for interest on foreign loans registered at the Ecuadorian Central Bank (ECB) are tax-deductible but are not subject either to income tax or to withholdings on account of taxes in Ecuador, as long as that interest does not exceed the interest rate fixed by the board of directors of the ECB as of the date on which the loan was registered or registration was renewed. If the interest rate of the loan exceeds the ECB’s interest rate, a withholding of 25 per cent must be made on the excess.

Income (capital gains) generated by the direct or indirect transfer of shares is no longer tax-exempt, since the tax laws were amended in 2015. However, share transfers are exempt from VAT.

Transfers of assets and liabilities that take place as a result of a merger are exempt from income tax. The increase or reduction in the value of the shares that may take place as a consequence of the merger is also tax-exempt but is not deductible. Any personal property transfer taking place as a result of the merger would not be subject to VAT. Likewise, the transfer of real estate property would not be subject to VAT or municipal taxes.

One tax implemented since 2008 that still discourages foreign investment is the Overseas Remittance Tax. This is levied on the value of all monetary operations and transactions carried out towards any other country, with or without the intervention of institutions belonging to the financial system. The tax base is the amount of the currency transfer, of the credit or deposit, or the amount of the cheque, wire transfer or draft abroad. The current tax rate is 5 per cent and there are few exemptions.

In the past, Ecuador has not only imposed higher taxes on transactions involving persons located in tax havens, but it general it has been combating tax havens. One of the most recent examples is that, in February 2017, Ecuadorians voted to bar politicians and civil servants from having assets, company interest or capital in tax havens.

Ecuador has been part of the global trend towards greater tax transparency and the fight against tax evasion. In May 2017, Ecuador joined G20 countries, OECD members and other developing countries as a member of the Global Forum on Transparency and Exchange of Information for Tax Purposes. In May 2018, the Director of the Internal Revenue Service announced that Ecuador had become a party to the Multilateral Agreement on Mutual Administrative Assistance in Tax Matters. As a party to this agreement, Ecuador will be able to exchange financial information with 117 countries.

Ecuador has concluded tax treaties with several countries (including Belgium, Canada, Chile, France, Germany, Mexico, Singapore and Spain) to avoid the double taxation of income.
Several tax incentives are set forth in the Production Code, The Law of Public-Private Partnerships and the Organic Law for the Reactivation of the Economy, all aimed at attracting both domestic and foreign investment in certain priority sectors: logistical services, biotechnology, tourism, forestry, etc. A five-year tax moratorium on corporate tax applies to new investments that comply with certain requirements and are located outside the main cities of Quito and Guayaquil. A tax exemption of 10 years applies for investments in some industries. The Law of Public-Private Partnerships includes benefits for foreign investors that become parties to these types of partnerships.

IX Competition Law

The Organic Law of Regulation and Control of Market Power (the Antitrust Law) was enacted in Ecuador in 2011 and the current control agency is the SCPM.

i Market power

Pursuant to Article 7 of the Antitrust Law, market power ‘is the capacity of the economic operators to influence significantly in the market’. The Law seeks to avoid, prevent, correct, eliminate and sanction the abuse of market power by economic operators. The scope of the Law covers all economic operators, individuals or corporations, public or private, national or foreign, for profit or not-for-profit, and that currently or potentially perform any economic activities in Ecuador, as well as the associations they form. It is also applicable to entities that perform economic activities abroad if their acts, activities or agreements produce or might produce adverse effects on the local Ecuadorian market.

For market power analysis, the SCPM will determine the relevant market by looking at the product or service market, the geographical market and the particular characteristics of the sellers and buyers who participate in the market. The SCPM will carefully screen the nature of the investigated conduct, based on their economic and real effects and not merely on their legal form.

Additionally, the Antitrust Law provides the criteria for determining whether an economic operator has market power in a relevant marketplace (i.e., participation in the market, existence of barriers of entry and exit). Abuse of market power is prohibited. This abuse occurs when one or several economic operators, based on their market power, by any means impede, restrict, falsify or distort the competence, or negatively affect economic efficiency or general well-being.

ii M&A and the Antitrust Law

According to the Antitrust Law, M&A transactions are defined as those where there is a change in ownership or control in one or more entities in favour of another. The law requires the approval (clearance) of transactions that meet certain thresholds.

The Antitrust Law sets forth the following clearance thresholds for M&A transactions: (1) operations that involve a combined participation (market share) of 30 per cent or more of a relevant market; or (2) operations of a combined amount exceeding US$1.24 billion in the case of banks, US$82.6 million in the case of insurance companies and US$77.2 million in all other cases.

Depending on the markets in which the M&A transaction is taking place, the approval of specific regulatory agencies (such as the Superintendency of Companies, the
Superintendency of Banks, the Hydrocarbons Regulatory and Control Agency, the Mining Regulation and Control Agency, the Telecommunications Regulatory and Control Agency) must be obtained.

As previously indicated, the enactment of the Antitrust Law has completely changed the landscape in Ecuador with respect to large M&A transactions. The need for regulatory approval under many circumstances has increased both the time and cost of closing transactions of economic significance. In addition, a perceived sense of unpredictability that clearance will be granted will remain until there has been sufficient and consistent practice by the regulator.

Violations of the Antitrust Law are severely penalised. Monetary fines range from 8 per cent to 12 per cent of turnover in the fiscal year previous to the one when the infraction is determined. There are also substantial monetary fines for the legal representatives, directors and officers of a company involved in an infraction.

X OUTLOOK

The forecasts that the economy in the region is growing and that the Ecuadorian economy is expected to grow by 2 per cent bodes well for M&A operations in 2018. The Organic Law for the Reactivation of the Economy, the government’s economic plan, the laws that are expected to be sent to the National Assembly to attract foreign direct investment, the campaign announced by the Minister of Foreign Trade and Investment to make ‘Ecuador a new investment destination’, the liberalisation of air transport, among other measures, will undoubtedly contribute to an increase in M&A activity in the next few years.

The strengthening of the principle of limited liability will undoubtedly be an incentive for both local and foreign investors, as will be the guarantee of the continued ‘dollarisation’ of the economy, which is perceived to bring much-needed stability for long-term investment.

Note that international organisations are working with local experts on general guidelines for a comprehensive reform of the Companies Law with a view to simplifying costs, protecting minority shareholders and allowing new types of companies that are in line with the reality and economic needs of the modern economy. The project can be expected to serve as a model for other Latin American countries that have economies similar to Ecuador and where closed companies that are controlled by family members or by few main shareholders (with little protection for minority interests) are common. The project is expected to be ready by the beginning of 2019.
Chapter 16

EGYPT

Mohamed Gabr, Ingy Darwish and Engy ElKady

I OVERVIEW OF M&A ACTIVITY

The Egyptian economy had been struggling since the January 2011 Revolution, with increasing budget and trade deficits coupled with reduced growth and significant inflation. The Central Bank of Egypt (CBE) implemented several policies with the aim of protecting the official value of the Egyptian pound, which was much higher than its actual value in the parallel unofficial market. The artificially high value of the Egyptian pound and the high volatility in the parallel market, coupled with various bottlenecks affecting foreign investor confidence in the repatriation of funds, resulted in much-reduced foreign investor appetite for investment in Egypt. Foreign investors were particularly reluctant to overpay for Egyptian pound-denominated assets and securities, and concerned about the availability of foreign currency to repatriate profits and exit proceeds.

A number of significant changes have occurred, starting with the CBE’s decision to float the Egyptian pound on 3 November 2016 and followed by the International Monetary Fund (IMF) extending a US$12 billion facility to Egypt approved by the Executive Board of the IMF on 11 November 2016. Since then, the Egyptian pound has lost slightly more than 50 per cent of its value from the 8.88 Egyptian pound peg to the US dollar to around 18 Egyptian pounds per US dollar, and has relatively stabilised at this rate after a period of sharp fluctuations. In the meantime, the CBE finally lifted restrictions on foreign currency transfers on 14 June 2017. The conclusion of the IMF facility, the fair valuation of the Egyptian pound, the stabilisation of the foreign currency exchange rates, the increased availability of foreign currency, and the removal of various restrictions and bottlenecks affecting the repatriation of funds have all contributed to increased foreign investor confidence in the Egyptian economy.

The new exchange rate regime continued to increase foreign investor appetite for Egyptian assets. The net FDI inflows have been increasingly covering the current account deficit (excluding grants) since Q3 (2016), reducing the gap to US$0.1 billion during Q3 (2017), the lowest since Q1 (2013).

The CBE has gradually increased interest rates in an effort to reduce inflation and ‘dollarisation’, raising the overnight deposit rate, the overnight lending rate and the rate of the CBE’s main operation, as well as the discount rate, in July 2017, by 200 basis points to 18.75, 19.75 and 19.25 per cent, respectively. The higher interest rates were obviously increasing

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the cost of borrowing, with direct implications on many businesses reliant on borrowing to finance capital expenditure or working capital requirements, and with indirect effects on other businesses dependent on consumer financing (e.g., car loans in the automotive sector). However, recently this trend has been gradually reversed, with the overnight deposit rate, the overnight lending rate and the rate of the CBE’s main operation, as well as the discount rate, being reduced to 16.75, 17.75 and 17.25 per cent, respectively, as of March 2018.

Real monetary conditions continued to tighten despite nominal policy rates being kept unchanged during Q3 and Q4 2017. The previous policy rate increases led to inflammatory pressures negatively affecting the disposable income of the very large Egyptian middle class, which has been one of the key drivers of growth in many consumer-spending driven sectors of the economy, most notably fast moving consumer goods (FMCGs).

The government, attempting to control the already high budget deficit, and now under more pressure due to the devaluation of the Egyptian pound and higher interest rates, has been gradually reducing energy and fuel subsidies, with the latest fuel subsidy reductions occurring on 28 June 2017 (Prime Ministerial Decrees 1435 to 1439 for 2017). More energy and fuel subsidy reductions are expected to occur during 2018. The reduction of those subsidies is also contributing to more inflation and more pressure on the disposable income of the middle class, which will undoubtedly in turn affect various businesses. Furthermore, higher energy and transport costs directly affect numerous businesses, requiring them to increase prices or reduce margins.

The inflationary impact of the domestic currency depreciation has diminished, and the monthly headline inflation registered minus 0.1 per cent and minus 0.2 per cent in January 2018 and December 2017, respectively. This follows the period between August and November 2017 at around 1.1 per cent, affected by upward adjustments of regulated prices, which accounted on average for 44 per cent of monthly headline inflation, due to subsidy reforms. The prices of regulated items contributed tremendously to headline inflation due to subsidy reforms related to hydrocarbons, electricity and water.4

On the macro level, those policies and measures have resulted in an overall surplus in the fiscal year 2016–2017 amounting to US$13.7 billion, as opposed to an overall deficit of US$2.8 billion in the previous fiscal year. This was mainly driven by a decline in imports and an increase in exports as a consequence of the Egyptian pound devaluation coupled with significant inflows of foreign portfolio investments, especially in Egyptian treasury bonds with considerably high yields.5 In the meantime, the considerable devaluation of the Egyptian pound has sharply increased the cost of imported finished goods and Egyptian products reliant on imported raw material, while significantly increasing the attractiveness of Egyptian exports of goods and potentially of services as well.

To summarise, the CBE and the government have been adopting several policies and measures simultaneously with the aim of reducing budget and trade deficits and attracting foreign direct investment (FDI). While this policy direction has indeed increased foreign investor confidence in the Egyptian economy, this has not necessarily translated into a significant increase in FDI (the total inflows of FDI in Egypt in July 2016 to March 2017 rose by only 12.1 per cent, mainly driven by investments in the oil sector).6

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4 Ibid.
6 Ibid.
impediments to FDI growth remain political and policy matters, which are discussed in more detail in Section IV. With regard to M&A activity, these policies and measures affect almost all types of businesses across all sectors of the economy in different ways (mostly negatively, at least in the short-term; however, also positively in certain cases, such as exporters). As these changes are fairly recent and in many cases are actually still unfolding, many businesses are still digesting them and devising strategies to cope with or benefit from them. As such, it is extremely difficult at this stage to devise business plans and budgets, or to come up with reasonably confident projections or forecasts, which is consequently making the valuation of businesses for the purposes of various types of M&A exceedingly difficult.

Therefore, in spite of the fact that the Egyptian economy remains fundamentally attractive due at least to its sheer size and depth, and even though the recent policy direction of the CBE and the government is restoring foreign investor confidence in the economy, the level of M&A activity is still lower than its level before 2011, and its level during the brief period of relative political and economic stability and optimism immediately following the presidential elections of 2012.

II GENERAL INTRODUCTION TO THE LEGAL FRAMEWORK FOR M&A

The Egyptian legal system is strongly influenced both by the French civil code and Islamic shariah, and is based on legal codification with judicial precedents playing a less important role compared to common law jurisdictions. The Civil Code is the main pillar of the Egyptian legal system. It codifies contract law and governs all types of sale and purchase transactions. Therefore, all M&A transactions governed by Egyptian law are mainly regulated by the Civil Code.

Furthermore, there are numerous specific codes addressing specific areas of law. The Commercial Code complements the Civil Code with regards to certain areas of commercial and corporate law. The main codes relevant to M&A are the Companies Law and its Executive Regulations, which govern corporate matters in relation to joint-stock and limited liability companies, and the Capital Market Law and its Executive Regulations, which address several important corporate matters (including, without limitation, capital increases of joint-stock companies, public offerings of securities and takeover rules pertaining to publicly listed companies). The Listing Rules of the Egyptian Exchange (EGX), issued pursuant to Decree No. 11 of 2014 of the Board of Directors of the Financial Regulatory Authority (FRA), regulate the listing, delisting and disclosure requirements of securities on the EGX, and are consequently relevant to transactions involving listed companies, whether as targets or parties. The Central Securities Depository and Registry Law and its Executive Regulations regulate the central depository and registry of dematerialised securities, and the clearing and settlement of listed securities. In addition, specific laws include provisions that impact M&A transactions in the sectors they regulate (e.g., the Central Bank and Banking

7 No. 131 of 1948.
8 No. 17 of 1999.
9 No. 159 of 1981.
10 No. 95 of 1992.
11 No. 93 of 2000.
Law\textsuperscript{12} regulating acquisitions in the banking sector). Finally, the new Investment Law,\textsuperscript{13} cancelling and superseding the old Investment Law,\textsuperscript{14} regulates various investor incentives and guarantees as well as specific investment regimes and procedures, and complements the Companies Law with regards to certain areas of corporate law.

The Egyptian regular court system consists of three tiers: the courts of first instance, courts of appeal and the Court of Cassation. Civil and commercial disputes are heard before regular courts. The Council of State, consisting of two tiers of administrative courts, the Administrative Court and the High Administrative Court, decides over administrative disputes relating to administrative contracts and decisions issued by the different branches of the administration. In addition, Law No. 120 of 2008 has established specialised economic courts, which are specialised circuits within the regular court system, with the aim of expediting the settlement of commercial and investment disputes. In spite of the relative success of the specialised economic courts compared to the regular courts in terms of the expedited settlement of disputes, it is very common for M&A transaction documents to refer potential disputes to arbitration. In light of the provisions of the Arbitration Law,\textsuperscript{15} and based on the fact that Egypt is a signatory of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958), arbitral awards are enforceable in Egypt subject to a few relaxed conditions, and are not subject to review on their merits. Furthermore, it should be noted that it is also quite common in cross-border M&A transactions involving foreign investors that the parties agree on an applicable law other than Egyptian law (English law in particular). This is particularly the case as the Egyptian legal system respects party autonomy to a very large extent (except in very few instances, such as technology transfers and local commercial agency termination), as the parties are free to agree on the applicable law and jurisdiction, and their agreement will be upheld by local courts as long as it does not violate public policy or mandatory legal standards. In such case, the contractual obligations of the parties are governed by foreign law (e.g., English law); however, corporate matters are still regulated by the relevant Egyptian laws and regulations to the extent an Egyptian target is involved.

III DEVELOPMENTS IN CORPORATE AND TAKEOVER LAW AND THEIR IMPACT

The past couple of years have witnessed numerous legal developments, the most notable being the passing of the new Investment Law, the Value Added Tax Law\textsuperscript{16} and the Bankruptcy Law,\textsuperscript{17} which have cancelled and superseded their predecessors, as well as the passing of the Movable Securities Law\textsuperscript{18} and its Executive Regulations. Furthermore, amendments to the Companies Law and its Executive Regulations were promulgated to enhance and improve Egyptian corporate law and introduce the sole person company (that is also known as a sole proprietorship).

\begin{footnotesize}
\begin{enumerate}
\item No. 88 of 2003.
\item No. 72 of 2017.
\item No. 8 of 1997.
\item No. 27 of 1994.
\item No. 67 of 2016.
\item No. 11 of 2018.
\item No. 115 of 2015.
\end{enumerate}
\end{footnotesize}
The key amendment of the Companies Law and its Executive Regulations is the introduction of the sole person company, which allows the incorporation of an Egyptian company fully owned by a natural person or a juristic person. This new corporate vehicle was introduced to encourage more investment in small and medium-sized enterprises (SMEs) and also facilitate corporate structuring. Another important amendment is allowing the introduction of preferred shares post-incorporation, which was previously prohibited. One very important amendment is the permitting of the conclusion of a shareholders’ agreement that, if approved by the extraordinary general assembly of shareholders of the company, is binding both on the company and minority shareholders. This amendment has wide implications on the regulation of corporate governance and shareholder relations in Egyptian joint-stock companies. Finally, another notable amendment is the introduction of comprehensive demerger procedures, which were not previously set out in this detailed and properly regulated manner. This amendment will undoubtedly facilitate corporate structuring procedures.

With regards to the new Bankruptcy Law, one of the crucial factors that made Egypt a ‘high risk environment’ for investment is the bankruptcy legal framework, which was tainted by bureaucracy and lengthy, complicated procedures. The new Bankruptcy Law intends to mitigate the associated risks of doing business in Egypt through creating a friendlier and less intimidating business environment for struggling or risk-taking investors. First, the current regulations no longer deal with the bankrupt person as a criminal. The new Bankruptcy Law introduces new mechanics such as reorganisation to create a win–win situation for all the concerned parties in a bankruptcy process. In addition, it mitigates the imprisonment penalties imposed on non-fraudulent bankrupt persons to encourage risk-taking investors to do businesses in Egypt. Second, the new Bankruptcy Law introduces comprehensive reorganisation procedures entailing the continuation of a business and facilitating bankruptcy procedures through the intervention of the competent court. The involvement of the court aims to put in place an efficient and adequate reorganisation plan with a detailed timeline for the purpose of assisting debtors and their creditors to achieve the reorganisation. Third, the new Bankruptcy Law allows debtors to file for bankruptcy while still operating their business during the negotiation period. This new philosophy does not aim to penalise struggling businesses, but rather to assist them to get back on the right track.

The Movable Securities Law and its Executive Regulations have been issued to close a loophole in the Egyptian debt market where the availability of collateral was a constraint for SMEs requiring financing. The FRA has established an electronic registry with the purpose of the registration of movables, which may be used as collateral (including existing or future physical assets or moral rights, receivables, credit notes, bank deposits or accounts, equipment, tools, stock, trees and agricultural products). This Register is also used to indicate the existence of a security interest over a movable asset and for prioritising creditors. This system is far more flexible. Creditors no longer need to hold possession of the movable asset used as collateral, as required under the previous Civil Law regime. This allows the debtor to use the movable asset while it is securing the debt. Furthermore, any party having a legitimate interest over the movable asset may object to the registration before the courts on an urgent basis. In an insolvency event, movables subject to the registered collateral will not be part of the debtor’s assets. Creditor ranks will apply; however, the registration of the collateral will grant the secured creditor a first-ranking security over the movable asset. The Movable Securities Law allows creditors to directly recover their debt or directly sell the pledged movables without a court order as well as direct set-off in the case of bank accounts.
Other recent legal developments with the most significant impact on M&A transactions are far less publicised. First, the Importers Register Law was amended to allow foreign ownership of up to 49 per cent in Egyptian companies registered on the Importers Register (a requirement for importing finished products), which was previously completely prohibited. Second, a new Chapter 13 was added to the Executive Regulations of the Capital Market Law stipulating rules regarding the disclosure of information pertaining to the ultimate beneficial owners (UBOs) of Egyptian joint-stock companies. This is a novel and important legal development in the Egyptian market, as the concept of UBOs and monitoring who they are were never regulated in this level of detail previously. The disclosure requirements are extensive and substantial, and apply to all instances of incorporations as well as any major transactions and restructuring exercises involving Egyptian joint-stock companies. This development, coupled with the introduction of the general anti-avoidance rule (GAAR) to the Income Tax Law and the restrictions on non-cash share transfer transactions, all make ‘offshoring’, a very common practice by Egyptian sellers with the purpose of avoiding tax (and, during the foreign currency shortages, for receiving foreign currency abroad), both more difficult to achieve and easier to trace and combat. Third, the board of directors of the FRA issued Decree No. 17 of 2017 regulating over-the-counter transactions implemented through the Egyptian Exchange (EGX) (i.e., in relation to shares that are not listed on the EGX). The new regulations prohibit non-cash settlement with very few exceptions, which not only has significant implications on ‘offshoring’ as explained above, but also makes numerous pre-transaction restructuring processes as well as escrow arrangements, which are very commonplace in M&A transactions, exceedingly difficult. In addition, the new regulations include restrictions on the backdating of buy and sell orders. This also makes many escrow and closing arrangements common in M&A transactions very difficult to implement. Fourth, the Executive Regulations of the Capital Market Law were amended followed by the issuance of a decree by the board of directors of the FRA to require the prior approval of the FRA for the acquisition, directly or indirectly, of more than one-third of the capital of brokerage companies or fund management companies with a market share greater than 10 per cent. Decree No. 135 of 2016 stipulates the procedures and criteria required to be granted FRA approval.

IV FOREIGN INVOLVEMENT IN M&A TRANSACTIONS

The policies and measures to attract FDI and increase foreign investor confidence adopted by the CBE and the government have not yet translated into a significant increase in FDI or foreign involvement in M&A transactions. Foreign investors are certainly viewing the policy developments unfolding in Egypt favourably. In particular, with the Egyptian pound losing more than 50 per cent of its value, Egyptian assets and securities are now available at attractive prices.

Nevertheless, there are a number of factors that still reduce the attractiveness of Egypt to foreign investors. First, political turmoil and security concerns in Egypt and throughout

19 No. 121 of 1982.
20 The Egyptian Financial Supervisory Authority issued Decree No. 94 of 2018, cancelling and superseding Decree No. 17 of 2017; however, the new regime does not introduce significant amendments to the old regime. The non-cash settlement remains prohibited under the new regulations, subject to exceptions approved by the FRA.
the Middle East and North Africa reduce investor appetite. Second, the increased economic role of the military is raising concerns for local as well as foreign investors. Third, in spite of serious efforts to improve the legal framework for investment in Egypt, including most notably the issuance of the new Investment Law, low-level bureaucratic bottlenecks are still stifling real progress on the ground, and only time can tell whether true and meaningful change will occur from the bottom up.

Traditionally, key players in M&A transactions taking place in Egypt are either from the Gulf (the United Arab Emirates, Saudi Arabia and Kuwait, and previously Qatar, which is now largely out of the picture for political reasons) or the West (the United States or Europe). This trend is continuing to a very large extent. However, recently investors from China and South Africa are becoming visible in the Egyptian market as well.

V SIGNIFICANT TRANSACTIONS, KEY TRENDS AND HOT INDUSTRIES

Owing to the political and economic uncertainties that have adversely affected Egyptian businesses since the January 2011 Revolution, and which continue to affect them, most M&A activity in the past few years has been focused on the defensive sectors with rather stable levels of demand (e.g., health, education and FMCGs). Healthcare and education continue to drive the trend in M&A activity. A significant education transaction this year was EFG Hermes acquiring a portfolio of schools valued at 1 billion Egyptian pounds from Talaat Mostafa Group. The schools will be managed and operated by GEMS, an Emirati education provider. While health and education continue to perform, solar energy has also become sought after in the M&A market as Egypt’s feed-in tariff programme has incentivised many financial investors to consider the solar energy sector. Major transactions this year have also taken place in the telecommunications and oil and gas sectors. In May of this year, Telecom Egypt signed a US$90 million transaction to acquire 100 per cent of Orascom Telecom, Media and Technology Holding’s subsidiary MENA Cables, a company licensed to own and operate a submarine cable system that connects Europe to the Middle East and South Asia. On the other hand, Eni Petroleum has sold 10 per cent of its stake in Egypt’s Zohr Gas Field to Mubadala Petroleum in a transaction valued at US$934 million.

VI FINANCING OF M&A: MAIN SOURCES AND DEVELOPMENTS

The main source of financing M&A in Egypt is equity, whether self-financing in the case of strategic investors, or capital-raising through various types of private equity funds or investment vehicles (onshore or offshore) in the case of financial investors. Debt financing is rather challenging to obtain in the context of M&A.

First, leveraged buyouts involving debt push down to the target face several complexities. On the one hand, upstreaming dividends requires adequate profits or retained earnings permitting the required distribution, while dividends are now subject to withholding tax at a rate of 5 or 10 per cent, as applicable (see Section VIII). On the other, using the target company to guarantee the loan obtained by the acquirer or lend to the acquirer is expressly prohibited under the Companies Law where the acquirer is a board member of the target company, and in the absence of an explicit prohibition (i.e., even if the acquirer is not a board member) still raises legal questions under Egyptian law (especially where minorities or other creditors exist) due to being prejudicial to the corporate interest of the target company.
Therefore, more often than not, the elegant solution is to set up an acquisition vehicle and merge it with the target company, a process that is not without its complexities from the legal, tax and accounting perspectives.

Second, due to the recent issues regarding the availability of foreign currency, restrictions on transfers of foreign currency and fluctuations in foreign currency exchange rates, foreign lenders are difficult to attract to the Egyptian market, at least at this stage, perhaps except in the case of targets with considerable foreign currency income.

Third, local banks are subject to restrictions imposed by the CBE on granting acquisition financing. Those restrictions include, most notably, requiring prior CBE approval in the event local banks consider financing more than 50 per cent of an acquisition transaction (excluding letters of guarantee in the context of mandatory tender offers on listed securities). In addition, the CBE imposes restrictions on the percentage of acquisition financing in a bank’s loan portfolio, and the percentage of financing granted to a single client and its related parties. Furthermore, the CBE’s directives include requirements with regard to due diligence and valuation, as well as criteria for increasing the risk-weighted credit exposures related to acquisition financing for the purpose of calculating capital adequacy requirements.

VII EMPLOYMENT LAW

Employment matters are regulated in Egypt by the Labour Law.21 In the context of equity-based M&A transactions, employment matters are pretty straightforward. In the case of an acquisition, the rights and obligations of employees and employers remain unaffected. In the case of a merger, employees are automatically transferred to the employment of the surviving entity with the same rights and obligations. However, employment matters are extremely complex in the context of asset or business transfers, as Egyptian law is based on the philosophy of freedom of employment. Accordingly, employees cannot be transferred against their wishes as part of an asset or business sale. This requires them to resign from the employment of the previous employer (the seller) and to enter into a new employment relationship with the new employer (the buyer). This is a particularly tricky process, as it is individualised for each employee, and because employees are very reluctant to relinquish accrued rights from their previous employment (in particular, rights to adequate compensation based on the length of their employment in the case of unjustified dismissal). As such, this aspect complicates asset and business transfers in Egypt, especially where the number of employees is significant, and even more so where the average period of their employment is relatively high.

VIII TAX LAW

The Income Tax Law22 was issued on the basis of simplifying the tax regime and reducing the applicable tax rate (the corporate tax rate was reduced to 20 per cent) to incentivise reporting and improve collection rates. This has actually proved very successful. However, following the January 2011 Revolution and increasing budget deficits, successive changes have been introduced into the Egyptian income tax regime.

21 No. 12 of 2003.
22 No. 91 of 2005.
In 2011, the corporate tax rate remained at 20 per cent for the first 10 million Egyptian pounds, and an additional tranche above 10 million Egyptian pounds was introduced with an applicable rate of 25 per cent. In 2012, the corporate tax rate was increased to 25 per cent across the board. In 2014, a surtax of 5 per cent was added to income in excess of 1 million Egyptian pounds applicable for a three-year interim period. Finally, in 2015, the corporate tax rate was reduced to 22.5 per cent, and the 5 per cent surtax became applicable for one year only.

Dividend income was not previously taxable in Egypt. However, an amendment introduced in 2014 subjected dividend income (excluding stock dividends) to taxation at a rate of 10 per cent, reduced to 5 per cent in the case of holdings of more than 25 per cent of the capital for a period of at least two years. This dividend withholding tax is applicable on all types of Egyptian companies and is applicable on resident as well as non-resident holders.

Furthermore, capital gains realised from the sale of shares of Egyptian companies (excluding companies whose shares are listed on the EGX) by resident companies are taxable. In addition, as of the 2014 amendment, capital gains realised by resident individuals from the sale of shares of Egyptian companies (excluding companies whose shares are listed on the EGX) are also explicitly taxable (previously, the common interpretation was that, for resident individuals to be subject to such capital gains taxes, they should be professionally involved in the trading of shares, i.e., not merely engaged in a one-off transaction). The capital gains realised by non-residents from the sale of shares of Egyptian companies (excluding companies whose shares are listed on the EGX) are also taxable.

As for the capital gains realised from the sale of Egyptian shares listed on the EGX, a major development in 2014 was their being subjected to taxation at a rate of 10 per cent, which was applicable on both resident and non-resident corporations and individuals (these capital gains had been exempt from taxation until that amendment came into force). This change was met with huge resistance from investors and brokerage companies, and the application of taxes on those capital gains was suspended for a two-year period starting on 17 May 2015. This suspension was recently extended for an additional three years, ending on 17 May 2020.

In this regard, double tax treaties can serve to reduce or eliminate the taxes on non-residents in respect of capital gains and dividend income. Therefore, in recent years it has been quite common for foreign and Egyptian investors to utilise vehicles established in treaty jurisdictions with the purpose of avoiding those types of taxes. It is worth noting that the amendments introduced in 2014 included the stipulation of a GAAR under Article 92-bis of the Income Tax Law. Furthermore, Egypt has very recently signed the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting.²³

In the meantime, in parallel to the suspension of the application of taxes on the capital gains on listed shares, a stamp tax was imposed on the trading of securities, whether listed or not, at a rate of 1.25 per mille, borne by both the buyer and the seller, until 31 May 2018, to be raised to 1.5 per mille until 31 May 2019 and to 1.75 per mille as of 1 June 2019. The rate is increased to 3 per mille, borne by both the buyer and the seller, in the case of the acquisition of 33 per cent or more of capital in a single transaction or group of related transactions in a

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two-year period. It should be noted that a stamp tax was imposed in 2013 on the trading of securities, which was abolished in 2014 in conjunction with imposing taxes on the capital gains on listed shares for the first time.

Finally, a major development in the Egyptian tax regime, albeit not directly relevant to M&A activity, was the enactment of the Value Added Tax Law, which cancelled and superseded the old Sales Tax Law.24

IX COMPETITION LAW

The Competition Protection Law25 and its Executive Regulations require that the Competition Protection Authority be notified within 30 days of the conclusion of any merger or acquisition transaction in the event that the annual turnover of the relevant person (or persons) as per the latest financial statements is in excess of 100 million Egyptian pounds. The relevant provisions of the Competition Law and its Executive Regulations are somewhat conflicting and confusing in terms of specifying how the threshold referred to above should be calculated, and whether it is limited to turnover in the Egyptian market or should be applied globally. This obviously raises practical complications with respect to major multijurisdictional M&A transactions involving large multinational corporations with huge global turnover and limited presence in the Egyptian market. The conservative approach is to notify the Competition Protection Authority in those cases notwithstanding low turnover levels in the Egyptian market.

It should be noted that the penalties for a breach of the above notification requirement or for providing incorrect information to the Competition Protection Authority are insignificant fines. However, the change of the notification requirement to a pre-approval by the Authority is currently under discussion.

X OUTLOOK

Looking ahead, it is evident that the CBE and the government are devising policies aimed at reducing budget and trade deficits, increasing foreign investor confidence in the Egyptian economy and consequently attracting FDI. It remains to be seen whether these policies will actually succeed in convincing investors to make long-term investments in the Egyptian economy in spite of security concerns, the current political environment and historical complaints regarding the difficulty of doing business in Egypt.

In addition, the policies are strongly reshaping the Egyptian economy and changing fundamentals for almost all Egyptian businesses. The coming year, much like the year before, will be a period of adjustment and learning, and the expectation is that M&A activity will truly pick up following this period when investors, potential buyers and potential sellers have more visibility both on the macro and micro levels. During this interim transitional period, the expectation is for M&A activity to continue leaning towards defensive sectors and distressed assets that could be acquired at attractive valuations, especially in light of the Egyptian pound devaluation.

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24 No. 11 of 1991.
25 No. 3 of 2005.
Chapter 17

FINLAND

Jan Ollila, Wilhelm Eklund and Jasper Kuhlefelt

I OVERVIEW OF M&A ACTIVITY

After a strong performance in 2016, the Finnish M&A market remained active in 2017. The second half of 2017, with 68 announced deals according to data compiled by Mergermarket, showed a slight decrease compared to the 80 deals announced in the second half of 2016. Although the number of deals fell, the aggregate disclosed deal value for announced acquisitions of Finnish targets increased to approximately €5.8 billion in the second half of 2017, compared to €1.9 billion in the second half of 2016. The high value in the second half of 2017 was due mainly to the acquisition of Elenia, a Finnish power distribution company, by Allianz, Macquarie and the State Pension Fund of Finland for €4 billion, announced in December 2017.

In general, the deal-making environment has started to reach the levels it was at before the 2008 financial crisis. Strong growth in the Finnish economy, following a sustained period of low and even negative growth, has supported optimism in the Finnish M&A market. The availability of financing remained relatively good.

The first half of 2018 has seen continued strong activity, although it has decreased slightly, with 82 deals announced. The aggregate disclosed deal value for announced acquisitions of Finnish targets decreased from approximately €12.6 billion to approximately €2.7 billion. The high value in the first half of 2017 was due mainly to Blackstone Group’s €3.6 billion tender offer for Sponda Oyj, the Finnish listed real estate investment company, and the €6 billion combination of Finnish pensions insurance companies Ilmarinen and Etera, both announced in July 2017. The activity level is expected to remain high despite a number of uncertainties. Many deals are still being prepared and negotiated quite extensively, and the number of failed or significantly delayed structured sales processes has remained relatively high.

II GENERAL INTRODUCTION TO THE LEGAL FRAMEWORK FOR M&A

The Finnish legal system derives from the Nordic legal tradition, which itself is based on the German civil law tradition. Historically, agreements have been relatively brief, leaving room for interpretation in accordance with contract law principles and market practice. However, during the past few decades, agreements (and in particular acquisition agreements) have become more detailed and have started to resemble Anglo-American acquisition agreements.

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The manner of carrying out a takeover of a Finnish company depends primarily on its ownership structure and whether the company's shares are listed or unlisted.

The ownership of most Finnish private companies is concentrated. Even in many listed companies, the majority of shares are held by a relatively small group of shareholders. Therefore, negotiations with the majority shareholders are often important in both public and private takeovers, and irrevocable undertakings from major shareholders may be decisive for the success of a public offer.

The legal framework applicable to public takeovers varies considerably from the regulation of private transactions. Contrary to private deals, takeovers of listed companies are subject to fairly detailed rules.

Regulation of Finnish public takeovers essentially consists of the rules applicable to public takeovers included in Chapter 11 of the Securities Markets Act (SMA), regulations and guidelines on takeover bids and the obligation to launch a bid (Regulation 9/2013) issued by the Finnish Financial Supervision Authority (FSA), which entered into force on 1 July 2013 and replaced the FSA Standard 5.2c, as well as the revised Helsinki Takeover Code issued by the Takeover Board of the Securities Market Association, which entered into force on 1 January 2014 and replaced the Takeover Code of 2006. The current SMA entered into force at the beginning of 2013.

Chapter 11 of the SMA sets out, inter alia, the general requirement to treat holders of each class of securities subject to the offer equally, the general structure of the offer procedures, rules on publication of the offer and disclosure obligations, the requirement to make a mandatory offer, pricing of offers and rules on competing offers.

There is a dual mandatory offer threshold, which is exceeded when the bidder, and its affiliated parties, obtains more than 30 per cent or more than 50 per cent of the voting rights in the target. No mandatory offer will be required if the relevant thresholds are exceeded as a result of a voluntary offer made for all shares and securities entitling to shares in the target.

Public offers are monitored by the FSA, which is authorised to interpret the relevant statutory provisions and issue regulations and guidelines. Regulation 9/2013 supplements the statutory rules and sets forth the FSA’s interpretation of the relevant provisions of the SMA. Regulation 9/2013 contains more detailed rules on matters such as the takeover procedure, disclosure obligations and pricing.

Furthermore, the rules and regulations of NASDAQ OMX Helsinki regulate, inter alia, the trading in securities in connection with public transactions.

If the consideration consists of securities, the rules of the SMA relating to public offerings and the listing of securities may also become applicable. Under the EU prospectus regime, an EU listing prospectus may be used in exchange offers in Finland if the consideration consists of securities listed in Finland or in another EU Member State. In such cases, the offer document will also have to comply with the EU Prospectus Regime.

Another source of law is the Companies Act, which sets out general principles of company law and provides the regulatory framework for corporate reorganisations and squeeze-outs.

Under the Companies Act, a squeeze-out procedure can be initiated by a shareholder holding, either directly or indirectly through a group company, more than 90 per cent of the shares and votes of a company. A shareholder whose shares can be redeemed also has a right to require that the majority shareholder redeems that shareholder’s shares.

The redemption price in a squeeze-out is the fair price. If the 90 per cent threshold is exceeded as a result of a voluntary or mandatory public offer, the offer price is regarded as the
fair price unless there are special reasons for deviation from that price. If the bidder intends to exercise the squeeze-out right upon reaching the legal threshold through a tender offer, that intention should be disclosed in the offer document. The squeeze-out is effected through arbitration proceedings, which are usually initiated by the majority shareholder against all other shareholders.

Whereas the takeover of a listed company follows a rather rigid statutory procedure, the acquisition of a private company can be structured more freely.

With regard to private transactions in particular, there are few processes involving notaries and government officials. As a result, few formal requirements exist concerning documentation governing the transfer of a business regardless of whether it is transferred through an asset or a share deal.

With regard to defensive action, the board of the target company has a general obligation under Finnish company law to act in the interests of the target company, with particular regard to the interests of the shareholders. In line with this general obligation, Chapter 11 of the SMA provides that the board is generally obliged to seek shareholder approval for defensive action that may frustrate a tender offer.

Finland has resolved to opt out of the breakthrough rule contained in Article 11 of the Takeover Directive. Breakthrough rules may, however, be voluntarily adopted by listed companies in their articles of association. To date, these provisions have not been adopted by any listed company.

Finnish law severely restricts financial assistance. Under the Companies Act, a Finnish limited liability company may not grant any loan, grant any security for a loan, give any guarantee or assume any other liability the purpose of which is to finance an acquisition of the shares in the company or the shares in its parent company. A breach of the financial assistance rule may lead to, inter alia, personal liability for the members of the board of directors. In practice, alternative structures, such as merging the target company into the acquirer after the initial transaction, are used to facilitate intragroup financing arrangements in connection with acquisitions.

III DEVELOPMENTS IN CORPORATE AND TAKEOVER LAW AND THEIR IMPACT

The current SMA entered into force at the beginning of 2013. It includes certain rules applicable to public offers for securities.

The amendments introduced in the 2013 SMA derive mainly from the Takeover Directive. Among the key amendments, a revised definition of persons acting in concert was introduced into law, mirroring that included in the Takeover Directive. Accordingly, natural or legal persons are regarded as acting in concert if, on the basis of an agreement or otherwise, they cooperate with a shareholder, the bidder or the target company with a view to exercising or acquiring significant influence in the company or frustrating a public offer. In addition, related parties, such as group companies, are regarded as persons acting in concert. Also, a bidder’s obligation to promote the fulfilment of a public offer is now expressly stated in the SMA, in line with the general principles of the Takeover Directive. Under this rule, the bidder may not prevent or substantially hamper the fulfilment of the bid or its conditions.

The FSA has the right to impose on a potential bidder a deadline for launching a public offer (‘put up or shut up’). Such a deadline can be imposed on the target company’s
application in a situation where a potential bidder has publicly stated that it is considering launching a public offer. In cases where the potential bidder does not launch a bid, it can be prevented from doing so during the following six months.

To ensure sufficient protection of target shareholders, shareholders have the right to withdraw their acceptance until the bidder has announced that all the conditions of the bid have been fulfilled or waived. With regard to unconditional bids, the acceptance can be withdrawn if the bid has been valid for 10 weeks and the purchase transactions have not been effected.

The SMA provides for two exceptions from the obligation to launch a tender offer for all shares in the company. First, significant shareholders are permitted to launch a conditional consortium bid: if the mandatory bid obligation is triggered merely as a result of shareholders acting in concert in launching a voluntary offer, the shareholders are exempted from the mandatory bid obligation, provided that their acting in concert is limited to the voluntary bid. Second, no mandatory bid obligation will arise if a shareholder, or a party acting in concert, disposes of the number of voting rights exceeding the mandatory bid threshold within one month of the mandatory bid obligation arising.

Furthermore, following an amendment to the SMA implementing the EU resolution and recovery regime, no mandatory bid obligation will arise if the threshold for a mandatory bid obligation is exceeded as a result of the Financial Stability Authority having exercised its resolution implementation authority.

The SMA requires all listed companies to be members of a common organisation, the purpose of which is to develop good securities market practice.

In connection with the entry into force of the SMA, the former Takeover Panel was closed down, and as of January 2013, the renewed Securities Market Association has taken care of issuing recommendations and opinions to promote compliance with good securities market practice. The Association has also established the Takeover Board to promote good securities market practice in connection with takeover bids. Furthermore, an application can now be made to the Takeover Board for a statement regarding the interpretation of the Helsinki Takeover Code, compliance with good securities markets practice and individual company law issues.

In December 2013, the Takeover Board issued the new revised Helsinki Takeover Code, which entered into force on 1 January 2014 and replaced the Takeover Code of 2006. Compliance with the Takeover Code is based on a ‘comply or explain’ principle; in a tender offer, both the target company and the bidder have an obligation to confirm whether they comply with the Takeover Code, and to publicly explain if they are not committed to complying with the Takeover Code or some of its individual recommendations.

IV FOREIGN INVOLVEMENT IN M&A TRANSACTIONS

The private M&A market is an integrated part of the Nordic and international private M&A market. This is reflected in Finnish market practice and the procedures followed in Finnish private transactions. Even purely Finnish transactions are often prepared, negotiated, drafted and executed in ways that are similar to those in the international marketplace.

A large number of Finnish transactions have a cross-border element, as foreign ownership of Finnish businesses continues to increase. The financial crisis significantly decreased the use of structured sales and auctions in the Finnish market, but in recent years structured sales and auctions have made a strong comeback.
As the Finnish market is relatively small, Finnish companies frequently engage in M&A transactions abroad, both as sellers and buyers. Foreign buyers are, on the other hand, frequently involved in the Finnish market on the buy side.

As in other Nordic countries, the legal advisory market concentrates on domestic firms. The same goes for domestic or Nordic banks, which handle a large share of the financial advisory mandates. However, the largest transactions frequently involve large international investment banks, complemented by local Finnish players.

V SIGNIFICANT TRANSACTIONS, KEY TRENDS AND HOT INDUSTRIES

i Finnish activity abroad

One of the largest transactions ever to involve a Finnish company was announced in September 2017 when Fortum Oyj launched a hostile tender offer to acquire Uniper SE, the Germany-based conventional power generation and energy trading business company. To date, Fortum has obtained a 47.12 per cent stake in Uniper for €3.8 billion, mainly comprising shares sold to Fortum by E.ON SE.

Other notable deals include the following acquisitions:

a Wärtsilä, the listed Finnish manufacturer of power generation and marine propulsion equipment, acquired Transas Marine Ltd, a UK-based company in the navigation and marine transport industry, for €210 million (announced in March 2018);

b Amer Sports Oyj, the listed Finnish sporting equipment company, acquired Peak Performance, the Sweden-based provider of active and casual wear, for €255 million (announced in April 2018); and

c Asiakastieto Group Plc, the Finland-based listed provider of commercial and credit reports, acquired its Swedish peer UC AB for €325 million as a combination of cash and shares (announced in April 2018).

In general, acquisition activity abroad by Finnish companies has been relatively high during the past 12 months, with Finland-based companies actively seeking international growth, mainly through smaller acquisitions.

ii Private equity

Private equity (PE) investors remained relatively active during 2017 and the first half of 2018. The amount of PE and venture capital (VC) investments into Finnish companies decreased to approximately €114 million in 2017 in the aggregate, according to data from the Finnish Venture Capital Association. The total number of investments by PE and VC funds into Finnish companies in 2017 was 118.

Notable PE transactions included the acquisition of Mehiläinen, the Finland-based provider of healthcare and social services, by CVC and Finnish institutional investors for an estimated €1.8 billion, announced in May 2018. In another major transaction, announced in October 2017, CVC sold Paroc Group, the Finland-based insulation producer, to Owens Corning, a US-based building materials company, for €900 million. In addition, there were a number of smaller transactions.

Many PE investors are expected to seek to exit portfolio companies already held beyond the planned investment horizon and to invest committed capital. In recent years, the trend in
sales processes has moved towards a higher level of differentiation in terms of structure, with the popularity of large-scale controlled auctions decreasing, and the focus remaining on more concentrated efforts with a limited number of bidders.

### iii Public-to-private activity

The largest public-to-private transaction during 2017 and 2018 to date was Blackstone Group’s €3.6 billion tender offer for Sponda Oyj, the Finnish listed real estate investment company, announced in July 2017. One other notable transaction was CGI Group’s €104 million public tender for Finnish IT solutions provider Affecto, announced in August 2017.

No major hostile offers have been seen on the Finnish market since Nordic Capital’s unsuccessful €1.1 billion offer for TietoEnator in 2008. However, one minor unsuccessful hostile offer occurred in November 2016 when Sistema Finance, a subsidiary of the listed Russia-based diversified holding company AFK Sistema, announced its offer to acquire Honkarakenne, the listed Finland-based housing construction company, against cash consideration of €7.8 million.

### iv Sector-specific trends

Activity in the healthcare sector has remained strong and the expected growth in future spending in the public health and social services sector, together with the government’s planned social and healthcare reform, has resulted in numerous deals and a strong pipeline. However, uncertainty in the market has increased because of repeated delays to social and healthcare reform, mainly caused by disagreements between the political parties represented in the current government. In addition to the acquisition of Mehiläinen, the Finland-based provider of healthcare and social services, by CVC and Finnish institutional investors for an estimated €1.8 billion (announced in May 2018), notable transactions during 2017 and 2018 include the €233 million acquisition of the Finnish healthcare operations of Attendo AB (publ), the listed Swedish health and social care company, by Terveystalo Oyj, the listed Finnish healthcare provider (announced in May 2018). In the medical device sector, Axcel, the Danish PE investor, acquired Orion Diagnostica Oy, a Finnish diagnostic and hygiene monitoring products manufacturer, for €163 million. There was also a significant number of smaller transactions.

Deal activity in the information technology sector has remained quite high during 2017 and 2018. In addition to CGI Group’s €104 million public tender offer for Affecto announced in August 2017, major transactions included the €165 million acquisition by Telia AB (publ), the listed Swedish telecom operator, of Nebula, the Finnish web services provider, from Ratos AB (publ), the listed Swedish PE investor (announced in May 2017).

Activity in the energy and infrastructure sector, which experienced a slight fall last year, seems to be growing once again. The largest transaction to date in the Finnish energy and infrastructure sector was seen in December 2017 when Allianz, Macquarie and the State Pension Fund of Finland announced their acquisition of Elenia, the Finnish electricity, heat and gas distribution company, for €4 billion. There were also several smaller transactions in the sector.

Transaction activity in the Finnish paper and pulp sector received a notable boost with Mondi’s acquisition of Powerflute, a Finnish manufacturer of specialised semi-chem fluting, and Harvestia, a Finnish wood procurement company, in a deal valued at €365 million, announced in December 2017.
In May 2016, the government announced its renewed ownership steering strategy, the main objective of which is to use invested capital to increase growth through, *inter alia*, the disposal of all or part of the government’s stake in certain wholly or majority owned companies. The government has planned further disposals of stakes in certain companies, including Neste, the listed oil refining company, Vapo, the bio-energy company, and Posti Group, the Finnish postal service and logistics company. Additionally, speculations regarding the sale of all or part of the government’s stake in the Finnish airline carrier Finnair continue to make headlines in the media.

The industrial products and services sector also witnessed strong activity in numbers of acquisitions. In addition to CVC’s €900 million sale of Paroc Group to Owens Corning, notable transactions included CapMan’s acquisition of KotiSun, a Finland-based company providing renovation services for water and heating systems, for €88 million.

**VI FINANCING OF M&A: MAIN SOURCES AND DEVELOPMENTS**

Domestic and Nordic banks have traditionally provided acquisition finance for Finnish transactions. However, large international banks are regularly involved in larger deals and have returned to the Finnish market, although not yet to the extent seen before the financial crisis. While Nordic banks may face lending constraints in the future because of increased bank regulation, the current market sentiment seems to be that they have a fair amount of capacity to finance transactions and that there is actually too little demand for financing. The 2017–2018 period indicates that Nordic banks are still willing to provide financing, at least for mid-sized transactions, in particular for deals in ‘hot’ industries. In terms of covenants, however, the Finnish market has not to date witnessed a proliferation of ‘covenant-lite’ loans without maintenance-based financial covenants.

High-yield and other corporate bonds have generally increased in importance as a financing source for larger companies. Recently, bonds have been issued in a number of refinancing transactions and for general corporate purposes. In the future, more PE sponsors are expected to tap the high-yield bond market, particularly as a source of refinancing existing portfolio company debt. The absence of maintenance-based financial covenants is often cited by PE sponsors as a key benefit of high-yield bonds, although it should be noted that, with the exception of a few bonds issued by PE-backed companies, Nordic high-yield bonds’ terms tend to contain maintenance-based financial covenants.

Finally, there is a trend towards an increasing number of non-bank loan investors in the leveraged buyout market, including assets managers, hedge funds and collateralised loan obligations. The majority of those investors are from outside the Nordic countries.

**VII EMPLOYMENT LAW**

A transfer of business under the Finnish Employment Contracts Act corresponds to the transfer under the Acquired Rights Directive (2001/23/EC). The basic requirement for a transaction or arrangement to constitute a transfer of business is that the subject of the transfer is an economic entity (i.e., an organised grouping of resources that has the objective of pursuing an economic activity) and that it retains these characteristics after the transfer. Supplementary operations may also be subject to a labour law business transfer.
The transfer is mandatory and automatic. It does not require the entry into new employment contracts or other agreements with the transferring personnel, and they cannot effectively object to the transfer.

The employees transferring to the transferee are those at the service of the business concerned at the time of the transfer.

According to the Finnish Cooperation Act, which applies to companies regularly employing at least 20 employees, the transferor and the transferee have a joint obligation to provide the employee representatives concerned with information regarding the timing of the transfer, the grounds for the transfer, the legal, financial and social consequences of the transfer to employees, and the planned measures concerning the employees. The information shall be provided well in advance of the transfer of business; generally, one to two weeks before the transfer is deemed sufficient, depending on the size of the transaction and its impact on the personnel.

After the transfer, the transferee needs to make sure that the transferred personnel have been provided with the requisite information within a week of the transfer. It should also be determined whether the transfer has effects on the personnel that should be handled in full-scale cooperation consultations. If there are no such effects, the transferee has no further transfer-related consultation obligations towards the personnel.

The procedure is the same irrespective of how many employees will transfer.

**VIII TAX LAW**

The main driver for choosing the form of transaction is taxation. Finland has implemented the provisions of the Merger Directive (90/434/EEC) and, accordingly, certain transactions such as share-for-share acquisitions can be carried out without triggering capital gains taxation.

An asset deal is typically preferable from the buyer’s perspective, since the buyer may obtain a step-up in tax basis and depreciate the acquired assets (including goodwill). However, losses cannot be transferred in an asset deal. The sellers typically prefer share deals, as a capital gain is often tax-exempt in a share deal. An asset deal may be preferred by a seller with carry-forward tax losses, or if the sale resulted in a loss. A buyer cannot depreciate the acquisition cost (including goodwill) in a share deal. The tax loss carry-forwards of the target may be lost in a share deal.

Transfers of shares and other securities in Finnish companies are subject to a transfer tax of 1.6 per cent of the sale price (2 per cent for transfers of securities in a real estate company). The sale price is deemed to include any payments made, or obligations assumed, by the transferee to or for the benefit of the transferor. Transfers of securities between non-residents are generally exempted from the transfer tax unless the securities are issued by a Finnish real estate company. In addition, transfers of securities in a foreign real estate holding company are subject to the transfer tax if the assets of the foreign company mainly comprise real property (directly or indirectly) located in Finland, and either the transferor or transferee is Finnish. In addition to securities, a transfer tax at a rate of 4 per cent is levied on the transfer of real property. Where the consideration consists of securities, other than newly issued shares, the transfer tax is levied on the transferred assets and the consideration. Certain corporate restructurings, such as the transfer of a business against share consideration, are exempt from the transfer tax. Certain transfers of listed shares on the stock exchange are also exempted from the transfer tax.
An asset deal is not subject to VAT if it is treated as a transfer of a business as a going concern, the transfer is made to the buyer and the buyer starts using the assets in a business subject to VAT. No VAT is payable upon a transfer of shares in a share deal.

Acquisitions are typically carried out through a local, newly established and leveraged acquisition vehicle (a limited liability company or a branch). Specific interest limitation rules limit the deductibility of net interest expenses on intragroup loans to the extent that the total net interest expenses (including third-party interest expenses) exceed 25 per cent of the borrower’s fiscal EBITDA.\(^2\) The limitation does not apply if total net interest expenses for the year do not exceed €500,000 (including third-party interest expenses) or the company’s equity ratio is at the level of or higher than the equity ratio of the group. The Finnish Supreme Administrative Court (SAC) has confirmed in a ruling that a comparison is to be made regarding the consolidated financial statements of the foreign ultimate parent company as opposed to the Finnish subgroup parent company even if the foreign ultimate parent company is not obliged to prepare consolidated financial statements pursuant to an exception under local law. Financial institutions and certain other companies are outside the scope of the interest limitation rule. The currently applicable specific interest limitation rules will be amended following implementation of the Anti-Tax Avoidance Directive (2016/1164/EU). As of 2019, among other changes, third-party interest expenses will also be subject to the interest limitation rules.

The SAC has recently issued two rulings in which the right to deduct interest costs within a group of companies was limited pursuant to the general anti-avoidance rule. In both cases, the Finnish branch of an international group was not able to deduct interest costs on a loan related to an intragroup share acquisition paid by the branch to a foreign group entity. The rulings are expected to affect, at least, the interpretation of branch structures used in intragroup share acquisitions. Otherwise, arm’s-length interest expenses on acquisition debt are generally tax deductible. There is generally no withholding tax on interest payments made to non-residents.

When certain conditions are satisfied, one group member can transfer profits to another member by way of a tax-deductible group contribution, which constitutes taxable income for the recipient. The preconditions include a minimum ownership by the (common) parent of 90 per cent of the share capital in the subsidiary (subsidiaries) that has lasted the entire fiscal year, the fiscal years ending simultaneously as well as both parties carrying out business activities. Group contributions to foreign group members are not deductible.

Capital gains are generally taxable for resident individuals at 30 per cent, or 34 per cent for taxable capital income exceeding €30,000. In the case of corporations, capital gains are generally included in the taxable income. The general corporate income tax rate is 20 per cent. Capital gains from transfers of shares classified as fixed assets are tax-exempt for corporate shareholders, as a general rule, provided that the shares represent at least 10 per cent of the share capital of the target and have been held for at least 12 months. However, PE investors have been excluded from the scope of the capital gains tax exemption. Capital gains realised by non-resident shareholders are generally not taxable in Finland under domestic rules, unless the shareholding relates to a business carried out in Finland, for example, through a permanent establishment, or if the shares are shares in a real estate company.

\(^2\) EBITDA = earnings before interest, taxes, depreciation and amortisation.
Dividends received by corporate shareholders are generally tax-exempt. The exemption applies to (1) domestic dividends, (2) dividends from resident companies of other EU Member States referred to in Article 2 of the EU Parent–Subsidiary Directive (2013/13/EU) and (3) dividends from other EEA resident companies, provided that the company is subject to a minimum of 10 per cent tax on its income. Specific rules apply to financial, insurance and pension institutions. Furthermore, dividends received by an unlisted company from a listed company are fully taxable at 20 per cent, unless the unlisted recipient company directly holds a minimum of 10 per cent of the capital of the distributing listed company. Dividend income is fully taxable at 20 per cent in cases other than the aforementioned if no exemption is provided under a tax treaty. However, dividend income is fully taxable if the dividend has been deductible for tax purposes for the distributing company, or if it relates to arrangements that are not genuine and have been put in place for the purpose of obtaining a tax advantage.

Dividend income received by resident individual shareholders from domestic listed companies is partly taxable (85 per cent) and partly exempt (15 per cent). The taxable dividend income is taxed as capital income at 30 per cent, or at 34 per cent when taxable capital income exceeds €30,000. The taxation of dividend income received by resident individual shareholders from domestic unlisted companies is determined based on an annual return of 8 per cent of the net value of the shares. As a general rule, within the 8 per cent annual return, dividend income is partly taxable (85 per cent) as capital income and partly tax-exempt (15 per cent). However, up to an amount of €150,000, only 25 per cent of the dividend income is taxable as capital income. To the extent that the dividend income exceeds the 8 per cent annual return, 75 per cent of the dividend income is taxable as earned income at progressive rates and 25 per cent is tax-exempt.

Foreign corporate shareholders are generally subject to a withholding tax at a rate of 20 per cent on dividends. However, dividends are not subject to withholding tax if paid to a corporate recipient covered by Article 2 of the Parent–Subsidiary Directive (2013/13/EU) that holds more than 10 per cent of the distributing company’s share capital, or an EEA-resident corporate recipient that cannot obtain a credit for the withholding tax, and the dividend, if paid to a Finnish-resident corporate recipient, had been tax-exempt. Further, the level of withholding tax is generally reduced to between zero and 15 per cent under Finland’s tax treaties.

As a general rule, losses can be carried forward and used up to 10 years after the year in which they arose. However, losses incurred by a company are not carried forward if a change of more than 50 per cent in the ownership occurs. The rule also applies in the case of an indirect ownership change. An exemption may be granted by the tax authorities.

IX COMPETITION LAW

Merger control rules are set out in the Finnish Competition Act, which entered into force in November 2011. If the EU Merger Regulation does not apply, a transaction must be notified to the Finnish Competition and Consumer Authority (FCCA) if the aggregate worldwide turnover of the parties (i.e., usually the acquirer and the target) exceeds €350 million and each of at least two of the parties has a Finnish turnover of at least €20 million. Finnish turnover means sales to customers located in Finland irrespective of whether the seller has any physical presence in Finland. Notification must be submitted after entering into a concentration agreement, acquisition of control or an announcement of a public offer, and in any event before closing the transaction. It is also possible to notify the transaction as soon as the
parties have, with a sufficient degree of certainty and sufficiently specific terms, proven their intention to conclude the transaction, for instance, with a signed letter of intent. A notified transaction may not be implemented before clearance unless the FCCA grants an exemption.

The FCCA applies the significant impediment to effective competition test in line with the EU Merger Regulation. The Market Court\(^3\) may, if proposed by the FCCA, prohibit a transaction, order it to be cancelled or impose conditions if the concentration would significantly impede effective competition in Finland or in a substantial part thereof, particularly as a result of the creation or strengthening of a dominant position.

The FCCA will decide within one month of submission of the notification to either approve the transaction or begin an in-depth investigation. The in-depth investigation may last for three months (but may be extended by two months). The FCCA can extend the investigation period if the parties to the transaction do not submit the required information to the authority, or if the information is significantly incomplete or inaccurate. In May 2018, the government issued a proposal to lengthen the time period of Phase I proceedings from one month to 23 working days. Consequently, if the proposal is passed, the time period for Phase II proceedings would be amended from three months to 69 working days. If the FCCA wishes to prohibit the transaction, it is required to make a proposal to that effect to the Market Court, which will decide on the issue. The Market Court’s decision can be appealed to the SAC. The notifying party, however, is not entitled to appeal a conditional approval decision of the FCCA to the Market Court.

In connection with the pending planned social and healthcare reform, the government has proposed the introduction of a temporary notification obligation applicable to all transactions involving companies providing social and healthcare services. The amendment would impose an obligation to notify concentrations, irrespective of thresholds in the Competition Act, when at least one party provides social or healthcare services or laboratory services to customers in Finland.

**X OUTLOOK**

The general short to medium-term outlook is positive, as the deal pipeline is currently strong. However, the expectation is that M&A activity will begin to stabilise, both for larger structural deals and for small and mid-cap transactions, and further acceleration seems unlikely.

Financial sponsors have been more active in the markets than at any time since the financial crisis and are expected to remain active. The amount of the funds already raised but not yet invested continues to be significant. On the other hand, financial sponsors are likely to be under increased pressure to dispose of portfolio companies already held beyond the planned investment horizon, even in the face of lower valuations. Many potential industrial buyers continue to be in a strong financial position and to seek investment targets.

After a lengthy process, the Finnish government’s reform of public social and healthcare services is beginning to take its final form. It is expected to enter into force at the beginning of 2019 if passed in Parliament. As part of the reform, the responsibility for organising social and healthcare services would transfer from municipalities to counties and partially open up the public case social and healthcare market to private providers. As a result, consolidation in the social and healthcare sector is expected to continue.

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\(^3\) The Market Court is an independent and impartial court that hears cases concerning market law, competition law, public procurement and civil intellectual property rights throughout Finland.
After remaining quiet for several years, the initial public offering (IPO) market has seen an upswing in the past couple of years, with 2015 being the most active year in terms of IPOs since the financial crisis and activity showing no signs of slowing down. In the second half of 2016, one of the largest listings in years was that of DNA, Finland’s third-largest telecommunications operator, which was added to the main list of NASDAQ OMX Helsinki. There were 13 listings in 2017, the largest of which where Rovio, the online game developer and entertainment company owning the Angry Birds franchise, and Terveystalo, one of the biggest Finnish healthcare providers. The first half of 2018 has seen somewhat more limited listing activity compared to 2017, one noteworthy exception being the IPO of Altia, the leading Nordic alcohol manufacturer. Nevertheless, IPO activity is expected to remain strong, especially since PE firms’ portfolios contain several companies that are considered suitable listing candidates.

Generally, investor confidence appears to have remained at a good level, and stock market valuation levels remain attractive. The overall development of the share prices of Finnish companies listed on NASDAQ OMX Helsinki has been positive since early 2016.
Chapter 18

FRANCE

Didier Martin

I OVERVIEW OF M&A ACTIVITY

Against all odds, the presidential election that took place in the first half of 2017 did not affect the pace of investments. Although the aggregate value did not equal the historical record reached in 2014, M&A activity in 2017 nonetheless recorded its second-highest annual value during the past decade.

Even though the presidential election did not have any direct detrimental impact on deals during the first half of 2017, there was less activity in the second half of the year, which may indicate that investors were awaiting the new government's reforms. Indeed, the government intends both to vigorously reform and to simplify certain corporate duties of French companies, but in the meantime it may strengthen other regimes, including the regime applicable to investments made by foreigners in French companies, which will be a key issue in 2018.

In 2017, M&A activity followed the same expansion trend observed in the past two years. Even though the total number of transactions has decreased since 2016, their aggregate value reached €92.8 billion, an increase of nearly 20 per cent.

M&A activity was driven by several large cap deals, including the €12.1 billion acquisition of a 25.9 per cent stake in Christian Dior SA by private investor Bernard Arnault, which was carried out to simplify the structure of the LVMH Group. Simultaneously, LVMH Moët Hennessy Louis-Vuitton SE achieved the total absorption of Christian Dior Couture SA for a value of €6.5 billion. Other significant deals were announced, such as the €8.3 billion tender offer initiated by Safran on Zodiac Aerospace’s share capital (see Section V) and the acquisition by the government of a 50 per cent stake in the French company Areva SA.

Cross-border M&A transactions targeting France decreased in 2017, as in the previous year, reaching €31.6 billion, which represents a fall of nearly 13 per cent. Conversely, cross-border outbound deals skyrocketed in 2017, with an aggregate value that was worth more than twice the amount registered in 2016 (€99.6 billion in 2017 versus €44 billion in 2016). The main targets for French companies in 2017 were European companies, being subject to 294 deals valued at €61 billion, which differs from 2016, when the United States was the main centre of interest.

Private equity transactions – both buyouts and exits – confirmed the attractiveness of the French market: 352 deals were recorded for a total aggregate value of €31.5 billion, making the year under review one of the best transaction years (apart from 2014) since 2007.

1 Didier Martin is a partner at Bredin Prat.
2 Financial data extracted from Mergermarket, 'Trend Reports Q1–Q4 2016 and 2017 (France)'.

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Notable private equity transactions announced in 2017 include the takeover by Gecina SA of Eurosic SA for €5.8 billion and the sale by Engie SA of a 70 per cent stake in Engie E&P International SA to Neptune Oil & Gas Limited for €4.6 billion.

II GENERAL INTRODUCTION TO THE LEGAL FRAMEWORK FOR M&A

The French Commercial Code and the French Civil Code – in respect of which the provisions relating to contract law were reshaped in October 2016 – provide the statutory framework and form the legal basis for the purchase and sale of legal entities. Additionally, the French Monetary and Financial Code and the General Regulations of the French Financial Markets Authority (AMF) provide the regulations relating to takeovers. As a general rule, French takeover rules apply if the target is a French or EU public company whose securities are listed in France and, in some instances, if the company is dual-listed.

Rules relating to the financial services industry, to the listing and public offering of securities, and to the prevention of market abuse are set out in the French Monetary and Financial Code and in the General Regulations of the AMF.

French merger control rules are mainly contained in the Commercial Code. These rules apply to cross-border mergers having effects on the French market (as currently defined through worldwide and France-wide turnover thresholds) but with no ‘EU dimension’. Mergers with an ‘EU dimension’ (i.e., involving companies whose turnovers exceed the thresholds set by the EU Merger Regulation) are instead subject to the review of the European Commission.

Within the framework of the applicable laws and the General Regulations of the AMF, NYSE Euronext operates the three French regulated markets and some organised markets.

III DEVELOPMENTS IN CORPORATE AND TAKEOVER LAW AND THEIR IMPACT

i Use of blockchain technology in corporate law

France has adopted an ordinance dated 8 December 2017 that enables companies to use blockchain technology to record and transfer certain securities. This new option will apply to securities issued in France and governed by French law that are not listed on a regulated market or on a multilateral trading facility.

In practical terms, non-listed French companies such as a société anonyme (SA) or a société par actions simplifiée (SAS) (the most widespread French business structures) will be able to decide to register their securities on a shared electronic recording device (i.e., a blockchain) instead of the current book entry. Similarly, the transfer of securities will be possible through this blockchain and, therefore, will not require a transfer from one account to another. Finally, a pledge over the securities registered on the blockchain will be possible. An implementing decree was expected in the first half of 2018 but is now unlikely to occur before the autumn.

ii Law regarding the duty of vigilance of parent companies

On 27 March 2017, France adopted a law on parent companies’ duty of vigilance. It applies to large French companies with a head count of either 5,000 or more employees working for the company and its direct or indirect subsidiaries registered in France, or 10,000 or more employees working for the company and its direct or indirect worldwide subsidiaries.
Such companies are required to draw up and implement a ‘vigilance plan’. Vigilance plans should provide ‘reasonable measures’ pertaining to identifying risks and preventing serious violations with respect to human rights, fundamental freedoms, the health and safety of people and the environment arising from the activities of the company, the affiliates under its control or their subcontractors or suppliers with whom there is an ‘established business relationship’. Failure to draw up and implement a vigilance plan could result in the company being subject to civil liability and to a court order to comply with the parent companies’ duty of vigilance.

iii Rationalisation of various corporate duties
The year 2017 was characterised by a strong determination to reform the corporate law in order to simplify, clarify and ease the day-to-day business of French firms.

An ordinance dated 4 May 2017 has amended certain companies’ general meeting processes and their decision-making procedures. As an example, the articles of association of a non-listed French SA may provide that general meetings will only be held by videoconference or other means of telecommunications enabling the identification of shareholders. Likewise, the adoption or amendment of a share transfer approval clause in a French SAS no longer requires unanimity.

Following this trend, several ordinances and decrees were published in July and August 2017 simplifying both the corporate social responsibility reporting and annual reporting of companies. These measures have the benefit of clarifying the annual reporting duties of listed and non-listed companies. The government has also announced various measures to maintain the attractiveness of French corporate law (see Section X).

iv Modernisation of Euronext
The trend observed in tender offers (see Section V.iii) follows on from the modernisation of the stock market Euronext. Along with the simplification of the markets (Alternext became Euronext Growth and Marché Libre became Euronext Access) and various improvements, a new market for start-ups and SMEs was created: Euronext Access+. This may make the French stock market more attractive to companies and support the trend concerning public offers.

v Declaration of beneficial owners
As of 1 April 2018, all French companies (apart from listed companies) and all foreign companies with an establishment registered in France shall report their ultimate beneficial owners to the French Trade and Commerce Registry (and keep this information up to date) subject to criminal sanctions. Beneficial owners are deemed to be either individuals who own, directly or indirectly, more than 25 per cent of the share capital or voting rights in the reporting company, or who exercise control over the reporting company within the meaning of Paragraphs 3° and 4° of Article L 233-3 I of the French Commercial Code. According to these statutory provisions, a person is deemed to control a company when he or she actually determines the decisions of the shareholders’ meeting of such company by the voting rights he or she holds; or he or she has the power as a shareholder to appoint or remove the majority of the members of the executive, administrative or management bodies of such company. The purpose of this new duty is to enhance the transparency of companies’ ownership for anti-money laundering purposes, but its implementation may be burdensome.
IV FOREIGN INVOLVEMENT IN M&A TRANSACTIONS\(^3\)

In 2017, French companies (as bidders or target companies) were involved in seven of the top 20 announced European deals, with France being a major regional player.

i Cross-border inbound deals

For the second consecutive year, cross-border M&A transactions targeting France decreased, with a significant drop seen during the second half of 2017. The trend observed over the previous years of the United States being the leading investor in France continued, reaching an aggregate value of €11 billion for 55 transactions.

The interest of Chinese investors in the French market remains significant, with the aggregate amount of transactions realised in 2017 equalling 2016 (circa €2 billion).

Notable domestic M&A transactions included:

- the €12.1 billion acquisition by private investor Bernard Arnault of a 25.9 per cent stake in Christian Dior SA;
- the €6.9 billion acquisition by the government of a 50 per cent stake in French company Areva SA; and
- the €6.5 billion takeover of Christian Dior Couture SA by French-listed luxury company LVMH Moët Hennessy Louis Vuitton SE.

ii Cross-border outbound deals

In 2017, the aggregate value of outbound M&A deals soared substantially, €61 billion of which was invested in European companies, representing a threefold increase as compared with 2016.

While the United States remained a prime target, the Asia-Pacific region was also attractive.

In this context, notable outbound M&A transactions that were announced in 2017 included:

- the €24 billion merger between the French-listed ophthalmic lenses manufacturer Essilor International and the Italian-listed eyewear Luxottica Group;
- a €20.9 billion takeover of Westfield Corporation, an Australian shopping centre company, by French-listed property investments company Unibail-Rodamco; and
- a €6.3 billion takeover of Maersk Olie Og Gas AS, a Dutch oil and gas company, by the French-listed integrated oil and gas company Total SA, a transaction that was completed in the first quarter of 2018.

V SIGNIFICANT TRANSACTIONS, KEY TRENDS AND HOT INDUSTRIES\(^4\)

i Strong activity in 2017; many opportunities in 2018

For the second consecutive year, the overall value of M&A increased (by 18 per cent as compared with 2016, while the number of M&A transactions remained stable:

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France

869 in 2016, 861 in 2017). France stands out in the top 20 announced deals in 2017, with seven French companies initiating and four French companies being targeted by such deals.

The first and second quarters of 2017 were particularly active, representing a global value of nearly €75 billion, which is surprising given the fact that the political context was uncertain due to the presidential election. However, the two last quarters of 2017 did not follow the same path, with the aggregate value of the deals announced during this period being worth €19.2 billion.

The intense activity of the first half of the year may be explained by the ‘jumbo deals’ entered into, such as the acquisition by Bernard Arnault of a 25.9 per cent stake in Christian Dior SA (see Sections I and IV) and the tender offer initiated by Safran on Zodiac Aerospace’s share capital. Between its announcement in January 2017 and the signing of a business combination agreement in May 2017, this transaction was significantly reshaped into a tender offer, which was made in the form of a cash offer on a principal basis targeting 100 per cent of Zodiac Aerospace’s share capital, complemented by a subsidiary exchange offer targeting a maximum of 30.4 per cent of Zodiac Aerospace’s share capital. The tender offer was launched at the end of December 2017 and was successfully completed, and in March 2018, Safran owned more than 95 per cent of Zodiac Aerospace’s share capital.

This trend appears to be continuing in 2018, with many situations ongoing (including several privatisation projects) although they have as yet not led to formal processes. As a matter of fact, the state has expressed its wish to privatisé three major companies during 2018: the airport company ADP, the gambling company FDJ, and the energy producer and distributor Engie.

ii Most active sectors in 2017

In 2017, consumer, energy, mining and utilities, and defence were the most targeted sectors. The pharma, medical and biotech sector has experienced a significant decrease since 2016 due to the significant acquisition of Merial by Boehringer Ingelhein, a €11.4 billion mega deal that was completed in 2016. Indeed, the most targeted sectors do not appear to reflect investors’ appetite, as these sectors change from year to year because of certain ‘mega deals’. The fact that the consumer sector was the most active sector in 2017 is easily explained by the two deals that targeted Christian Dior SA and Christian Dior Couture SA together for an aggregate value of €18.6 billion (see Sections I and IV).

Energy, mining and utilities formed the second most active sector in 2017 due to the €6.9 billion acquisition of a 50 per cent stake in Areva SA by the government.

Surprisingly, defence was the third-most active sector in 2017, mainly due to the €8.3 billion tender offer initiated by Safran on Zodiac Aerospace’s share capital.

iii Tender offers in 2017

In 2017, the number of tender offers increased for the second consecutive year, reaching 40 deals. The total value of the target companies was €106 billion. This number was treble the number registered in 2016. However, this spectacular leap has to be linked with the operations related to Christian Dior SA (described in Sections I and IV), which represent

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44 per cent of the aggregate value. All the operations launched in 2017 were friendly, half being initiated by companies themselves (as part of share buyback programmes) or by their historical shareholders.

iv Development of private equity activity

In 2017, the private equity trend was upwards in terms of both value and deal counts. Buyout and exit deals reached an aggregate value of €31.5 billion, which is close to the pre-crisis levels. The most attractive sector, by deal value, was the pharma, medical and biotech sector.

In this respect, buyouts rose from €11.2 billion in 2016 to €18 billion in 2017. The most valuable buyout transaction registered in 2017 was the buyout by Neptune Oil & Gas Limited, a British company, of Engie E&P International SA. Together with Carlyle, CVC Capital Partners and China Investment Corporation, Neptune acquired the company from Engie SA, which is thus divesting from its hydrocarbon exploration and production branch. In addition to this specific buyout, the buyout of Sagem Sécurité by Advent International Corporation and Bpifrance SA for €2.4 billion was also a notable transaction.

Similarly, exit deal value in 2017 increased by more than 30 per cent, reaching €21.1 billion. The main exit was the €5.8 billion friendly tender offer by Gecina SA, a French listed real estate investment trust, on Eurosic SA, another French listed real estate investment trust. Other notable exits announced in 2017 included the sale by HBM BioVentures AG and Seventure Partners SA of Advance Accelerator Applications SA for €2.9 billion.

VI FINANCING OF M&A: MAIN SOURCES AND DEVELOPMENTS

i Overview on financing sources

The increase of M&A transactions did not benefit all financing segments equally. Indeed, 2017 is noticeable for a rise in bond issues, with 140 issues (all currencies) conducted by French non-financial companies for a total amount of €75 billion, compared to €65 billion in 2016. This performance was enhanced by the ECB’s expanded quantitative easing, pursuant to which the ECB acquired about €80 billion of securities (including bonds) per month from January to March 2017, and about €60 billion per month from April to December 2017, making the secondary bond market substantially less volatile and encouraging investors to take a position on the debt of non-financial companies. This general observation must nevertheless be nuanced by the decrease in convertible bond issues, which fell by 43 per cent (in value) in 2017.

Regarding the syndicated loan market, activity on the French market for 2016 had fallen significantly before seeing a slight improvement in 2017. Indeed, amounts borrowed by companies represented €75 billion in 2017 compared to €120 billion in 2015. Thus, the largest acquisition financing put in place in 2017 did not exceed €9 billion, despite historically low borrowing costs.

We also noted the come-back of substantial transactions on the IPO market in 2017 as well as an increase in the amounts issued in the context of capital increases, which rose from €6.9 billion in 2016 to €11.2 billion in December 2017, two-thirds having been used to finance acquisitions.

According to commentators, the number of M&A transactions should globally increase again from 2018 to 2020, with a peak this year in France, where M&A activity should
increase by 40 per cent. In the same way, financing conditions should remain favourable in 2018: ample liquidity, low interest rates, a high level of liquidity remaining to be invested by private equity buyers and recent legal reforms.

**ii  Recent legal reforms**

In 2017, France demonstrated its willingness to modernise the legal framework applicable to securities and bonds issues with a view to competing with the mechanisms already existing in Anglo-Saxon countries.

**Modernisation of the law on security interests**

After the reform of the law of contracts in 2016, France continued the modernisation of the law relating to security interests with the adoption of a new status for the security agent role.

Governmental Order No. 2017-748 dated 4 May 2017 came into force on 1 October 2017, and has given new powers to security agents. Previously, security agents had a simple representative role, and their prerogatives were quite limited. Further to such reform, a security agent can be the direct holder of both security interests and personal guarantees granted by the debtor. He or she can act in his or her own name for the benefit of the creditors of the secured obligations. Consequently, a security agent benefits from the same powers as a fiduciary. Moreover, security agents are now able to take legal action to defend the interests of creditors. In practice, the security interests are directly transferred to and managed by the security agent. The latter then becomes the new owner of the security interests, but must keep them separate from his or her own estate. Therefore, a change of one or several beneficiaries is now possible without any consequences for the security agent or additional formalities.

**Simplification of the law on bond issues**

Governmental Order No. 2017-970 dated 10 May 2017, completed by Decree No. 2017-1165 dated 12 July 2017, significantly simplifies the legal framework for bond issues. First, the Order simplifies the formalities required to issue bonds, particularly regarding the corporate steps that an issuer needs to take. It also introduces a new regime for wholesale bond issues pursuant to which the relationship between the bondholders and the issuer can be contractually agreed between the parties where the bonds are issued with a nominal value equal to at least €100,000. It must be noted that bonds issued by the state, convertible bonds and bonds with warrants are expressly excluded from this new regime. The Order also provides for the possibility for the issuer to amend unilaterally the terms and conditions of the bonds in cases of material error. Furthermore, it clarifies the rules governing the appointment of the representative of the bondholders and the conditions under which he or she can delegate some of his or her powers. It also simplifies the convening and holding of general meetings of bondholders and introduces a new procedure for the written decisions of bondholders. Finally, the Order provides for a simplification of the rules applying to the grant and release of security interests to bondholders.
VII EMPLOYMENT LAW

i The Macron Labour Law Reform

On 22 September 2017, the government enacted several executive orders,6 which were ratified by the Parliament on 29 March 2018: the Macron Labour Law Reform has brought significant changes to French labour law with a view to simplifying the existing rules and regulations under the French labour code and granting more flexibility for employers in respect of employee management, thus attempting to make France more attractive to foreign investors. The Macron Labour Law Reform includes provisions that may have an effect on M&A transactions; the main ones are as outlined below.

The Macron Labour Law Reform has created a unique representative body in lieu of the existing staff delegates, works council and health and safety committee: the social and economic committee (SEC). An SEC will have to be implemented in companies with 11 or more employees by 31 December 2019 at the latest. SECs will replace the works councils as from such date, and will exercise similar functions to those of the works councils. As is the case for works councils, relevant compulsory consultations with SECs must be carried out within certain time limits (see Section VII.iv).

Introduction of greater flexibility around employment restructuring

Rules governing collective redundancies for economic reasons

Under French law, in order to implement collective redundancies for economic reasons employers must provide valid economic grounds justifying the redundancies. Since the Macron Labour Law Reform, these grounds must now be assessed at the level of the French territory only (i.e., at the level of the French employer company only, or at the level of the French company and any other entities of the group located in France if those entities belong to the same business sector as the French company). Before the Macron Labour Law Reform, such grounds were assessed at the level of the group as whole in France and abroad.

These amendments further progressed on the simplification of the redundancy rules that had been initiated under Law No. 2016-1088, which entered into force on 8 August 2016 (El Khomri Act). The El Khomri Act introduced two main changes to the redundancy rules: the codification of two grounds of dismissal previously only recognised by case law (restructuring aimed at safeguarding a company’s competitiveness and the closure of a company); and the addition of economic indicators defining the concept of ‘economic difficulties’.

Since the El Khomri Act was enacted, economic difficulties are now mainly appreciated on the basis of a significant decrease in the number of orders or the turnover of a company, appreciated by reference to a number of quarters and the number of employees within a company (e.g., in companies with less than 11 employees, a decrease of the turnover during one quarter is considered as a sufficient ground for an economic redundancy). These indicators do not constitute an exhaustive list, and any other element justifying the existence of economic difficulties can be used to justify ‘economic difficulties’. Therefore, despite these modifications, French case law will continue to be of key relevance when establishing whether a company is facing economic difficulties.

Collective mutual termination procedure

To facilitate job reorganisations and head count adjustments other than for economic reasons, the 2017 Macron Labour Law Reform has introduced an ad hoc voluntary termination procedure called the collective mutual termination procedure. Under the procedure, employees apply for a voluntary departure plan, which must be validated by the French Labour Administration. Companies will not have to demonstrate economic difficulties before implementing such an agreement. Under the supervision of the French Labour Administration, the voluntary departure plan must contain specific provisions, and in particular the maximum number of job terminations contemplated and the modalities of information for SECs (no consultation with an SEC is required). The collective mutual termination procedure does not prevent an employer from hiring new employees either for a new position or a position occupied by an employee who agreed to the mutual termination of his or her employment contract.

ii Employees’ right to make an offer to buy shares or assets in small and medium-sized companies

Pursuant to the Hamon Act of 2014, as modified by the Macron Act of 2015, companies with fewer than 50 employees, or companies with between 50 and 250 employees that fall into the category of small and medium-sized companies (i.e., companies with a turnover below €50 million or a balance sheet total below €43 million), must inform their employees of any proposal to sell 50 per cent or more of the shares of the company or the sale of the company’s business as a going concern with a view to allowing them to make an offer to purchase the shares or the business. The Hamon Act does not grant any priority or pre-emption rights to the employees; however, the procedure does impact the timetable for the proposed transaction, and can also have an impact on the confidentiality of the transaction.

Regarding companies with fewer than 50 employees, such employees must be informed of a proposed sale no later than two months prior to the signing of the transaction. In addition, the transaction cannot take place before the expiry of this two-month period unless all employees have informed the company that they do not wish to make an offer.

In companies with between 50 and 250 employees, the employees must be informed of a proposed sale at the latest when the works council or the SEC of the company is informed and consulted on the transaction in question. Unlike in the case of companies with fewer than 50 employees, the law does not set any specific deadline prior to which the transaction cannot take place (except that the works council or SEC consultation process will have to be completed before any binding documentation with respect to the transaction is signed, in compliance with generally applicable French employment law rules).

The law provides that employees are subject to an obligation of discretion with respect to the information that they receive by virtue of the new law. For the moment, it is not clear what information regarding a company and its activities must be given to its employees in connection with the specific procedure. According to a strict interpretation of the law, when a company informs its employees of their right to make an offer to buy the company or the business, it is not required to give information on any other potential bidders or any

7 These provisions of the Hamon Act do not apply to companies that are subject to insolvency proceedings.
documents relating to the company or its strategy. However, should one or more employees ultimately decide to make an offer to buy the company or the business, the Hamon Act (and its implementing Decree of 28 October 2014) is silent as to the level of information that the company must provide.

Failing to comply with the obligation to inform employees that they can make an offer to purchase the shares or assets of a company exposes the seller to a monetary fine that cannot exceed 2 per cent of the value of the underlying transaction.

Following an information procedure under the Hamon Act, the contemplated sale must take place within two years of the date on which the employees are informed of the transaction; otherwise, the company must complete the information process again.

iii Reinforced role of the works council or the SEC of the target of a takeover bid

Pursuant to Law No. 2014-384, which entered into force on 29 March 2014 (the Florange Act), in a public company takeover context, the works council or the SEC of the target company must be formally consulted and issue an opinion (either positive or negative) on the takeover bid (whether friendly or hostile).

The consultation of the target company’s works council or the SEC must be completed (i.e., a positive or negative opinion must be issued) within one month of an offer being filed. If the works council or the SEC has not issued an opinion within this time frame, it will be deemed to have been consulted, except in certain exceptional circumstances where the works council or the SEC can justify in court that it did not receive sufficient information about the transaction.

In any case, the board of directors or the supervisory board of the target company cannot make a decision with respect to the takeover bid (including whether to recommend the bid) until the consultation process with the target company’s works council or the SEC has been completed. Note that in a situation in which the bidder has entered into a prior agreement with the target (generally called a tender offer agreement) specifying the main terms and conditions of the offer and providing for a break-up fee based on the recommendation of the target’s board, it should be carefully assessed whether such agreement triggers the obligation to consult the works council or the SEC prior to its signature.

During the consultation process, the target company’s works council or the SEC may ask the offeror questions about its industrial and strategic plans for the company. It may also choose to be assisted by a third-party expert (whose fees will be paid by the target company, and who will issue a report that will assess the offeror’s industrial and strategic plans and their impact on the target company and its employees). The third-party expert has three weeks from the filing of the offer to issue its report.

iv Defined time limits for works councils or SECs to issue their opinion in compulsory consultation situations

A decree dated 27 December 2013 establishes the relevant time limit for works councils to issue their opinion in the event that their consultation is compulsory. Unless an agreement is reached between the employer and the trade union representatives (or, failing that, the works

8 The guidelines that have been published by the French Ministry of Labour for the implementation of the Hamon Act confirm this approach.
council) that provides for a specific time frame for their consultation, the members of the works council must issue their opinion within the following time limits (the starting point being the date on which the employer discloses the information):

\[\text{\begin{align*}
& a \quad \text{one month generally;} \\
& b \quad \text{two months if the works council is assisted by an expert;} \\
& c \quad \text{three months if one or more health and safety committees (CHSCT) are involved in the project; and} \\
& d \quad \text{four months if a temporary coordination committee of the CHSCT is created.}
\end{align*}}\]

If the works council has not issued an opinion within the relevant time limits, it will be deemed to have been consulted and to have issued a negative opinion.

As indicated in Section VII.i, the SEC will replace the works council on 31 December 2019 at the latest. The defined time limits within which the SEC will have to render its opinion in compulsory consultations (and that will apply as from the setting up of the SEC) are as follows: one month generally; two months if the SEC is assisted by an expert; and three months in very specific situations where the consultation is carried out in a company that has one or more local SECs involved in the consultation process being assisted by at least one expert.\(^9\) As is the case with the works council, these time limits apply in the absence of an agreement entered into between the employer and the trade union representatives (or, failing that, the SEC) providing for a specific time frame for the consultation of the SEC.

v Obligations to look for a buyer in the event of the closure of a business division

Among its provisions, the Florange Act has introduced an obligation for an owner seeking to close a business to attempt to find a buyer for the business. This obligation applies to an intention to close any business division with more than 1,000 employees when such closure would result in planned collective redundancies (i.e., more than 10 employees). This obligation provides for specific information obligations toward the works council and the employees of the target business, as well as an obligation on the company or the group to consider all offers to acquire the business and to justify any decision taken in respect of such offers to the works council.

vi Obligations of employers in the fight against corruption and the protection of whistle-blowers

The Sapin II Law on transparency, the fight against corruption and the modernisation of the economy created two new obligations for employers aimed at fighting corruption and protecting whistle-blowers.

Since 1 January 2018, employers with more than 50 employees must implement an internal process allowing employees to report, confidentially, any crime or criminal offence, a serious and obvious violation of an international treaty ratified or approved by France, or a threat or serious damage caused to the general interest, that they have had knowledge of personally during their employment.

Employers with more than 500 employees must also implement:

\[\text{\begin{align*}
& a \quad \text{a code of conduct that must give a definition as well as examples of what could constitute an act of corruption, and also include disciplinary sanctions to be taken in cases of its violation;}
\end{align*}}\]

a process allowing employees to report, confidentially, any violations of the company’s code of conduct; and

a training programme for the executives and staff most exposed to potential risks of corruption.

Any employee who submits, in good faith, a report of a violation will be considered as a whistle-blower and will benefit from a specific protective status against dismissal. Reports of violations must also be followed by an internal investigation that must verify the truthfulness of the report. Therefore, when implementing such processes, employers must ensure their compliance with the French labour regulations, in particular with regard to the protection of employees’ rights to privacy as well as mandatory information and the consultation of employee representatives, particularly when implementing monitoring devices.

vii Risk of requalification of equity instruments granted to managers (management packages) as remuneration subject to social security charges

The Paris Court of Appeal ruled in July 2017 that gains realised by managers upon the sale of equity instruments (warrants in the case at hand) in the context of an LBO exit, when such instruments were granted to the managers (because of their status) and kept by the latter to the extent that they remained within the company, should be considered as a salary for social contributions purposes (i.e., the gain would be subject to social contributions at a rate of around 40 to 50 per cent on an employer’s part, and around 20 to 30 per cent on an employee’s part).10 Indeed, it was held that the conditions under which such warrants were granted (to employees only) and may be kept (for as long as the beneficiaries remain within the company) establish a strong link with the employment agreement or corporate office (e.g., directorship) of the relevant beneficiary. The case is pending before the Supreme Court and, should it be confirmed, it cannot be ruled out that this principle would apply to any kind of equity instrument awarded in the same circumstances as the ones at stake. The outcome of this litigation will need to be monitored closely, considering its potential significant impact on the cost of management packages.

VIII TAX LAW

i Repeal of the additional 3 per cent tax on distributed dividends

Article 235 ter ZCA of the French tax code (FTC), introduced in 2012, originally stated that distributions made by entities subject to French corporate income tax, irrespective of the tax residence of the beneficiary, were subject to a 3 per cent tax at the level of the distributing company (subject to certain exceptions such as SMEs).

On 30 September 2016, the French Constitutional Council ruled such 3 per cent tax unconstitutional as it failed to observe the constitutional principles of equality before the law and before charges levied by the state.11 Indeed, the aforementioned Article provided for an exemption for distributions occurring within a French tax consolidated group; however, this exemption did not apply to distributions made to companies that fulfilled the conditions to be part of a French tax consolidated group, but that had not elected such tax regime; or were

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10 Paris Court of Appeal, 6 July 2017, No. 14/02741.
11 Constitutional Council, 30 September 2016, No. 2016-571 QPC, Sté Layher SAS.
not able to elect such tax regime as they were located in another EU Member State. Following such decision, such exemption was extended by law, and distributions made to qualifying companies meeting the criteria to be part of a French tax consolidated group had they been located in France are, in principle, exempt from the 3 per cent tax (in particular, a qualifying company was required to hold at least 95 per cent of the distributing company).

Furthermore, on 27 June 2016, the French Administrative Supreme Court referred the two following questions to the Court of Justice of the European Union (CJEU) for a preliminary ruling:

a. Does Article 4 of the Parent Subsidiary Directive (PSD) preclude a levy such as the 3 per cent tax, which is payable on the distribution of profits by parent companies that are liable to corporation tax in France and which is assessed on the basis of the sums distributed?

b. Is a levy such as the 3 per cent tax to be regarded as a ‘withholding tax’ from which, pursuant to Article 5 of the PSD, profits distributed by a subsidiary must be exempt?

In the procedure before the CJEU regarding the Belgian fairness tax, the Advocate General considered it to be contrary to the PSD, and mentioned in his opinion the similarities with the French 3 per cent tax on distributed dividends, paving the way for similar decisions to the extent that, for the French case, the Advocate General dispensed with an opinion and no hearing was held. On 17 May 2017, the CJEU ruled both the Belgian fairness tax and the French 3 per cent tax to be contrary to the PSD. Regarding France, the CJEU first underlined that profits received from subsidiaries and redistributed by a parent company to its shareholders fall within the scope of Article 4 of the PSD. Consequently, it judged that Article 4 of the PSD precluded a levy on the distributions, by a parent company, of profits consisting of dividends received from a subsidiary. Such preliminary ruling echoed the action for failure the European Commission initiated against France in February 2015.

Following this CJEU decision, the French Administrative Supreme Court referred on 7 July 2017 a priority preliminary ruling to the French Constitutional Council on whether the 3 per cent tax was contrary to the constitutional principles of equality before the law and before charges levied by the state on the grounds that there was a difference in treatment between dividends redistributed by parent companies, depending on whether they originate from French subsidiaries, subsidiaries located in non-EU countries or EU subsidiaries; and distributions by a company originating from its own operating profits and distributions originating from dividends received from subsidiaries.

In its decision dated 6 October 2017, the French Constitutional Council welcomed the argument and ruled that the 3 per cent tax was contrary to the above constitutional principle of equality. This declaration of unconstitutionality had immediate effect as from the date of

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13 Council of State, 8th and 3rd chambers, 27 June 2016, No. 399024, Association française des entreprises privées (AFEP) et al.
15 Council of State, 8th and 3rd chambers, 7 July 2017, No. 399757, Société de participations financière.
France

the publication of the decision (i.e., 8 October 2017) and applied to all cases for which a final judgment was not rendered at this date. For past distributions, taxpayers are also entitled to claim a refund of the 3 per cent tax unduly paid, subject to applicable statutes of limitation.

Following these various negative decisions, the law was subsequently amended, with the 3 per cent tax being repealed for distributions paid by French companies as from 1 January 2018.17 To finance the refunds of the 3 per cent tax without affecting the public budget, two additional surtaxes to French corporate income tax were introduced for large companies for the fiscal year 2017 only.

ii Modification of the rules regarding the rollover tax regime for partial asset contributions in a cross-border situation

The French prior ruling procedure for cross-border mergers was held contrary to the EU Merger Directive and the freedom of establishment by the CJEU.

Article 210 C of the FTC provided that when transfers were made to foreign legal persons by a French company, the applicability of the French rollover tax regime was subject to a prior ruling.

The ruling was granted if the taxpayer evidenced that:

a. the operation was justified for commercial reasons;

b. it did not have as its principal objective, or as one of its principal objectives, tax evasion or avoidance; and

c. the manner in which the operation was carried out made it possible for the capital gains deferred for tax purposes to be taxed in the future.

This ruling was not required for mere domestic transfers. In Euro Park,18 the French Tax Administration denied the benefit of the rollover tax regime because the taxpayer did not seek this ruling and, in any case, it would not have obtained it under point (b). In response, Euro Park challenged the ruling procedure based on EU law.

The CJEU decision showed that the rules of the French ruling procedure were not sufficiently precise, clear and foreseeable. While it is only by way of exception and in specific cases that Member States may, pursuant to Article 11(1)(a) of the Merger Directive, refuse to apply or withdraw the benefit of all or any part of the provisions of that Directive, French law had recourse to a general presumption of tax evasion or tax avoidance, according to the CJEU. Furthermore, the CJEU noted that:

a. French law treated cross-border mergers and domestic mergers differently; and

b. that if such difference may be justified by the overriding public interest motive linked to preventing tax evasion or tax avoidance, in the present case, the prior ruling procedure introduced a general presumption of tax evasion or tax avoidance that goes beyond what is necessary to achieve that objective and could not, therefore, justify an obstacle to the freedom of establishment.

The CJEU therefore ruled that the prior ruling required to benefit from the rollover tax regime for cross-border mergers that was required by French law was contrary to Article 11 of the Merger Directive and the freedom of establishment. Consequently, the second Amended Finance Bill for 2017 has modified the provisions of French domestic tax law accordingly: the

17 Law No. 2017-1837 of 30 December 2017, Article 37.
18 CJEU, 8 March 2017, C-14/16, Euro Park Service.
French legislator repealed the advance tax ruling required prior to any partial contribution of assets implemented to the benefit of a foreign beneficiary company (thus, a tax ruling will only be required in the context of a transaction that does not involve a qualifying ‘complete and autonomous business’). For a transaction to benefit from the favourable merger tax regime, the contributed assets shall be allocated to a French permanent establishment of the foreign beneficiary company (unless such assets are qualifying shareholdings).

Finally, if the transaction benefits from the favourable merger regime, the French contributing entity will be required to file a specific return in order for the French Tax Administration to understand the purpose of the transaction as well as its consequences. Failure to file such specific return will trigger a €10,000 fine per transaction.

IX  COMPETITION LAW

The French Competition Authority has had responsibility for merger control since 2009 (this function was previously carried out by the Minister for the Economy), and has increasingly adopted a more efficient approach to the application of its rules. In 2017, 236 concentrations were reviewed and cleared by the Authority, eight of which were cleared conditionally (that is, with remedies). In one of the cases notified in 2017, the Authority opened in-depth investigations (second phase).¹⁹

It is also important to note that the Competition Authority is breaking new ground in the way it deals with cases. In an unprecedented move, it has closed a litigation procedure against La Poste, and on the same day cleared a merger between the latter and Suez involving the same activity.²⁰ In both cases, the identified concerns involved, on the one hand, a risk of using competitive advantages that could not be reproduced by competitors, linked to the universal postal service, and on the other, price setting by La Poste of offers or services for the collection of non-hazardous office waste at prices below costs. The Competition Authority accepted two series of similar commitments made by the parties in each case.

Recently, and for the first time, the Competition Authority had to issue a decision on a merger involving two online platforms.²¹ To do so, it had to take into account network cross-effects and address multi-homing practices, and take an interest in the importance of data in this transaction. In this regard, the Competition Authority opened an in-depth investigation to evaluate the capacity of current and potential competitors to stimulate competition in the face of the merger of two of the main operators in the French online real estate advertising market, Concept Multimedia (Logic-immo.com) and Axel Springer Group (SeLoger.com). It conducted an online questionnaire on more than 30,000 real estate agencies, and eventually gave an unconditional clearance.

i  Application of the new merger control guidelines of 10 July 2013

On 10 July 2013, new guidelines on merger control were adopted by the Competition Authority, revising the previous guidelines of December 2009 and taking into account the Authority's experience since.

The guidelines on merger control set out measures aimed at facilitating the pre-notification process, specifying the criteria for the simplified notification procedure,
the conceptual framework of the analysis of relevant markets and the role of this analysis, and proposing standard models for transfers of assets and trustee mandates. The guidelines also place greater emphasis on economic and econometric analysis, especially quantitative tests, when the data and methodology used are reliable and verifiable. In particular, the new guidelines introduce a reference to the upward pricing pressure, illustrative price rise and gross upward pricing pressure index (GUPPI) tests, used to measure the impact of a merger on prices without having to define the relevant market.

The GUPPI test was last used by the Competition Authority in its decision of 27 July 2016 authorising the acquisition of the Darty company by the Fnac group.\textsuperscript{22} In this decision, the Authority, for the first time in France and Europe, considered the market for the retail distribution of certain domestic electronic products to include both online and in-store sales. The Authority then based its analysis of horizontal effects on the GUPPI test to conclude that a post-merger price increase by the new entity was likely. The Authority also noted that the transaction would lead to a risk of the stores not being incentivised to propose price discounts or punctual promotions that would likely enhance local competition. To meet the identified concerns, the Fnac group has committed to divest six stores to one or more retailers of electronic products. Consequently, the Authority cleared the acquisition, considering that this divestiture will guarantee sufficient competition in the market of retail distribution of electronic products in Paris and its suburbs.

\textbf{ii} \textbf{Substantial penalties can be imposed for gun-jumping}

When French thresholds are met, a pre-merger filing is mandatory. This applies to all concentrations, including foreign-to-foreign transactions, even in the absence of an overlap between parties’ activities.

Individuals and companies acquiring control of all or part of an undertaking are responsible for notifying. In the case of a merger, this obligation is incumbent upon the merging entities. In the case of a joint venture, parent companies must file a joint notification.

Sanctions for not filing or for closing before clearance are as follows: corporate entities – up to 5 per cent of the turnover in France during the previous financial year (plus, where applicable, that of the acquired part generated in France); and individuals – up to €1.5 million.

An example of sanction for the first type of gun-jumping (i.e., for failing to notify) can be found in Case No. 13-D-22.\textsuperscript{23} On 26 December 2013, the Competition Authority imposed a fine of €4 million on Castel Frères, a company active in the wine sector, for failing to notify its acquisition of six companies before closing the transaction on 6 May 2011. It was only in September 2011, in the context of the examination of another acquisition, that this merger was reported to the Authority by a third party. On appeal, the fine was reduced to €3 million on the grounds that the transaction was notified shortly after the Authority’s request and that Castel Frères did not intend to bypass the competition rules.\textsuperscript{24}

Regarding the second type of sanction for premature implementation, the Competition Authority imposed a fine for a breach of the standstill obligation for the first time in 2016. In 2014, Altice, active in the French telecom market through its subsidiary Numericable, notified the planned acquisition of SFR and OTL, which was authorised by the Authority.

\begin{itemize}
  \item Case No. 16-DCC-111.
  \item Situation of the Castel Group in light of Article 430-8 of the Commercial Code, decision dated 20 December 2013, Case No. 13-D-22.
  \item Judgment of the Supreme Administrative Court dated 15 April 2016, Appeal No. 375658.
\end{itemize}
in October 2014. In April 2015, the Authority conducted a dawn raid on the premises of Numericable, SFR and OTL, and found evidence that Altice was involved in SFR’s business and strategy prior to the clearance, notably in approving the participation of SFR in a public tender, assisting SFR in renegotiating a network sharing agreement with Bouygues Telecom, determining the prices of SFR internet retail offers and coordinating with SFR in the context of OTL’s acquisition. As a result, on 8 November 2016, the Competition Authority imposed a fine of €80 million on the Altice Group for implementing two transactions prior to obtaining merger control clearance.25 This is one of the highest fines worldwide ever enforced for such a practice.

Finally, the parties may be required, subject to a periodic penalty for non-compliance, either to file the concentration or to demerge. Transactions that have been completed without clearance are illegal and not enforceable. There are no criminal sanctions for not filing.

### iii Diversification of remedies that can be imposed by the Competition Authority

Regarding commitments and injunctions, in its new merger control guidelines, the Competition Authority provides several examples of its decision-making practice, which is characterised by a preference for structural remedies (e.g., divestment of minority shareholdings). However, in the case of complex transactions, the Competition Authority pragmatically accepts behavioural remedies, of which it provides several examples. Merger review over the past few years tends to confirm such trend. For instance, in 2016, in five cases out of six, the Authority conditioned its approval only on behavioural remedies. However, 2017 was a more balanced year, as in half of its cases, the Authority cleared the transaction subject to structural and behavioural remedies,26 and conditioned its approval only on behavioural remedies for the other half.27

An illustration of such behavioural remedies can be found in the Authority decision dated 13 November 2017 relating to the absorption of Coopérative agricole des Agriculteurs de la Mayenne (CAM) by Terrena.28 In the markets of agricultural supplies, and especially in the market of conventional and non-organic seed distribution, the Competition Authority identified several possible anticompetitive effects in one geographic area. In view of a high market share and of the supply obligations provided by the terms of the cooperative (i.e., Terrena affiliates had to purchase 100 per cent of their supplies from the cooperative, whereas CAM affiliates were not subject to any similar quantified targets), the new entity could have used its market power to increase its prices. Another anticompetitive risk was identified in the market for the collection of cereals, protein and oilseed crops in the same

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25 Situation of the Altice group with regard to Section II of Article L 430-8, decision dated 8 November 2016, Case No. 16-D-24.

26 Acquisition of Anios by Ecolab, decision dated 31 January 2017, Case No. 17-DCC-12; acquisition of MédiPôle-Partenaires by Elsan, decision dated 23 June 2017, Case No. 17-DCC-95; acquisition of the Bricorama group by ITM Équipement de la Maison, decision dated 18 December 2017, Case No.17-DCC-215; acquisition of stores owned by the Tati group (Tati, Fabio Lucci, Giga Store) by Gifi (GPG group), decision dated 18 December 2017, Case No. 17-DCC-216.

27 Merger by absorption of Ecofolio by Eco-emballages, decision dated 3 April 2017, Case No. 17-DCC-42; acquisition of Totalgaz SAS by UGI Bordeaux Holding SAS, decision dated 3 July 217, Case No. 17-DCC-103; merger by absorption of Coopérative agricole des Agriculteurs de la Mayenne by Terrena, decision dated 14 December 2017, Case No. 17-DCC-210; creation of a full-function joint venture between La Poste and Suez, decision dated 21 December 2017, Case No. 17-DCC-209.

area, insofar as the affiliates would have had to sell their entire production to the new entity. To address those competition concerns, Terrena committed to modify its terms to reduce the contribution obligation of the new entity’s affiliates and the obligation to get supplies from the new entity to a minimum of 55 per cent. Consequently, the Authority cleared the acquisition subject to the enforcement of these commitments.

It is important to note that the Competition Authority carefully monitors the implementation of remedies, and may withdraw an authorisation in cases of non-compliance. In such a case, the parties will then have to either restore the situation to what it was before the transaction (i.e., ‘unwind’ the operation) or re-notify the transaction to the Competition Authority within a month. Compliance with commitments by companies is central to the process of French merger control. The power of the Authority to withdraw merger approvals was validated in 2012 by a decision of the French Constitutional Court in the context of the appeal by Canal Plus and Vivendi against an order to re-notify the purchase of its former rival TPS. The Authority withdrew its approval on the ground that Canal Plus Group did not fulfil several commitments that were attached to the authorisation decision.

If such non-compliance with remedies is confirmed, the Competition Authority is also able to impose financial penalties on the notifying parties of up to 5 per cent of their net turnover achieved in France. In this regard, in 2017, the Competition Authority fined the Altice and SFR Group €40 million for its non-compliance with commitments made when SFR was taken over by Numericable.

As a final observation, the recent Macron Act empowers the Authority with the right to impose, subject to fines, injunctions or prescriptions as a substitute for commitments the parties did not comply with. Such a right enables the replacing of a commitment that has become outdated without withdrawing the clearance decision.

iv Contemplated changes in the French merger control regime

The Competition Authority launched an initiative on 20 October 2017 to modernise and simplify the merger law. Three topics have been proposed for consideration:

a. the simplification of merger procedures (especially the current ‘simplified procedure’);

b. the need to define new criteria triggering control in order to enable the Competition Authority to review operations that could lead to competition problems and that are not currently covered by merger control procedures, in particular through the introduction of limited ex post control by the Competition Authority or the reintroduction of a market share threshold; and

c. the role of trustees in merger control.

At least 20 contributions have been received from stakeholders. Following this first informal consultation, the Competition Authority officially launched a public consultation on 7 June 2018, for which stakeholders’ responses are expected by 28 September 2018.
X OUTLOOK

i Strengthening of the Foreign Investment Regulation

During the course of 2017, the French Foreign Investment Regulation was subject to certain technical amendments, and the European Commission has presented a proposal to establish a framework to examine foreign direct investments into the European Union. At the end of 2017 and the beginning of 2018, an inquiry commission was created by the National Assembly to examine the state’s decisions relating to industrial policy matters, as well as measures that are likely to protect France’s national industrial leaders. The commission most notably looked into three major transactions, namely the acquisition by General Electric of Alstom’s power division, Alcatel’s acquisition and merger with Nokia, and the acquisition of STX France by Fincantieri. Moreover, the commission criticised the loss of sovereignty in companies deemed strategic for France’s national interests, and pointed out the political context in which these transactions were authorised by the former government. The government has announced its intention to strengthen the applicable regulation. If, for the time being, they are only proposals, such reform would have an impact on foreign investments as follows:

a the sectors in which foreign investments require a prior authorisation would be extended to include new strategic sectors such as the artificial intelligence, robotics, spatial, financial infrastructures and data storage sectors;
b monitoring tools would be created to verify whether foreign investors comply with their commitments;
c a new penalty system would be implemented, providing for more progressive sanctions, including injunctions, remedy measures orders, and financial penalties of €5 million or 10 per cent of the target’s turnover;
d ‘golden shares’, which would consist of shares with specific rights to the benefit of the state, allowing the state to block any transfer of assets, intellectual property or delocalisation in companies deemed strategic, would be introduced; and
e a defence and national security council would be established to quickly react to takeovers of strategic assets.

ii Promoting the growth and transformation of companies

A draft law relating to an action plan for corporate growth and transformation will be discussed before the end of 2018. The aims of this reform are, among others:

a enhancing the creation of new companies by reducing administrative procedures costs, creating a single register for the publication of information on companies or even creating more flexible duties for entrepreneurs;
b supporting the financing of companies, in particular by making stock markets more accessible to SMEs (see Section III.iv) and directing French people’s savings towards companies;
c fostering investment in French companies by protecting inventions and expanding R&D;
d involving employees in companies’ results, and developing employees savings and employee ownership;
e facilitating exportation through the establishment of a single exportation counter; and
f simplifying takeovers of companies by their employees.
iii General Data Protection Regulation 2016/679 takes effect

Two years after its adoption, the provisions of the General Data Protection Regulation (GDPR) finally became applicable across the Europe Union on 25 May 2018. GDPR, which replaces EU Data Protection Directive 95/46/EC, is meant to facilitate the flow of personal data within Europe by harmonising the rules that govern how the data can be collected and used. The new law introduces a number of changes to the previous data protection regime, including:

\[a\] increased transparency and accountability obligations imposed on entities that process personal data;

\[b\] extraterritorial application of the law to parties outside the EU that offer services or target EU consumers;

\[c\] a one-stop shop mechanism for enforcement; and

\[d\] significantly increased sanctions for breaches.

Given the financial and reputational consequences for non-compliance with the GDPR, it is anticipated that data privacy and security issues will become increasingly prominent issues in M&A transactions.
Chapter 19

GERMANY

Heinrich Knepper

I OVERVIEW OF M&A ACTIVITY

After the huge drop in deal value of more than 16 per cent in 2016, to US$3.26 trillion, the downward trend continued in 2017, albeit to a lesser extent, with a total global value of minus 3.2 per cent. Although the total global deal value fell to US$3.15 trillion, it was nevertheless the fourth year in a row in which M&A has broken the US$3 trillion barrier. Several mega-deals in December, including the acquisition of Twenty-First Century Fox Inc by the Walt Disney Company (with a value of US$68.4 billion) and the merger between CVS and Aetna meant the year ended on a high and achieved the largest monthly total of the year, at US$427.5 billion.1

By taking a look at the German market, it is evident that, despite the global decrease, the German M&A market remained steady in 2017. M&A activity with German involvement (as bidder, seller or target) stayed above the mark of US$200 billion in value. Although the number of announced deals with German involvement remained relatively constant (1,247 deals in 2016 compared to 1,256 in 2017), the average deal size decreased from US$175 million to US$166 million.

The volume of deals with German targets increased again by about 40 per cent from US$90.3 billion in 2016 to US$126.3 billion in 2017. Most notable was the merger of Linde AG and Praxair Inc (US$45.5 billion), the combining of Siemens’ mobility business with Alstom SA (US$8.7 billion) and the acquisition of ista International GmbH by Sarvana S.a.r.l. (US$7.3 billion). Germany continues to be one of the most attractive target jurisdictions in Europe, with 559 inbound transactions in 2017 (France 327, Italy 301, Netherlands 270). Only the United Kingdom attracted more inbound deals, with 785 transactions in 2017.

On the other side, outbound activity of German buyers acquiring outside Germany dropped by about 40 per cent, from US$129.4 billion in 2016 to US$77.4 billion. The German outbound activity was driven by one of the top five global mega-deals of more than US$10 billion: the acquisition of Albertis Infraestructuras SA by Hochtief AG (US$39.9 billion). The acquisition of BUWOG by Vonovia (US$5.9 billion), Akron by Fresenius Kabi (US$4.8 billion) and Elenia Group by ACP (US$4.6 billion) also attracted attention. Overall, on the top 10 list of German-based companies acquiring targets in foreign countries, all acquisitions were valued at more than €1 billion.

The transaction volume of the 10 biggest transactions with German involvement increased again and reached more than US$140 billion (US$130 billion in 2016), including

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the US$45.5 billion takeover of Linde AG by Praxair Inc. The most active sector was the industrial products and services sector with 195 transactions worth US$25 billion, including Alstom SA’s US$8.7 billion acquisition of Siemens AG (mobility business). This was followed by the services sector with 131 transactions worth US$1.3 billion. Attention should be paid to the chemicals and materials sector with just 63 transactions worth US$59.4 billion. The landmark deal in this sector was also the acquisition of Linde AG by Praxair Inc.

Further active sectors were the computer software sector (120 deals with a cumulated value of US$1.6 billion) and the medical and medical pharmaceutical sector (112 deals with a cumulated value of US$19.3 billion).

The market for initial public offerings (IPOs) decreased a little in 2017 with 18 IPOs. Some of the companies that failed to list in the last quarter of 2016 recovered and achieved their goals in 2017. As an example, the German battery producer Varta successfully completed its IPOs. More remarkable has been the IPO of the leading global provider of online food ordering services, the Delivery Hero AG. Since the IPO in June, its success has been worth just over US$1.1 billion.

II GENERAL INTRODUCTION TO THE LEGAL FRAMEWORK FOR M&A

The main source of regulation for public takeovers in Germany is the Takeover Act, as amended in 2006 to implement the EU Takeover Directive, as well as the German Stock Corporation Act, which provides the general framework of the corporate legislation pertaining to German Stock Corporation. In addition, provisions of the German Securities Trading Act, including provisions on the disclosure of holdings of listed securities and certain other instruments, are relevant in connection with any public takeover relating to German target companies (or, in some respects, companies with securities that are listed at a German stock exchange).

Further provisions relevant for the implementation of a public takeover and potential further steps after the completion of a takeover are set out in the German Act on Corporate Transformation, the Stock Exchange Act, the Offering Prospectus Act and the Commercial Code.

The Takeover Act creates a comprehensive legal framework that enables public takeovers to be conducted fairly and transparently. The Takeover Act is also designed to protect the financial interests of minority shareholders and employees of target companies. It contains, inter alia, provisions dealing with takeover bids, mandatory bids, including provisions on pricing and procedure, and requirements in relation to the contents of the offer document.

The Takeover Act also provides a specific squeeze-out procedure following a successful takeover bid (in addition to the general squeeze-out provisions under the German Stock Corporation Act, and in addition to the squeeze-out provisions under the German Act on Corporate Transformations) and a right of sell-out for minority shareholders following a successful takeover bid.

Pursuant to the Takeover Act, the Federal Ministry of Finance has adopted a number of regulations, one of which contains important provisions governing the contents of an offer document, the consideration payable in a takeover bid and exemptions from the obligation to make a compulsory offer.

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In implementing the EU Takeover Directive, Germany has taken a minimalist approach, changing the existing German Takeover Act only to the extent necessary. In particular, Germany has opted out of the strict provisions of the Takeover Directive on frustrating actions that would have made such actions in hostile takeover scenarios generally subject to shareholder approval. Germany has also opted out of the breakthrough rule under the Takeover Directive that would have resulted in setting aside certain transfer restrictions and voting agreements during a takeover bid. The German non-frustration rules allow a target to take any action, including frustrating action, with the consent of its supervisory board. However, it is generally acknowledged that in giving its consent, the supervisory board is bound to authorise a frustrating action in a takeover situation only if the benefit for the company of implementing the action clearly outweighs the interests of the shareholders.

Although the stricter prohibitions of defensive measures and the breakthrough rules under the EU Takeover Directive could be opted into by German publicly listed companies, this possibility has not been used by any of the larger German corporates.

The Stock Corporation Act contains provisions relevant for all German stock corporations (both public and private), including provisions relevant to public and private takeovers of stock corporations, including those relating to the implementation of permissible defences that can be employed against hostile public takeovers, and provisions on the squeeze-out of minority shareholders by a majority shareholder (both in the case of publicly listed and private stock corporations) by a shareholder who has achieved 95 per cent or more of the shares of the corporation.

The Securities Trading Act contains provisions relating to insider dealing, which make dealing in securities based on inside information a criminal offence. It also contains provisions dealing with market price manipulation, reporting requirements for significant shareholdings and reporting obligations for listed companies regarding major new business developments; these reporting requirements for major shareholdings have been significantly extended since 2011 to include reporting obligations for holders of other instruments linked to shares.

The Act on Corporate Transformations contains the mechanics for a process of statutory merger between two German companies, which can be an alternative to a takeover offer. It also contains the most important provisions regarding corporate restructurings that could be relevant in the post-closing phase both for public and private acquisitions, including, since 2011, provisions allowing the majority shareholder of a stock corporation (which itself has to be a stock corporation holding at least 90 per cent of the registered share capital of the target company) to squeeze out the remaining minority of up to 10 per cent by implementing a merger between the target and the shareholder (for the shareholder as surviving corporation).

The Stock Exchange Act and the Offering Prospectus Act set out the rules dealing with prospectus requirements applicable when issuing new shares as consideration for the takeover offer.

The Commercial Code provides for extensive disclosure obligations for publicly listed companies in respect of the structure of their share capital, the statutory provisions and provisions under the company’s articles on the nomination and dismissal of members of the supervisory and management boards, and certain categories of agreements or matters that may frustrate a takeover offer, including agreements among shareholders on the exercise of voting rights and the transfer of shares (to the extent that these agreements are known to the management board) and material agreements of the company providing for a change of control clause.
III DEVELOPMENTS IN CORPORATE AND TAKEOVER LAW
AND THEIR IMPACT

A notable change to capital markets laws that has had a significant effect on M&A transactions on a number of levels is related to the immediate applicability in all EU Member States of the EU Market Abuse Regulation (MAR),\(^5\) effective as of 3 July 2016. The provisions of the MAR have replaced a number of capital markets regulations of the individual Member States and, in many cases, significantly increase and strengthen compliance obligations. In particular, any issuers with securities that are traded, at the initiative of the issuer, in the regulated unofficial markets, will in the future be subject to obligations to disclose inside information \textit{ad hoc}, to maintain insider lists and to comply with regulations on directors’ dealings. In addition, rules restricting insider dealings and market manipulations will be significantly more strict, and potential sanctions in case of infringements will be strengthened and more severe.

In 2013, the German legislator enacted the German Investment Code (GIC), which implemented the Alternative Investment Fund Managers Directive (AIFMD).\(^6\) The GIC applies, \textit{inter alia}, to managers of ‘alternative investment funds’ (including private equity funds) and aims to reduce the risks posed by alternative investment fund managers (AIFMs) to the financial system by introducing various mandatory disclosure, corporate governance, liquidity management and other requirements. In accordance with the AIFMD, the GIC contains certain \textit{de minimis} provisions under which AIFMs managing AIFs below certain thresholds are exempted from full application of the GIC and are subject only to a registration rather than a licensing requirement. The German Federal Financial Supervisory Authority (BaFin) is the regulator responsible for enforcing the provisions under the GIC.

Certain elements of the GIC are of relevance to private equity investors. In particular, the GIC contains a requirement for AIFMs to hold a minimum amount of capital (Section 25). For an internally managed alternative investment fund (i.e., when the management functions are performed by the governing body or any other internal manager of the fund), the minimum level is €300,000; however, for an AIFM that is an external manager to an alternative investment fund (or funds), it is €125,000. In addition, if the value of the portfolios under management exceeds €250 million, the AIFM must provide its own funds equal to 0.02 per cent of the amount in excess of €250 million. This additional capital requirement is capped at €10 million. The GIC also imposes wide-ranging disclosure obligations on AIFMs. For example, managers are required to make regular disclosures to investors, including an annual report and numerous additional disclosures, such as details of investment strategy, liquidity and risks, and the use of leverage. In addition to these disclosures to investors, managers are required to disclose to the relevant authorities details of major shareholdings in non-listed (as well as listed) companies, if these holdings exceed or fall below thresholds of 10, 20, 30, 50 and 75 per cent (Section 289). These disclosure obligations are particularly onerous for private equity investors.

The GIC also provides for a restriction of ‘asset stripping’, where a private equity fund subject to regulation under the GIC has acquired control over an unlisted company or over an issuer. In particular, independent from the specific legal form of the target, any amounts


available for distribution must always be determined on the basis of the annual accounts of the immediately preceding fiscal year. In the case of targets in the form of a limited liability company (the most frequent corporate form in Germany), it remains unclear (and it has so far not been decided by any court) if these restrictions impose restrictions on capital or dividend distributions in addition to the statutory restrictions under the Limited Liability Company Act, in particular the capital maintenance rules. Furthermore, the GIC restricts the repurchase of own shares by a target acquired by a fund regulated pursuant to the GIC.

IV  FOREIGN INVOLVEMENT IN M&A TRANSACTIONS

In terms of foreign involvement, the foreign bidders interested in German targets continued to come from all over the world, with a strong showing of investors in 2017 from the United States, followed by Switzerland, the United Kingdom, France, the Netherlands, Sweden and China. The value of German inbound deals totalled US$109.6 billion – more than twice as much as in the previous year (US$52.1 billion). Outbound transactions by German purchasers very frequently involved the United States, followed by Britain and Italy. They reached a total value of US$38.8 billion.

V  SIGNIFICANT TRANSACTIONS, KEY TRENDS AND HOT INDUSTRIES

i  Significant transactions

The German market is characterised by several inbound and outbound mega-deals. Among the most notable in recent years are the following.

The listed German-based Bayer AG acquired US-based listed Monsanto Company for US$63.4 billion. The offer price was US$128 per share in cash, representing a premium of more than 20 per cent. The implied equity value of the transaction is US$56 billion. The deal will be financed through a combination of debt and equity, including a mandatory convertible bond and a rights issue. With this transaction, Bayer combines its broad Crop Protection product line with Monsanto’s Seeds and Traits and Climate Corporation platform to strengthen Bayer’s position in the crop science business.

A real estate fund of US-based Blackstone acquired Officefirst Immobilien AG, a Germany-based company engaged in office property business, from IVG Immobilien AG for US$3.6 billion. The transaction closed on 31 March 2017. Officefirst controls a predominantly office portfolio of 1.4 million square metres in Germany.

China-based Midea Group announced a takeover offer for Germany-based and listed industrial automation company KUKA AG for US$4.3 billion. The offer was structured as a voluntary cash public offer under German law. The offer was for the 86.5 per cent stake, Midea does not own in KUKA. The offer price was €115 in cash per share representing a 36.2 per cent premium. The consideration was funded by internal resources, and loans from Morgan Stanley and other banks. Midea does not intend for KUKA to be delisted.

Overall, the German market attracted several Chinese inbound investments, including the above-mentioned acquisition of KUKA by Midea Group, an 80 per cent stake in WindMV by Chine Three Gorges Corporation or the acquisition of KraussMaffei Technologies by China National Chemical Corporation, Guoxin International Investment
Corporation Limited and AGIC Capital. There were more Chinese investments in Q1 2016 than in the whole year in 2015. Chinese attempts to invest in German hi-tech companies abated slightly in 2017; there were no further significant acquisitions in the sector.

Partly as a reaction to the takeover by a Chinese company of KUKA, the German government tightened regulations on foreign investments in Germany to restrict non-EU acquisitions of German companies in certain industries. In particular, on 18 July 2017, an amendment to the German Foreign Trade and Payments Ordinance came into effect, which specified critical industries, introduced obligations to notify the authorities and extended applicable review periods, among other things. This amendment is part of a recent political trend towards stricter control of foreign investments, triggered in particular because of Chinese efforts to acquire German hi-tech companies. The latest amendment introduces examples of German companies whose acquisition may be considered a risk to public policy or security (and which, as a result, may be prohibited by the German Federal Ministry for Economic Affairs and Energy). These areas include the operators of critical infrastructure (energy, transport, water, IT, telecoms, finance, insurance and health), developers of software serving the operation of critical infrastructure, certain telecoms and surveillance technology companies, companies in the area of crowd computing and certain companies in the area of telematics.

ii Key trends

One of the most conspicuous trends is the increased interest of German strategic investors in acquiring companies in the United States, and more generally, a return of interest in targets in the Western developed world. The total volume of announced deals with German bidders and US targets was €25 billion for 2015. Compared to the previous year, German bidders are still very interested in acquiring US companies, for example the €2.8 billion acquisition of HERE from Nokia Oyi by a consortium including the German market leaders in the automotive industries (AUDI, BMW and Daimler).

Analysts expect this trend to continue. The United States economy has not yet reached its pre-crisis growth rates but is generally seen as the country with the most positive growth prospects in the developed world, once again. On the other hand, growth in Asia, specifically in China is expected to decline, which is likely to shift German investors’ attention away from this region and back to the developed economies. Potential bidders in Germany, including strategic investors, continue to have full coffers so a continued significant outbound investment is very likely.

Also significant is the further increase of multiples in the valuation of M&A acquisitions. The continuous increase in stock prices, driven by a low interest rate on fixed income instruments, pushed price levels in the M&A market. In particular in the market for leveraged buyout transactions, the average valuations and multiples have almost reached the peak levels of the years 2006 and 2007, which is generally seen as an expression of the dearth of suitable target companies, combined with the ongoing liquidity overhang, both of which have significantly increased investors’ preparedness to take risks and accept leverage.

As far as the general market is concerned, statistics kept by St Gallen University show that there has – as in the previous year – been an increased trend towards consolidation, with transactions where the purchaser and target belong to the same sector increasing throughout the various sectors. Strong candidates for consolidation were the area of food producers,

Mergermarket Database as at 26 April 2017.
the textile industry, the energy and waste disposal industries and media. In 2015, and, to a lesser extent, in 2016 and 2017, there was also an increased tendency towards consolidation in the real property markets; one highlight in this sector was the takeover of Süddeutsche Wohnen by Deutsche Annington (since renamed Vonovia), which was on of the top 10 deals in 2015. As a result of a number of acquisitions, Vonovia was the first real property company to be included in the German DAX. The chemical industry also showed itself to be strong in consolidation deals, with a share of 74 per cent of all transactions in this sector involving target and purchaser from the same sector. This tendency also underlines the increased strength of strategic bidders in the overall market, in spite of continuing low interest levels that also make transactions particularly attractive for financial investors.

Another notable development that began couple of years ago is the increased presence of activist shareholders in the German market who seek to actively influence the management of a company that they believe is underperforming, or that, in the activist investors’ view, has the potential to return additional value to the shareholders. The approach is not seen as frequently as in the United States but there is a notable increase, partly driven by the same activist investors that have been active in the United States for much longer.

iii Hot industries
In terms of deals in Germany, the industrial products and services sector was very frequently the target sector, followed by the services sector and the computer software sector regarding inbound deals in Germany. With regard to German outbound deals, the industrial products and services sector and the services sector were the most sought after, followed by the computer software sector.8

VI FINANCING OF M&A: MAIN SOURCES AND DEVELOPMENTS
The availability of M&A-related financing has generally been good in 2017, given the extremely low interest environment, and competition for banks from alternative lenders such as debt funds on leveraged buyouts. Mergermarket expects activity to pick up in the upcoming quarters within high consolidating industries such as real estate, agriculture, the food industry and automotive suppliers.9

More stringent regulatory requirements for banks, especially in relation to capital and liquidity, resulting from the implementation of Basel III through CRD IV, CRR and related Regulations, came into force in 2014 (subject to phase-in provisions over the next few years). Contrary to what may have been expected, the actual impact of these regulatory developments on the availability of syndicated bank financings (both senior tranches and, increasingly, also second lien and sometimes mezzanine tranches), both generally and for private equity investors, has been relatively limited. In particular, the increased requirements have apparently not reduced the lending capacity of banks for acquisition financings, at least where the targets were of sufficient quality. It is generally believed that this is a result of the low interest policy of the ECB, combined with asset purchase programme of a size unseen so far, which significantly increased the liquidity in the market and thus overcompensated for any restrictive effect that the new capital and liquidity requirements might otherwise

8 Mergermarket Database as at 19 April 2017.
9 Mergermarket, 'Trend Report Q1 2017: Germany'.

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have had. Contrary to widespread expectations, the ECB has, throughout 2017, not phased out or reduced its purchase programmes in the open market, nor have any significant steps been taken towards an increase of the general interest rate level, contrary also to tendencies in the United States, where the Federal Reserve has at least significantly reduced or tapered out open market purchases. In Germany in particular, these factors have been compounded by the negative real interest on German Bunds, which contributed to a sustained inclination of all actors in the financial market to take risks in return for acceptable yield prospects. Competition on the syndicated lending market therefore continued to be strong.

Capital markets, in particular the high yield bond market in Germany, has remained at a relatively low level. Only a few German domiciled or headquartered issuers tried to tap the high yield bond market, and some of them directly turned to the more liquid US market. Notable bond issues in 2016 included the issue by Schaeffler of a €9.5 billion corporate high-yield bond, the issue by Heidel Cement of a €752 million high-yield bond and the issue by Grenke AG of an €896 million high-yield bond on the Euromarket.10

Another factor contributing to the weak performance of the high-yield bond markets in Germany may have been a renaissance of mezzanine financings and second lien financings, as well as the availability of debt financings from debt funds, in particular unitranche financings (see below). Nevertheless, interest by investors in high-yield bond investments has remained strong, with many issues oversubscribed, in particular for issuers with a rating at the upper end of the sub-investment grade spectrum (e.g., once again – after a successful launch in 2015 – Schaeffler, who issued €9.5 billion equivalent high-yield bonds in one of the largest and most widely reported transactions of this kind in September 2016).

Despite the relative slowdown in 2016, high-yield and crossover bonds documented under German law have generally proven to be a feasible option for the financing and refinancing of private equity acquisitions. They have been successfully placed in the market in various instances as refinancing for German corporate issuers (such as HeidelbergCement, Continental, Phoenix Pharmahandel, KUKA), which shows their marketability. This trend continued in 2017. Issuers of high-yield bonds under German law benefit in particular from two advantages: the documentation of the covenant package is in general shorter and less convoluted, but remains in substance the same as for New York law bonds, which reduces the administrative effort and operational risk for the issuer significantly; and the choice of German law and the jurisdiction of the German courts mitigates the risk of expensive US litigation (in particular in Regulation S offerings, where bonds are not sold in the United States). Thus, German law high-yield bonds remain a viable alternative to New York law bonds and should also be increasingly considered in connection with private equity deals to the extent that marketability of the bonds is ensured.

Finally, there has been a modest renaissance of mezzanine and second lien acquisition financings provided by banks.

As in previous years, club deal financings (mostly by banks) were also seen as a viable option in the segment of small or mid-cap transactions. They continued to be an attractive option for smaller or medium-sized acquisition financing packages, in particular given the stronger relationship of the borrower or sponsor with the financing banks and thus the leaner post-closing communication and administration processes.

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In the current environment of readily available funds at still relatively low margins, a recapitalisation through debt refinancing continues to be an attractive option, especially where a true exit may require further preparations. Even though recapitalisations pose several challenges from a legal perspective, many successfully closed transactions have shown that these can be sufficiently solved. The increase of the leverage ratio to finance the additional cash amounts taken out by the investor require diligent review and monitoring, in particular in respect of capital maintenance rules and liquidity protection rules. A violation of these rules may result in the personal liability of managers of the group companies. As with other types of financing, the refinancing documentation would usually address these issues to a certain extent (such as in respect of the capital maintenance regime) by the insertion of ‘limitation language’ limiting the liability of subsidiaries in respect of upstream and cross-stream securities granted by them. To the extent that cash is upstreamed to the investors (i.e., similar to a ‘super dividend’), however, this requires additional legal and financial analysis of available capital reserves, as well as sound and solid liquidity planning to avoid personal liability risks. Additional leeway can often be created for this purpose by group restructurings, in particular where hidden reserves can be realised. Appropriate measures should also be taken to mitigate insolvency clawback risks that may arise in respect of cash upstreamed by subsidiaries to the investors if the portfolio company becomes insolvent during a hardening period that generally lasts one year. Landmark leveraged financings of German domiciled borrowers include a US$3.8 billion equivalent leveraged financing for ZF Friedrichshafen AG completed in July 2016, a US$2.8 billion equivalent leveraged loan for HSH Portfolio Management AÖR, the ‘bad bank’ of the public bank owned by the states of Hamburg and Schleswig-Holstein, a US$2.5 billion equivalent leveraged financing for Schaeffler, and a US$2.2 billion equivalent loan to Thyssen Krupp AG. Also widely noted was the successful completion of a US$1.1 billion leveraged refinancing in July 2016 by the INEOS subsidiary Styrolution.11

The trends in financial and legal terms outlined above illustrate that financing is available to those who can identify suitable opportunities to invest, and private equity investors continue to be able to raise financings on attractive terms, especially as excess liquidity is still driven by loose monetary policy and the resulting high lending capacity. Changes in financial markets, also affecting private equity acquisition finance, is certainly to be expected from Brexit as well as the change of government in the United States. Brexit and the uncertainties in particular for the financial industry in the United Kingdom resulting from the open questions around the regulatory environment post-Brexit, as well as the open question of whether decisions by UK courts will still enjoy the benefit of direct enforceability under EU regulations, are generally expected to increase the attractiveness of German law credit documentation for financing acquisitions of German targets.

The new government of the United States has announced (and has already partly implemented) significant cuts in regulations for banks, in particular a partial repeal of the Dodd–Frank legislation, which may be expected to result in an increased risk appetite of at least US banks (with a potential pull-effect for European institutions).

VII EMPLOYMENT LAW

The most notable developments in German employment law in 2017 that may be of relevance in an M&A context concern temporary agency workers, business transfers and minimum wage.

i Temporary agency workers

The legal position of temporary agency workers was strengthened significantly by the amendments to the German Act on Temporary Agency Work that became effective in April 2017. However, while the law resolved several previously uncertain issues, new areas of incertitude have been produced thereby.

The key changes introduced by the Act are as follows:

a a general 18-month limit on the use of individual temporary agency workers by a hirer, with re-engagement permissible after a waiting period of more than three months;

b longer maximum terms may be permitted directly through collective bargaining agreements (CBAs), or indirectly through shop agreements concluded on their basis. In fact, CBAs have already been concluded in some industries, most prominently in the metal industry, where a maximum term of 48 months for the engagement of individual temporary agency workers has been agreed upon. Employers not legally bound by CBAs may adopt the maximum length permitted under a regional CBA that applies to their industry.

Agencies may only provide workers employed by them (no chain hiring). Moreover, typical other scenarios of abuse of agency work, for example the use of agreements that on the face of it constitute service contracts, will no longer not be sanctioned: agency workers hired under an agreement that does not explicitly state that it is for agency work will be deemed employed by the hirer. This also applies if the relevant agency holds a valid permit for agency work. However, some of the edge of this change has been taken off by a 2017 precedent of the Federal Labour Court. Previously, in the event of a discrepancy between the formal denomination of an agreement and its actual implementation, for the purposes of the legal qualification of the agreement, the factual situation prevailed (i.e., if agency work was provided although a service agreement had been concluded, the agreement was legally deemed to be one for agency work). Pursuant to the recent ruling, however, this only applies if individuals legally capable of representing the parties are (1) actually aware of and (2) (at least impliedly) approve how the agreement is implemented. Otherwise, the formal denomination of the agreement will prevail.

Agency workers have to be taken into account for the thresholds for co-determination and works constitution purposes as a matter of statutory law. In this context, the Federal Labour Court has requested a preliminary ruling from the European Court of Justice (ECJ) on whether agency workers also count towards the thresholds of mass redundancy proceedings. Finally, agency workers may not be put to work in an establishment affected by a strike.

A key sanction under the Act on Temporary Agency Work is that an agency worker taken out of work in violation of the terms of employment will be deemed employed by the hirer. What is new is that agency workers may object thereto, in which case they will remain employed by the agency. Objection has to be declared in writing within one month of the beginning of a deemed employment and presented to the Federal Labour Agency prior to delivery to the employer or the hirer. This raises issues if the agency worker is unaware of the circumstances giving rise to the beginning of the term for objection. Biding legal precedent.
on the question whether (contrary to the law's wording) the objection period should only begin once the agency worker is aware of the circumstances, this remains another area of uncertainty.

Further to the above, equal pay now has to be provided to an agency worker from the outset of his or her engagement. CBAs may provide for postponement for up to nine or, under limited circumstances, up to 15 months. Employers not bound by CBAs may adopt the rules of regional CBAs for their industry. The concept of equal pay has been defined by the Federal Labour Court as meaning payment of the same aggregate compensation as paid to an employee of the hirer in the same function (i.e., who performs the same tasks) as the agency worker. If the actual function of the agency worker varies over time, separate comparisons have to be made for each function. Despite this, many aspects of what exactly constitutes equal pay remain unclear.

Finally, the Federal Labour Court has ruled on who can be an agency worker: namely, individuals who are not employees, but who perform their work under an obligation resulting from their membership in a registered association, and who are provided to a third party by that association, do constitute agency workers if, in light of the work performed by them, they are legally protected as employees. The decided case concerned nurses of the German Red Cross. On the other hand, a company's sole shareholder cannot constitute an agency worker, even if he or she is 'provided' to a third party, since he or she is not subject to his or her own company's instructions.

ii  Business transfers
In the field of business transfers within the meaning of Section 613a of the German Civil Code, 2017 was another year of stability. The Federal Labour Court has essentially confirmed its stand on a number of previously treated items (e.g., the requirements for a business transfer).

Following a preliminary ruling issued by the ECJ, the Federal Labour Court declared that the German rule, essentially binding a transferee by the content of the employment agreements of transferring employees as if it had concluded those agreements itself, was in compliance with EU law. In the decided case, the employment agreements of transferring employees provided that the CBAs of a certain industry, as amended from time to time, would be applicable to the employment relationships.

In two other rulings, the Federal Labour Court continued to sharpen its stand on the right of an employee to object to a transfer of employment following deficient information letters: it held that forfeiture of the right to object to a transfer does not require any acts demonstrating acceptance of the transfer, provided the employee has worked for the transferee for a sufficiently long period of time following the transfer. The passage of seven years from the later of the business transfer or the expiry of the one-month objection period following receipt of the information letter was found sufficient. However, the decision also made clear that the seven-year threshold is rather strict: in the decided case, the employee’s right to object was upheld even though the threshold was only about a week short of a full seven years.

Further to that, the Federal Labour Court ruled that an employee could no longer object to a transfer following an information letter failing to set out that the transferee was a newly founded company and as such liberated from the requirement to negotiate a social plan in the event of an operational change. Its key argument was that the information letter’s deficit no longer affected the employment relationship as the four-year period during which the privilege was applicable had lapsed.
In other cases in the context of business transfers, the ECJ has ruled (1) that an employer has to honour times of service of transferred employees with a previous employer, except in the context of benefits to which the employee became eligible only because of the transfer (e.g., jubilee benefits under a programme introduced by the new employer), and (2) that if services transfer to a new provider, this will only constitute a business transfer if the new provider directly or indirectly takes over from its predecessor equipment that is necessary for providing those services.

iii Minimum wage

The minimum gross wage of employees across all sectors in Germany was raised to €8.84 per working hour as from 1 January 2017.

In notable decisions on the subject, the Federal Labour Court ruled that compliance with the Minimum Wage Act can be tested by multiplying the actual number of hours worked with the statutory minimum wage. The compensation paid has to be equal to or exceed that amount.

However, payments by an employer only count for the purposes of the minimum wage requirement if they (1) are made in return for work performed and (2) are unconditional and irrevocable. That is to say, payments do not count if they are made as a reward for a purpose other than the actual performance of work or for which statutory law defines a specific purpose (e.g., Section 6, Paragraph 5 of the Working Hours Act) for supplementary payments for work at night-time). Hence, the Federal Labour Court has established that, besides the base compensation, the following compensation elements in principle count towards minimum wage: supplementary payments that are performance-related, or paid for Sunday or holiday work, and service awards paid in the form of a supplementary payment per hour worked. The same goes for annual payments (e.g., a vacation bonus or a service award) that are paid in monthly instalments and payment of which is unconditional and irrevocable. Whether this also applies if the same kind of payment is made annually remains unclear. On the other hand, compensation paid for days of vacation or holiday does not count towards minimum wage claims since these are not paid in return for work performed, but rather for times in which no work is performed.

In another notable decision, the Federal Labour Court held that on-call duty, during which the employee has to stay in a certain place and it can be expected that he or she has to perform work, constitutes working time to which the Minimum Wage Act applies, and which has to be compensated accordingly.

Currently, the question is pending before the Court as to whether exclusion clauses are invalid as a whole or only in part if claims for a minimum wage are not explicitly excluded from their scope. Lower courts have decided both ways.

A number of further issues in the context of minimum wage also continue to involve material risks for an acquirer of a business in Germany: uncertainty as to the treatment of employees under flexible working time regimes and receiving an unvarying fixed monthly compensation remains. So does the risk that principals will not only be held responsible for a general contractor’s compliance with the minimum wage requirements, but rather for any of their subcontractors’. Finally, the much-debated burdensome documentation requirements on industry sectors deemed particularly prone to illicit employment remain in place.
VIII TAX LAW

From a legislative perspective, the year 2017 was overshadowed by the federal election in October 2017. After the election failed to produce a clear winning coalition, it took until the middle of March 2018 for a new government to be formed. As a result, very few major legislative initiatives that could have an impact on German M&A practice were introduced in 2017. New developments, if any, were mostly forced by court decisions and the obligation to implement the rules of the EU Anti-tax Avoidance Directive into German law. Other projects discussed in last year's edition are still pending.

i Distressed M&A

In a landmark decision delivered in February 2017, the Federal Fiscal Court ruled that a ‘restructuring decree’ is unconstitutional because it violates the constitutional principle of legality of administrative actions. The restructuring decree was a tool often used to recapitalise distressed companies in a tax neutral manner. By way of background, the waiver of a loan by a third party creditor leads to a capital gain on the level of the company, subject to corporate income tax and trade tax (approximately 30 per cent). The waiver of a shareholder loan leads to a taxable capital gain to the extent that the shareholder loan is impaired, which is a typical situation for distressed companies. The restructuring decree provided relief from such a tax burden if certain requirements were met, for example that the company has a positive going-concern projection.

The Federal Fiscal Court ruled that the tax authorities were not competent to issue such a far-reaching decree and that a legislative basis in tax law was required. The legislator reacted and introduced legislation that aims to provide tax relief that is of a similar kind to the restructuring decree. However, to avoid this being classified as illegal state aid under EU law, the new legislation will only come into effect once the EU Commission has given its permission. Germany notified the EU Commission in autumn 2017 but, at the time of writing, has not yet received an answer. According to sources familiar with the proceedings, there are indications that the EU Commission might view the legislation as illegal state aid. Should this view prevail, the restructuring of German companies in the future could face significant difficulties without further legislative action.

Moreover, the German tax authorities tried to provide some form of relief by issuing a decree according to which the rules of the restructuring decree could still be applied to debt waivers implemented before and including the day on which the landmark decision of the Federal Fiscal Court had been published (8 February 2017). Even this decree was ruled to be unconstitutional in another decision by the Federal Fiscal Court to which the German tax authorities reacted by issuing yet another ‘non-application decree’, according to which German tax offices shall not apply the latter of the Federal Fiscal Court decisions.

ii Anti-treaty shopping rule

The ECJ ruled in December 2017 that a pre-2012 version of Germany’s anti-treaty shopping rule in Section 50d, Paragraph 3 of the Income Tax Act (ITA) violates the EU Parent–Subsidiary Directive as well as the freedom of establishment principle of Article 49 of the Treaty of the Functioning of the European Union.

Section 50d, Paragraph 3 of the ITA limits the ability of foreign taxpayers to claim a relief from German withholding tax on dividends under applicable double taxation treaties or the Parent–Subsidiary Directive. The provision aims at preventing foreign taxpayers who
would not otherwise be entitled to withholding tax relief to gain such relief by interposing a functionless intermediate company that is entitled to relief. The pre-2012 version of Section 50d, Paragraph 3 of the ITA therefore stipulated that a foreign company is not entitled to withholding tax relief if (1) the foreign company’s shareholders would not be entitled to similar benefits had they received the taxable income directly, and (2) the foreign company lacks sufficient substance. Whether sufficient substance is present was determined by a number of substance tests. These substance tests were (and even in the current version are) rather strict. While the ECJ recognised the authority of Member States to disallow withholding tax relief on mere artificial constructs, it ruled that Section 50d, Paragraph 3 of the ITA was too broad. In particular, it criticised the substance tests for being too general and did not allow the taxpayer to prove that a certain structure was not an abuse of law, even if it nominally failed a substance test. The German Federal Ministry of Finance reacted by publishing a decree, dated 4 April 2018, according to which the current version of Section 50d, Paragraph 3 of the ITA has to be interpreted in light of the ECJ decision to the extent that the current version matches the pre-2012 version. However, this decree only applies to relief claims based on the Parent–Subsidiary Directive, not double taxation treaties. While the decree somewhat lessens the requirements for claiming withholding tax within the European Union, it also creates further uncertainty. It remains to be seen whether legislative action will be taken to bring German anti-treaty shopping rules in line with EU law.

iii German controlled foreign companies rules to be revised
As part of Germany’s obligation to implement the rules of the EU Anti-tax Avoidance Directive into German law, it is also expected that the German rules on controlled foreign companies are going to be revised. However, the exact content and scope of these revisions are as yet unclear, as a first draft of the revised rules was not expected to be published until June 2018.

iv Amendment of the real estate transfer tax rules
German real estate transfer tax (RETT) becomes due not just upon the direct transfer of German real estate itself but also upon certain direct or indirect transfers of shares or partnership interests in real estate-owning companies or partnerships. In particular, RETT is levied:

a on the direct or indirect transfer of 95 per cent (or more) of the interests in the assets of a real estate owning partnership within a five-year period (Section 1, Paragraph 2a of the RETT Act);

b if 95 per cent (or more) of the shares or partnership interests in a real estate-owning company are directly or indirectly transferred to a single person (including related persons) (Section 1, Paragraph 3 of the RETT Act);

c if a person (including related persons) holds, as a result of a transaction, directly or indirectly, 95 per cent (or more) of the shares or partnership interests in a real estate-owning company (Section 1, Paragraph 3 of the RETT Act); or

d if a person holds, as a result of a transaction, a direct or indirect economic interest of 95 per cent (or more) in a real estate-owning company (Section 1, Paragraph 3a of the RETT Act).

The threshold of 95 per cent means that, in practice, share deals are often structured in a way that manages not to trigger RETT. However, there is now a broad political consensus
across party lines to amend the RETT rules with the explicit intention of capturing a larger percentage of share deals. The new legislation was originally expected to be introduced before the end of 2017. However, at the time of writing, draft legislation has yet to be published. As such, very little is known about its content. Nevertheless, it seems realistic that the new legislation will be introduced before the end of 2018.

IX COMPEETITION LAW

In 2017, about 1,300 merger control notifications were reviewed by the Federal Cartel Office (FCO). Despite an increase of roughly 10 per cent compared to the previous year, the total number of notifications still remains relatively low compared to the pre-financial crisis years (2008, almost 1,700 filings; 2007, more than 2,400 filings).

The FCO cleared almost all notified transactions (more than 99 per cent) within the Phase I deadline of one month, similar to previous years. Only 10 transactions raised potential competitive concerns and were reviewed in more detail (Phase II proceedings), which is the same number of cases as in 2016. Of these 10 transactions, the acquisition of Four Artists by CTS Eventim was prohibited, whereas three transactions were cleared unconditionally and one was cleared subject to conditions and obligations.

In five cases, the parties withdrew their filings after the FCO expressed competition concerns about the transactions. The reasons for withdrawal vary. Sanitation wholesalers Cordes & Graefe and Wilhelm Gienger withdrew their filing to address the FCO’s concerns by means of a ‘fix it first’ solution (i.e., the sale of one of Gienger’s subsidiaries in the affected geographical market), allowing them to obtain Phase I clearance upon the refiling of the transaction. The FCO expressed its strong preference for ‘fix it first’ or ‘up-front buyer’ solutions (including a possible withdrawal of a pending filing in close cooperation with the FCO) in its Guidance on Remedies in Merger Control, published in May 2017. On the other hand, the FCO claims that conditions subsequent and obligations are only accepted in exceptional cases because such commitments require the toleration of negative effects on competition, for a certain period at least. The FCO’s guidance paper also indicates that the FCO, which – compared to the European Commission – has so far been outspoken against behavioural remedies, may accept such commitments in the future if a divestment will be deemed an inappropriate response to the competition concerns. Nevertheless, behavioural remedies will still need to have a lasting effect on market conditions (e.g., through access to important infrastructure or technologies) and must not require continuing control by the FCO.

In other cases, the notifying undertakings decided to withdraw their filings after receiving a formal statement of objections from the FCO to avoid a prohibition decision (in the cases of the planned acquisition of Sovitec Mondial SA by Potters Industries LLC and the intended creation of a joint venture between Raiffeisen Waren-Zentrale Rhein-Main eG and Landgard Blumen & Pflanzen GmbH & Co KG). A prohibition decision would set out the FCO’s competitive assessment in detail and could de facto even establish a ruling on the parties’ market power in the public domain after, or even before, the transaction.

Another interesting case in 2017 has been the agreement between Lufthansa and Air Berlin regarding the wet-lease of 38 airplanes. As is common in wet-lease agreements, the responsibility for, inter alia, flight operation, crew planning and maintenance remained with the wet-lease provider, in this case Air Berlin, as did its airport slots. After the European Commission declined its jurisdiction because the wet-lease agreement did not constitute a concentration under the European Merger Control Regulation, the FCO considered
whether the wet-lease agreement needed to be qualified as an acquisition of a substantial part of another undertaking’s assets. Upon its substantive assessment, which did not raise any competition concerns, the FCO could ultimately leave this question open.

It remains to be seen whether the newly introduced transaction value threshold, which entered into effect on 9 June 2017 as part of the Ninth Amendment of the Act against Restraints of Competition (ARC), will further increase the number of merger control notifications. Against the background of the Facebook/WhatsApp transaction, the Ninth Amendment provides for a new Section 35, Paragraph 1a of the ARC. Transactions whereby one party generates a turnover in excess of €25 million in Germany but the turnover of any other party is below €5 million in Germany are now nevertheless subject to merger control if the transaction value exceeds €400 million and the target company has ‘significant activities’ in Germany. The legislator thereby closed a perceived regulatory gap that was widely debated in competition law circles after the Facebook/WhatsApp merger: start-ups and companies offering free services often simply do not generate sufficient turnover to be subject to merger control under the current regime. Hence, the new size-of-transaction test aims to draw those takeovers within the ambit of German merger control and, thus, FCO scrutiny in order to avoid any transactions that could potentially affect the German competitive landscape being implemented without control. While the legislator assumed during the consultation period that only three concentrations will be filed on a transaction value basis per year, the new ‘German activities’ criterion will require further interpretation. A case-by-case analysis will include raising the question whether the undertaking that does not meet the revenue threshold has a significant customer base or a large number of users in Germany (e.g., in the case of a free app) or specifically addresses the German market with a product under development that has not yet reached market maturity. The FCO has announced that guidelines addressing these questions will be published later this year to provide further guidance for the parties’ self-assessment (as pre-merger consultations remain unusual in Germany).

The Ninth Amendment of the ARC contains two further important changes that are relevant for merger control: (1) according to the new Paragraph 2a of Section 18, the fact that services are offered free of charge (i.e., without a monetary payment) does not exclude that fact that there is a market (within the meaning of competition law) for these services; and (2) Paragraph 3a of the same provision will complement the statutory criteria for assessing a company’s market position by factors especially relevant for multi-sided markets and networks, such as direct and indirect network effects, multi-homing and the extent to which users may switch between platforms, economies of scale, access to relevant data and competitive pressure driven by innovation.

Generally, it has become particularly clear during the past two years that there will be a growing focus on digital economy and digital markets by the FCO. Following the 2016 Paper on ‘Market Power of Platforms and Networks’, the authority published a working paper on ‘Big Data and Competition’ in October 2017, which focuses on competition and consumer protection in the digital economy as new digital products and business models emerge that do not only concern telecommunication markets. Access to data has become the key parameter in many industries, including the energy, banking and insurance sectors.
Another important working paper, published in November 2017, focuses on innovation that poses a challenge for competition law practice. After innovation-centred theories of harm took centre stage in global merger cases (e.g., Bayer’s acquisition of Monsanto or Dow’s acquisition of Dupont), the FCO lays out its thoughts about the role of innovation as a competitive and often disruptive force, both in traditional industries and markets and in the digital economy.

The ARC’s response to the trend towards digitisation inspires one more change destined to ‘support’ traditional press publishers. The Ninth Amendment to the ARC lessens the level of scrutiny over cooperation among press publishers. While the new Section 30, Paragraph 2b of the ARC does not affect the applicability of merger control provisions, it exempts certain commercial (not editorial) cooperation agreements between press publishers from the German cartel prohibition in Section 1 of the ARC. Hence, cooperation agreements may become an interesting and suitable alternative to conventional mergers or acquisitions.

X OUTLOOK

Shareholders and the search for innovation continue to drive corporates towards M&A. In the first quarter of 2018, US$890.7 billion was recorded across 3,774 deals, an increase of 18 per cent on Q1 2017’s value of US$754.7 billion (4,672 deals). A clear wave in deal-making in March pushed Europe’s year-to-date figure to its highest post-crisis value. Activity in the first quarter achieved US$256.4 billion (through 1,409 deals), which is 21.6 per cent more than Q1 2017’s already high figure of US$211 billion. This year’s figures were driven by an increased number of mega-deals, with six exceeding US$10 billion, the largest of which was E.ON’s US$46.6 billion acquisition of German-energy firm innogy, accounting for just under a fifth of Europe’s value so far this year.12

I OVERVIEW OF M&A ACTIVITY

Greece is ‘living’ through its eighth year of deep recession and increased levels of unemployment, meaning that the country’s financial recovery is still non-existent. Significant structural problems remain in the Greek economy but, equally importantly, instability has to be overcome. Although the revival of ‘Grexit’ scenarios was pushed back for some time, the continuing lengthy negotiations between the government and the ‘Quartet’ representatives for the appraisal of the implementation of the latest memorandum of understanding and agreement, lasting for several months, are not helpful for the economic environment. Increases in taxation and the launch of a recently introduced new social security system are only causing the situation and the overall investment environment in Greece to deteriorate.

Enterprises remain conservative, maintaining cost-reduction measures on the one hand, and trying to build more efficient corporate structures (e.g., through internal restructuring) and to obtain a more outward focus on the other.

At the same time, the government has started to make some progress with the privatisation procedures already announced as part of the policy framework. After significant delays, the implementation of several projects in the area of privatisations, such as Ellinikon, the privatisation of Thessaloniki port and the privatisation of DESFA, has eventually gone through to a significant extent. In addition, the new ‘hyper-fund’ has been created with the aim of promoting privatisations in a much wider spectrum compared with what was planned some years ago. However, it remains to be seen how the government will finally treat this politically sensitive situation.

In addition, Greece has been heavily involved in the refugee crisis, which has significantly affected an economy and society that was already under pressure, adding further problems to be managed by the government and Greek society, and creating an odd environment in the country.

The private sector, to the extent that it is not dependent on the state, has shown it is capable of surviving despite these difficulties. If the public sector stops draining the economy once the economy stops shrinking, it should be able to grow rapidly and recover relatively quickly.
II GENERAL INTRODUCTION TO THE LEGAL FRAMEWORK FOR M&A

The Greek M&A legal framework mainly includes the following:

a. Codified Law 2190/1920, on public limited companies, which was radically amended in 2007 (Law 3604/2007), and most recently was amended by Law 4308/2014 and Law 4336/2015 (annual financial statements and audits);

b. Law 4172/2013 (tax incentives for business transformations);

c. Law 2166/1993 (tax and other incentives for business transformations (e.g., merger, split, spin-off));

d. Law 1297/1972 (incentives for business transformations);


f. Law 3864/2010 on the Hellenic Financial Stability Fund;

g. Law 3777/2009 on cross-border mergers of limited liability companies (implementation of Directive 2005/56/EC);

h. Law 3401/2005 on prospectuses in the case of public offers of securities (implementation of Directive 2003/71/EC), which was amended by Law 4374/2016 (adopting EU Directives 2013/50 and 2014/51);

i. Law 3461/2006 on public takeovers (implementation of Directive 2004/25/EC);

j. the Athens Stock Exchange Regulation; and

k. Law 3959/2011 on Greek merger control provisions.

III DEVELOPMENTS IN CORPORATE AND TAKEOVER LAW AND THEIR IMPACT

Following a legislative initiative in 2012 to introduce a new corporate entity called a ‘private corporation’ (IKE), this new form is gradually replacing the form of companies with limited companies (EPEs), which were not particularly attractive to the Greek business community because of certain inflexibilities in their mechanisms. The IKE does not have a minimum share capital requirement and it provides for, inter alia, a certain elasticity regarding management and shareholders’ relations. Recent statistics show that the IKE is welcome in the market and has prevailed over the old EPE form.

Requests from the business community concern more important measures that need to be taken to increase the competitiveness of Greek enterprises in their daily operations, such as fast-track permit procedures.

In the field of corporate governance, following a legislative amendment in 2010, listed companies have to implement a corporate governance code. In the absence of any such template code in Greece, the Hellenic Federation of Enterprises (SEV) took the initiative to draft a model Corporate Governance Code, which allows flexibility for companies to adopt it accordingly. In terms of developments, the Hellenic Council of Corporate Governance (HCCG) is a new body jointly created by the Hellenic Exchanges and the SEV, which now bears the burden of monitoring market conditions, interacting with the international environment and improving the proposed corporate governance practices. The combination

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2 Sociétés anonymes, not to be confused with listed companies.
of institutional profile and market awareness are promising indications for the future. The HCCG has concluded the first revision of the SEV’s Code, and the revised, currently applicable Code has now been renamed the Hellenic Corporate Governance Code.

IV FOREIGN INVOLVEMENT IN M&A TRANSACTIONS

As previously mentioned, the business environment in Greece is unfortunately characterised by bureaucracy, administrative procedures and actual disincentives for foreign investors. Despite several efforts to the contrary and a fast-track procedure to attract strategic investments through the Enterprise Greece AE vehicle (a public entity previously called Invest in Greece AE), the results so far are not very encouraging.

Other than that, within the privatisation programme run by the Hellenic Republic Asset Development Fund, the majority stake of Thessaloniki Port Authority was sold to a German-led, French and Russian consortium. Following last year’s failure concerning the sale of 66 per cent of the state-controlled Greek gas operator DESFA SA to SOCAR, the tender was relaunched this year and went through successfully, by awarding the consortium of SNAM-ENAGAS-FLUXYS as the preferred bidder of the process. In this framework, the sale of a minority stake of 25 per cent in the Greek power grid operator, ADMIE, to the Chinese grid operator has also proceeded successfully. Also positive was the sale of the rail company TRAINOSE to Italy’s state railways, which has been successfully completed.

V SIGNIFICANT TRANSACTIONS, KEY TRENDS AND HOT INDUSTRIES

There have been a couple of M&A deals during the past 12 months. In the maritime sector, Blue Star Ferries acquired a majority stake of Hellenic Seaways, an extremely heavy concentration in terms of merger control, which was very recently conditionally cleared by the Hellenic Competition Commission. In telecoms, mobility was easily noted last year, when on the one hand Vodafone was the successful bidder for CYTA, while on the other, the tender process for the sale of Forthnet SA is also in progress. At the same time, the Hellenic Republic Asset Development Fund ran the tender process for the sale of an additional 5 per cent of OTE SA. In the retail sector, last year’s highlight was the acquisition by Sklavenitis over (distressed) Marinopoulos, which was another important consolidation in the Greek retail market. Another interesting deal concerned the entry of CVC Capital into a couple of M&A deals in the health sector, having already acquired both the Metropolitan and IASO hospitals.

The real estate sector has suffered severely from the effects of the crisis, but it seems that gradually there are some slight signs of a comeback. It is worth mentioning that the recent trend in favour of short-term leases (e.g., through the Airbnb platform) have assisted in this development, but the commercial leasing of stores and offices has also started improving.

It is also finally worth noting the trend of several Greek companies to seek an alternative to bank financing through the issuance of bond loans. This tendency has increased in the past year and still continues, and there are several such deals, announced or even completed, including bonds listed on the regulated market of the Athens Stock Exchange.
VI FINANCING OF M&A: MAIN SOURCES AND DEVELOPMENTS

As far as mergers are concerned, there is no practical need for financing since they are implemented through an exchange of shares. Acquisitions can either involve an exchange of shares (which was the case in several past deals, especially in the banking sector) or a cash consideration, in which case financing is required. Such financing normally takes the form of one of the following alternatives:

a. self-funding by the shareholders of the acquiring company: the procedures for an increase in share capital are rather formal, as per the EU directives, especially when made in cash. A main point of interest is the price offered for the new shares to be issued (which cannot be less than market value), because this is linked with the valuation of the company and determines the balance between shareholders; or

b. bank financing, which can either be in the form of a classic bank loan or that of a bond loan (common or convertible) issued by the company: experience shows a tendency in favour of bond loans due to their favourable tax and other treatment, as well as due to the easy transfer of bond titles, if needed. It cannot be ignored that, contrary to the recent past, the severe financial situation has heavily affected and practically eliminated bank financing for M&A.

In a case of intra-group financing, attention should be paid to the applicable provisions of Law 2190/20 regarding ‘related party’ agreements. In any case, one must also be cautious about the arm’s-length principle, which was recently introduced as being mandatory by virtue of market policy provisions.

VII EMPLOYMENT LAW

Employment legislation was not further developed during 2017 or to date in 2018 as far as M&A is (directly) concerned, except for a couple of provisions pertaining to the protection of employees’ rights in the case of ship transfers (as part of the business to be transferred).

On the one hand, there is a plethora of special provisions of law regarding, inter alia, mergers and restructurings of state-owned enterprises (SOEs) and within the banking sector. Numerous provisions have been further instituted on an ad hoc basis to regulate the employment relations of specific state organisations (see, for instance, Article 3 of Law 4138/2013 regarding the merger of local development organisations). However, no generally applicable rule can be derived therefrom that would be of any interest for the private sector; past governments very often established special legislative texts for M&A of SOEs due to their politically sensitive nature.

On the other hand, as a general rule, in the case of a merger there is a full succession of the surviving (absorbing) entity regarding all the rights and obligations of the merged company. Accordingly, the latter becomes fully liable for any and all labour obligations of the former. In the case of acquisitions, there are protective provisions regarding ‘transfer of business’ (implementation of European law) that provide that both the transferor and the transferee shall be jointly and severally liable in respect of labour obligations that existed at the date of transfer. It is worth mentioning that the means of transfer (i.e., if it takes place via a contract – even an invalid one – or by law, or even by a simple assignment of the operation of the business without transfer of tangible or intangible assets) is irrelevant, but the transfer and succession in the employer’s position is examined on a case-by-case basis.
Since 2010, it has been expected that the downturn in the Greek market and the crisis in the Greek economy would generally give rise to significant changes in employment law, which might not refer directly to M&A topics, but which would nevertheless have an impact, since the labour perspective is generally a critical point of assessment in an M&A deal. As part of the agreement for the financial support of the country, Greece undertook to proceed quickly with radical changes in many sectors of the Greek economy and in the labour market. The main areas that have been affected from a labour law perspective are as follows:

1. introducing restrictions in the system of collective labour agreements or negotiations, and a more flexible regime;
2. abolishing the procedure of referring collective labour disputes to the organisation for mediation and arbitration;
3. increasing the thresholds in the case of group dismissals and, eventually, abolishing the authorities’ prior approval;
4. decreasing severance pay and allowing its repayment in instalments;
5. introducing more flexible employment terms *(sub minima)* for workers under the age of 25;
6. extending probationary periods, facilitating greater use of part-time work, moderating wages for overtime and introducing remuneration connected to the productivity of the business; and
7. keeping salaries temporarily frozen (initially) for three years after the conclusion of the previously mentioned memorandum.

There have been quite a few examples of the implementation of the above-mentioned guidelines during the past seven years. For instance, the Ministers’ Council issued Act No. 6/2012, which instituted an obligatory decrease of 22 per cent in minimum wages under the national collective labour agreement, and abolished the possibility of unilaterally resorting to arbitration in cases where collective bargaining fails. Law 4093/2012 further reduced the termination severance (mainly by preventing the accrual of seniority rights after November 2012), facilitated the split of annual leave, decreased the requirements for the operation of temporary work agencies and instituted a number of additional favourable provisions for the labour market. Most importantly, however, Law 4093/2012 abolished the system of determining the minimum wage through collective bargaining procedures by introducing the minimum wage itself. Finally, it vests the government with the power of adjusting the minimum wage.

In general, the purpose of the above amendments was to reduce the cost of labour and make the Greek employment market more competitive. On the other hand, various provisions have been instituted to protect vulnerable groups, such as older employees. Thus, it is obvious that, due to the financial support of EU Member States and the International Monetary Fund, Greece has been obliged to proceed more quickly to implement those measures to ensure the ‘flexicurity’ of the employment market.

However, based on the experience of recent years, the measures implemented so far have not efficiently served these purposes. The above situation, apart from rendering any reforms ineffective, has made it unclear whether each provision of this multitude of recent laws affecting the employment terms in the public and private sectors would survive if contested before the Greek courts. There had been various judgments of first instance courts (within the framework of injunction measures) that considered certain provisions concerning public sector employees as being contrary to the provisions of the Greek Constitution and European
law. In addition, such legislative initiatives of the government had raised multiple concerns by the Committee on Freedom of Association of the International Labour Organization’s governing body, especially as to what regards the weakening and eventual abolishment of collective bargaining rights and the overall scope of collective bargaining laws.

In 2014, the Administrative Supreme Court found certain provisions of Ministers’ Council Act No. 6/2012, and in particular the ones requiring the consent of both parties (employer and trade union) for the initiation of an ‘intermediation and arbitration process’, to be non-compliant with the constitutional provisions, which led to the ‘reinstatement’ of the previous regime of the unilateral application of the interested party (Law 4303/2014).

In 2016, the government launched a dialogue regarding the introduction of a new social security system, which was, however, rejected by, *inter alia*, the trade unions and professional associations. The draft bill comprised several structural changes in the area of social security, with the major ones being to have all social security funds and organisations merged into one; and the implementation, for all categories of employees, self-employed persons and other professionals, of a uniform treatment with regards to the calculation of their contributions based on their annual or monthly income falling within the range of 25 to 36 per cent. There were a variety of reactions about this restructuring of the social security concept (e.g., Greek lawyers abstained from their duties for almost six months), but the government managed to pass the legislation (Law 4387/2016). In terms of employment, a direct impact of the recent Social Security Act is employees being subject to more than one social insurance organisation (e.g., through being employees and self-employed at the same time), who are now required to pay more (approximately double) social security contributions without being entitled to additional pension amounts.

In 2017, Law 4472/2017 introduced a radical change pertaining to the collective dismissals legal framework by abolishing the ministerial veto that used to apply under the previous legal regime, which provided for an information and consultation procedure between the parties involved as well as the prior approval of the competent authorities in cases where the parties failed to reach an agreement. New Law 4472/2017 set out a different procedure on collective layoffs, including the extension of the consultation process of up to 30 days and the ‘supervision’ of the procedure by a new supervising body, the Supreme Labour Council. Pursuant to these new statutory provisions, the Supreme Labour Council is now in charge of the collective layoffs process, and is also responsible for checking whether the employer has abided by the consultation and information requirements set out in law. If the Supreme Labour Council finds that these requirements have been met, the employer is free to proceed with the intended group dismissal. On the other hand, non-compliance with these requirements would be the only reason for the government to discontinue a collective redundancy process, in the sense that the government’s role is now limited to the inspection of the existence of these typical consultation requirements.

Until very recently, Presidential Decree 178/2002 on the protection of employees’ rights in the event of transfer of business (which harmonised EU Directive 2001/23) was not applicable in the case of ship transfers. Through Law 4532/2018, said protection is now extended to transfers of ships under the Greek flag, but only when they are part of the business to be transferred and on the conditions set forth in the Law 4532/2018.
One of the first measures adopted by the parliament directly after the conclusion of the July 2015 agreement with the EU institutions was the adoption of a new Civil Procedure Code. Law No. 4335/2015 has introduced amendments in most areas of civil disputes aimed at expediting the process up to the hearing of cases (which, prior to this change, could take more than three to four years). The new Code provides that the whole process starts with the filing of a claim, without setting a more specific date for its hearing, which will take place within a maximum of 160 days from its submission. The process is concluded without a real hearing, and based only on documents and affidavits of the parties, while the presence of barristers is no longer necessary and grounds for the deferral of a hearing are practically abolished. Furthermore, the new Code has adopted a much quicker process for the enforcement of judicial decisions and a swift procedure for the collection of debts. The new Code came into force on 1 January 2016.

The first couple of years of implementation showed a slight improvement in the courts’ addressing of civil cases and delivering judgments more speedily, but it is still too early for any conclusion about the success of the new process. It seems, however, that the courts have adapted to the new situation, and ‘hearing dates’ are now set within two to three months from the final submission of the pleadings of the litigants.

A new tool for dispute resolution was introduced in the past 12 months with the aim of helping the government in its effort to relieve the courts regarding the volume of cases and claims pending. Law 4512/2018 provides for a compulsory mediation before the start of any judicial proceedings in certain areas of day-to-day business activity (e.g., disputes over trademarks, patents and IP rights in general may not be submitted to resolution to the competent court before the claimant can prove that mediation has been attempted but failed). Other kind of disputes that have to be addressed through mediation before any submission of claims to the competent courts are, among others, claims based on medical malpractice, compensation and claims from car accidents, collection of professional fees and claims based on stock exchange contracts. Mediators should be accredited to the Central Mediation Committee, and are full-time professionals with special training on mediation techniques. The Law provides that the maximum length of the mediation process is 24 hours in total (which may be extended by the parties), and for a short period for the conclusion of the process within 15 to 30 days from the appointment of the mediator. This process is going to be implemented on October 2018 after the accreditation of the new mediators.

Following the complete replacement of the Code of Income Taxation (CIT) and the introduction of a new Code of Fiscal Procedure, both of which came into force on 1 January 2014, as of 1 January 2015 the Greek Accounting Standards (Law 4308/2014) abolished the Code of Transactions Tax Reporting and the Greek accounting legislation, thereby becoming more compliant with the International Accounting Framework.

During 2016 and the first part of 2017, changes in the tax legislation continued, mostly aiming at implementing reforms agreed by the government within negotiations for financial support and enhancing the collection of public revenues, but also adopting EU rules and complying with commitments under international treaties.
The most important tax issues are as follows.

i  **Transfers of shares**

From 1 January 2014, any capital gain that derives from a transfer of shares of non-listed companies is subject to a 15 per cent tax if the transferor is an individual (Articles 42 and 43 CIT). In the case of legal entities, the capital gain shall be added to the gross income and, should there be a profit from the business activity, it shall be subject to the tax rates that apply to income from business activities (i.e., 29 per cent). For the calculation of the capital gain, the acquisition cost is deducted from the price.

The aforementioned tax is also imposed on the transfer of shares of listed companies provided that the following conditions are cumulatively met: the transferor participates in the share capital of the company with a stake of at least 0.5 per cent, and the shares to be transferred have been purchased after 1 January 2009. In any case, a tax on stock market transactions is also imposed.

ii  **Corporate income tax rate**

The corporate income tax rate for public limited companies, limited liability companies, private capital companies, Greek branches of foreign corporations and, in general, any company that maintains double-entry accounting books, which was raised from 20 to 26 per cent for fiscal year 2014 onwards, was further raised to 29 per cent for fiscal year 2015 onwards (Article 58, Paragraph 1 CIT).

iii  **Taxation on dividends**

For profits distributed from 1 January 2017 onwards, a withholding tax of 15 per cent is applicable on dividends. Until 31 December 2016, the rate of said tax was 10 per cent.

Withholding of the aforementioned tax exhausts the tax liability, provided that the taxpayer is an individual (Article 36 Paragraph 2 CIT) or a legal entity that is not a Greek resident and does not have a permanent establishment in Greece (Article 64 Paragraph 3 CIT). Under specific conditions, which are set out by Article 63 CIT (adopting Directive 2011/96/EC), intra-group dividends may be totally exempt from withholding taxation.

Dividends distributed to Greek legal entities or legal entities with a permanent establishment in Greece are also subject to withholding tax of 15 per cent, although an exemption under the conditions of Article 63 CIT may apply in the case of intra-group dividends. However, their income from dividends is added to their annual gross income and taxed as a profit at a rate of 29 per cent. In such a case, the tax withheld is credited against the tax payable.

Pursuant to Article 48 CIT, intra-group dividends received by a legal entity that is a tax resident of Greece are totally exempt from tax, provided that:

a  the recipient holds a minimum participation of at least 10 per cent of the value or number of the share capital, core capital or voting rights of the legal entity that makes the distribution of profits;

b  the aforementioned minimum participation is held for at least 24 months; and...
the legal entity that makes the distribution of profits:
• has a legal status that is included in the list of EU Directive 2011/96/EC;
• is a tax resident of an EU Member State, in accordance with the laws of that state, and may not be considered as a tax resident of a third country (non-EU Member State) by virtue of the double taxation treaty that has been signed with that third country; and
• is subject to one of the taxes listed in EU Directive 2011/96/EC.

In such cases, dividends received by the legal entity must form a tax-free reserve until they are further distributed to the entity’s shareholders.

For fiscal year 2016 onwards, for intra-group dividends to be exempt from taxation, in addition to the current applicable conditions a new condition has been introduced by virtue of which intra-group dividends are exempt from taxation to the extent that the respective dividends have not been deducted by the subsidiary (Directives 2014/86/EC and 2015/121/EC).

However, according to a recent amendment of the tax legislation, the aforementioned exemptions (of Articles 48 and 63 CIT) shall be alleviated in cases where it is considered that a 'non-genuine arrangement’ exists (i.e., an arrangement that has not been put into place for valid commercial reasons reflecting the economic reality).

iv Transfer pricing

The new CIT and the Code of Fiscal Procedure include transfer pricing (TP) provisions that differ in some ways when compared to the previous legal framework, and that are applicable for fiscal years starting as of 1 January 2014. It should be noted that under the new legal framework, an advanced pricing agreement may be established with the Ministry of Finance.

Taxpayers having intra-group transactions exceeding the thresholds provided in the above legislation have two main obligations: preparation of a TP report for the documentation of intra-group transactions within the deadline for submission of the annual tax return (the report is submitted to the tax authorities upon request and within 30 days of the request), and the filing of a summary information table within the same deadline. TP legislation provides serious penalties for the violation of the arm’s-length principle and for the failure to comply with the above obligations. There are also new penalties provided for the inadequacy, inaccuracy or late submission of the summary information table and TP report. Finally, the new TP legislation specifically refers to the OECD Transfer Pricing Guidelines for the documentation of intra-group transactions. There are also various circulars of the Ministry of Finance issued to date that establish special rules for the documentation of intra-group transactions.

v Losses

In accordance with the new CIT, losses incurred abroad cannot be used against profits of the same tax year or against future profits unless there is income that derives from other EU or EEA Member States and there is no provision in a double taxation treaty that provides a tax exemption for it. By virtue of a recent Circular issued by the Ministry of Finance, losses incurred abroad shall be monitored per country and may be used against future profits incurred in the same country. Moreover, by virtue of a more recent Circular, before the deduction of said losses in Greece, Greek entities shall need to prove before the Fiscal Authorities that they have made every effort to deduct losses abroad and have failed to do so.
In addition, if, during a fiscal year, direct or indirect ownership of the share capital or voting rights of a company is changed by more than 33 per cent of its value or number, the transfer of losses ceases to apply as regards losses incurred during that fiscal year and the previous five years, unless it is proven by the company that the change of ownership has been exclusively made for commercial or business purposes, and not for tax-avoidance or tax-evasion purposes.

vi Deductibility of interests – thin capitalisation rules

According to the CIT, interests are not recognised as deductible business expenses to the extent that the surplus of the interest expenses against income from interest exceeds a rate of 30 per cent of taxable profits before interest, taxes, depreciation and amortisation (EBITDA). The aforementioned rate used to be higher during previous fiscal years, and was gradually reduced.

However, interest expenses shall be recognised as fully deductible business expenses up to the amount of €3 million net-registered interest expenses per year. Any interest expense that is not deductible pursuant to the aforementioned rules shall be carried forward with no time limit. This does not apply to credit institutions, or to leasing and factoring companies.

vii The new CIT definitions and provisions

The new CIT introduces certain new definitions and provisions, the most important being terms for ‘legal entity’ and ‘legal form’, and the introduction of the ‘true place of exercise of management’ criterion.

The Code of Fiscal Procedures introduces definitions of tax avoidance, whereas a general anti-abuse clause has been introduced pursuant to which ‘the tax administration can ignore an artificial arrangement or series of arrangements put into place for the purpose of avoiding taxation and leading to a tax benefit’.

viii Statute of limitations

The statute of limitations period varies depending on the category of tax and the fiscal year.

The basic statute of limitations is five years.

For income tax for the fiscal years up to and including 2013, it may be 10 years under certain circumstances.

For a very long time, the expiry of the statute of limitations has been continuously extended by special laws. According to a very recent decision of the Supreme Administrative Court in Plenary Session, in brief, such extensions of the statute of limitations have been judged to violate the Constitution.

As of 1 January 2014, the statute of limitations in cases of tax evasion, which covers a very broad number of cases, is 20 years. This statute of limitations also applies to fiscal years that had not been time-barred on 1 January 2014. However, by virtue of a more recent opinion given by the state’s Legal Council, the 20-year statute of limitations shall not be applicable for fiscal years up to and including 2011.

Another aspect of the statute of limitation concerns fiscal years 2011 to 2013, during which the tax audit for sociétés anonymes was required to be carried out by a Greek certified auditor issuing a tax certificate under the then-applicable Law 2238/1994. According to certain jurisprudence, the tax authorities do not have the right to conduct an audit on sociétés anonymes with no comments in the tax certificate after the lapse of 18 months from the end of each relevant year unless exceptional circumstances exist.
For periods starting from 1 January 2014 onwards, acquisition of an annual tax audit certificate does not affect statute of limitations.

X COMPETITION LAW

Merger control provisions are included in Law 3959/2011 regarding Protection of Free Competition (Articles 5 to 10) and are enforced by the Hellenic Competition Commission (HCC), an independent administrative authority.

The Greek merger control system provides for pre-notification to the HCC (30-day deadline) in cases of concentration where the following two thresholds are cumulatively met: all participating enterprises have an aggregate worldwide turnover exceeding €150 million, and at least two of them each has a national (Greek) turnover of at least €15 million. In such a case, the transaction cannot be completed without the clearance of the Competition Commission. The latter theoretically has the power to block a transaction (but has not blocked any application to date).

There is currently no post-notification obligation for ‘minor’ mergers under Greek law.
Chapter 21

HONG KONG

Jason Webber1

I OVERVIEW OF M&A ACTIVITY2

Compared to 2016, M&A activity in Hong Kong in 2017 increased significantly in terms of total deal value and remained at a similar level in terms of the total number of deals. There was a 169.2 per cent increase in the value of M&A deals announced in 2017 compared to 2016, with a total of 878 announced deals and a total disclosed value of US$113.63 billion in 2017 compared with a total of 823 announced deals and a total disclosed value of US$42.21 billion in 2016. Similarly, there were 488 M&A deals completed in 2017, with a total disclosed value of US$69.49 billion, an increase of 86.9 per cent compared with the 485 M&A deals completed in 2016, with a total disclosed value of US$37.18 billion.3

The Hong Kong securities markets showed a significant increase in terms of market capitalisation and in terms of trading activity in 2017. The total market capitalisation at the end of 2017 was HK$33.9988 trillion, 37.3 per cent higher than the year-end total in 2016. Total securities market turnover in 2017 was HK$21,709.2 billion, an increase of 32.4 per cent compared with 2016. A total of 174 companies were newly listed on the Stock Exchange of Hong Kong Limited (SEHK) in 2017, and the total amount of equity funds raised on the SEHK in 2017 was approximately HK$581.39 billion.4

II GENERAL INTRODUCTION TO THE LEGAL FRAMEWORK FOR M&A

The law governing mergers and acquisitions comprises primary legislation, regulatory rules, the law of contract and case law.

The primary legislation that applies principally to Hong Kong-incorporated companies in general is the Companies Ordinance (CO) and includes provisions relating to financial assistance for the acquisition of a company’s own shares, merger relief, transfers of shares and schemes of arrangement affecting mergers. The Securities and Futures Ordinance (SFO) is also relevant, covering the regulation of offers of securities, and the communication of invitations and inducements to engage in securities transactions.

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1 Jason Webber is a partner at Slaughter and May. The author would like to thank Nicola Lui and Moonar Tsoi for their assistance in preparing this chapter.
2 Statistics on mergers and acquisitions involving Hong Kong companies differ significantly among various sources. This summary covers all M&A activity in which Hong Kong was the target region between 1 January 2017 and 31 December 2017.
3 Source: Thomson Reuters.
For companies in certain industries, there is also specific legislation that may be relevant, for example:

a. the Banking Ordinance for banking, restricted licence banking and deposit-taking companies;

b. the SFO for securities, financial advisory and asset management companies;

c. the Broadcasting Ordinance (BO) and the Telecommunications Ordinance (TO) for radio, television broadcasting and telecommunications companies; and

d. the Insurance Companies Ordinance for insurance companies.

Prior approval of ownership changes from the relevant regulatory bodies may be required under the legislation listed above.

If an M&A transaction involves a company whose shares are listed on the SEHK, the Rules Governing the Listing of Securities on The Stock Exchange of Hong Kong Limited (Listing Rules) will also apply. In addition, the Securities and Futures Commission (SFC), in consultation with the Takeovers and Mergers Panel (the Panel) – a committee formed by the SFC pursuant to the SFO – has issued the Code on Takeovers and Mergers and Share Buy-backs (the Takeovers Code), which applies to takeovers, mergers and share buy-backs affecting public companies in Hong Kong and companies with a primary listing of their equity securities in Hong Kong. The Takeovers Code is not statutory and does not have the force of law, but the Listing Rules expressly require compliance with the Takeovers Code. As a non-governmental statutory body, the SFC regulates the securities and futures markets in Hong Kong and oversees the development of these markets. Its decisions apply to M&A of public companies.

Since Hong Kong is a common law jurisdiction, the law of contract (which is largely derived from English law) and case law also form an important part of the legislation governing M&A.

III DEVELOPMENTS IN CORPORATE AND TAKEOVER LAW AND THEIR IMPACT

i The Takeovers Code

To ensure that the Takeovers Code takes account of market developments and developing international practice, it is kept under regular review by the Executive of the SFC, in consultation with the Panel. On 19 January 2018, the SFC published a consultation paper on

5 The Takeovers Code states that all circumstances are to be considered, and an economic or commercial test is to be applied (taking into account primarily the number of Hong Kong shareholders and the extent of share trading in Hong Kong), in deciding whether a company is a 'public company'. For the purposes of the CO, a private company is a company incorporated in Hong Kong that, by its articles of association, restricts the right to transfer its shares; limits the number of its members to 50, not including persons who are in the employment of the company and persons who, having been formerly in the employment of the company, were, while in that employment, and have continued after the termination of that employment to be, members of the company; and prohibits any invitation to the public to subscribe for any shares or debentures of the company (Section 11 of the CO).

6 Under the 'one country, two systems' approach, implemented after the transfer of sovereignty over Hong Kong to the People's Republic of China (China) on 1 July 1997, Hong Kong remains a common law jurisdiction.

7 English case law has persuasive authority only and is subject to interpretation by the Hong Kong courts.
certain proposed amendments to the Takeovers Code, one of which is an upwards revision of the voting approval threshold for whitewash waivers from a simple majority of independent votes to 75 per cent.

ii Listing Rules

The Listing Rules reflect currently acceptable standards in the marketplace and are designed to ensure that investors have, and can maintain, confidence in the market. To ensure that the Listing Rules take account of market developments and developing international practice, the SEHK regularly reviews the Listing Rules and may, subject to the approval of the SFC under Section 24 of the SFO, make amendments to the Listing Rules. On 24 April 2018, the SHEK announced that three new chapters will be added to the Listing Rules, and other consequential amendments to the Listing Rules will be made to:

a permit listings of biotech issuers that do not meet the financial eligibility tests under the Listing Rules;
b permit listings of companies with weighted voting right structures; and
c establish a new concessionary secondary listing route for Greater China and international companies that wish to secondary list in Hong Kong.

Certain investor safeguards and additional disclosure requirements have also been proposed as the SHEK recognises the potential risks associated with pre-revenue companies and those with weighted voting right structures. The amendments to the Listing Rules came into effect on 30 April 2018. These amendments are expected to result in a strong IPO pipeline and a corresponding increase in pre-IPO investment activity.

iii The CO

The CO came into effect on 3 March 2014. Various key concepts under the CO that are relevant in the context of M&A are as follows:

a the requirements for approving a scheme of arrangement differ depending on the type of scheme. For privatisation schemes and members’ schemes involving a takeover offer or a general offer, the ‘disinterested shares test’ (which requires ‘not more than 10 per cent of the total voting rights attached to all disinterested shares [to be] voted against the proposal’) applies so as to align with the requirement under the Takeovers Code in the context of a takeover. The headcount test (which requires that a majority of the shareholders of the ‘target’ company voting on a scheme of arrangement (either in person or by proxy) must vote in favour of it) applies to creditors’ schemes and members’ schemes not involving a takeover offer or a general offer, and in these situations, the court is given discretion to dispense with the test in appropriate circumstances;

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8 Source: Consultation Paper on proposed amendments to the Codes on Takeovers and Mergers and Share Buybacks, SFC (https://www.sfc.hk/edistributionWeb/gateway/EN/consultation/openFile?refNo=18CP1).
a company and its wholly owned subsidiaries may amalgamate and continue as one company without the sanction of the court, provided that certain conditions are met. Such conditions include, for example, that each amalgamating company is a Hong Kong incorporated company limited by shares, that each amalgamating company is solvent and that no creditor of an amalgamating company will be prejudiced by the amalgamation;

c there is a general prohibition on both private and public companies providing financial assistance for an acquisition of shares in itself, and streamlined ‘whitewash’ procedures are extended to listed companies. In addition, it is expressly provided that a company is not prohibited from giving financial assistance for the purpose of an acquisition of shares in its holding company if the holding company is incorporated outside Hong Kong; and

d companies now enjoy more flexibility in structuring and organising their share capital in light of the updating of certain concepts relating to share capital (par value (or nominal value), share premium and the requirement for authorised capital have been abolished). Despite the absence of share premium, merger relief continues to be available. The amount required to be recorded as share capital in respect of the consideration shares issued by an acquiring company is the subscribed capital attributable to the acquired shares.

Significant controllers register

From 1 March 2018, all Hong Kong incorporated companies (except those listed in Hong Kong) are required to create and maintain a register of significant controllers pursuant to Part 12 of the CO. A company’s ‘significant controllers’ are, in broad terms, natural persons, and corporate entities immediately above the company in the ownership chain, with significant control over the company. The new regime reflects the government’s commitment to combat money laundering and terrorist financing by enhancing the transparency of company ownership and control.

On 6 April 2018, the government published the Companies (Amendment) Bill 2018, which seeks to amend certain provisions of the CO to improve its clarity and operation and to further facilitate business in Hong Kong. The Companies (Amendment) Bill 2018 will be presented to the Legislative Council for debate, and its content may be further amended in the process before it is enacted as an ordinance.

IV FOREIGN INVOLVEMENT IN M&A TRANSACTIONS

Given Hong Kong’s position as a hub for investment into China, its status as a major regional financial centre, and the widespread use of offshore companies for investment into and out of China, a substantial number of transactions have foreign involvement, including in the form of acquisitions by offshore companies. An analysis by reference to foreign involvement in transactions is therefore not particularly meaningful.

V SIGNIFICANT TRANSACTIONS, KEY TRENDS AND HOT INDUSTRIES

A key trend observed in 2017 was the increased use of consortium structures involving both private equity and strategic investors to undertake acquisitions as a means to share risk and create value through synergies, examples of which include the COSCO Shipping Holdings Co, Ltd acquisition described below, and the privatisation of Belle International Holdings
Limited by a consortium led by HillHouse Capital Group and CDH Investments in July 2017. Another trend was increased investment in the fintech sector. As a result of regulatory and government support for fintech development in Hong Kong and corresponding efforts to position Hong Kong as a leading fintech hub, there were numerous notable transactions in the fintech sector in 2017, including the MassMutual Asia Limited acquisition described below.

The most active sectors for M&A activity in Hong Kong in 2017 included real estate, financial services and consumer. It is expected that interest in these sectors will continue in 2018, together with increased interest in the telecom and technology, and the energy and infrastructure sectors as a result of support for fintech development and the opportunities available under China’s One Belt, One Road initiative.

There were numerous high-profile M&A transactions in 2017. In July 2017, a consortium formed by COSCO Shipping Holdings Co, Ltd, a Hong Kong and Shanghai listed company engaged in container shipping and related businesses, and Shanghai International Port (Group) Co, Ltd, a Chinese state-controlled port operator, made a voluntary pre-conditional cash offer to acquire all of the issued share capital of Orient Overseas (International) Ltd for approximately US$6.3 billion. Orient Overseas is a Hong Kong-listed company engaged in container transport and logistics services. It is expected that after completion, the combined entity will become the third-largest container liner globally, and that the acquisition will help strengthen the position of COSCO Shipping Holdings Co, Ltd in the global container shipping industry by creating synergies and enhancing operational efficiencies.

In August 2017, Yunfeng Financial Group Limited, a Hong Kong-listed company with a fintech focus that is principally engaged in the provision of financial services, and other investors agreed to acquire all of the issued share capital of MassMutual Asia Limited, an insurance company in Hong Kong that offers a broad spectrum of insurance and wealth management products, from MassMutual International LLC for an aggregate consideration of HK$13 billion. It is expected that the acquisition will broaden Yunfeng Financial Group Limited’s product portfolio, significantly contribute to the development of its financial services ecosystem and widen its customer reach. In connection with the acquisition, Yunfeng Financial Group and MassMutual also entered into a strategic cooperation agreement to explore future business opportunities.

As a significant number of companies whose shares are listed on the SEHK have controlling shareholders, there is not a large number of unsolicited M&A offers.

VI FINANCING OF M&A: MAIN SOURCES AND DEVELOPMENTS

In common with many other jurisdictions, Hong Kong’s Takeovers Code requires an offeror to have certainty of funds to make an offer for a public company. Under the Takeovers Code, in an announcement of a firm intention to make an offer, that announcement should include a confirmation by a financial adviser (or another appropriate third party) that resources are available to the offeror sufficient to satisfy full acceptance of the offer (a sufficiency statement). Such confirmation is not only required when the consideration is cash, or includes an element of cash, but is also required when the consideration consists of, or includes, any other assets except new securities to be issued by the offeror. The executive may also require evidence to support the sufficiency statement, and evidence that the offeror has sufficient resources to complete the purchase of shares that gives rise to the offer obligation.
Depending on how the acquisition is structured, M&A transactions in Hong Kong are usually financed by:

- internal resources;
- shareholders’ loans;
- equity issues;
- debt issues;
- loan facilities from banks and financial institutions; or
- a combination of two or more of the above.

**VII  PENSIONS AND EMPLOYMENT LAW**

Under Hong Kong law, there is no specific regulation that provides for the transfer of employment contracts when there is a change of ownership of a business, as opposed to an employing company. Employment contracts would therefore be terminated in the case of an acquisition of a business, and the new employer would have the freedom to decide whether to enter into new employment contracts with existing employees. However, generally speaking, where termination of an employment contract takes place due to a transfer of business, this would constitute redundancy, and employees previously employed may be entitled to severance payments and long-service awards, for which the old employer would be liable. However, under Sections 31J and 31C of the Employment Ordinance (EO), severance payments and long-service awards are not payable in the case of a business transfer if, not less than seven days before the end date of an employee’s previous contract, the new employer has offered to renew that employee’s contract, or to re-engage him or her under a new contract, on no less favourable terms and conditions, and the employee has unreasonably refused that offer. If an offer of renewal or re-engagement is accepted by the employee, the new contract has effect as if the renewal or re-engagement had been a renewal or re-engagement by the old employer without any substitution of the new employer; therefore, the employment relationship will be regarded as being ‘continuous’ for the purposes of the EO. Any redundancy issues that may arise in future disposals of the business would therefore be passed to the new employer after the renewal or re-engagement.

Generally speaking, under the Mandatory Provident Funds Schemes Ordinance (MPFO), an employer must enrol its employees as members of one of the registered MPF schemes (as defined in the MPFO) available in the market in Hong Kong. An employer may enrol different employees in different registered schemes. During the contribution period (as defined in the MPFO), the employer must contribute to the registered scheme from its own funds an amount determined in accordance with the MPFO, and deduct from the employee’s relevant income for that period as a contribution by the employee to the scheme a further amount determined in accordance with the MPFO. Employees and employers may make additional voluntary contributions to the employee’s scheme.

Where there is a proposed disposal of a business, the existing employer and the proposed new employer should consider the implications of the MPFO and arrangements to deal with the accrued benefits of employees under the applicable MPF scheme. If a merger or

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10 Section 31J of the EO.
11 Subsection 3 of Section 31J of the EO and Paragraph 5 of Schedule 1 of the EO.
12 Under the MPFO, an ‘employer’ means any person who has entered into a contract of employment to employ another person as his or her employee.
acquisition is to be effected by way of a share sale, it is not likely that there will be any MPF implications (unless the relevant target company is spun out from a group of companies that operates a group-based scheme), as the merger or acquisition will not involve a change of employer. The surviving party or acquirer would nevertheless be well advised to carry out due diligence to ensure that all target employees are employed by the target company on terms that comply with the MPFO.

However, if the merger or acquisition is to be effected by way of a business transfer involving a change of employer, the employee must, in accordance with Section 14 of the MPFO, elect to transfer the accrued benefits to a contribution account\(^\text{13}\) under the new employer’s MPF scheme; retain the accrued benefits in the previous MPF scheme under a preserved account\(^\text{14}\); or transfer the accrued benefits to a preserved account of another MPF scheme.

Both the seller and the buyer must observe and comply with the requirements of the MPFO with respect to the transfer of the accrued benefits of employees.

On 1 May 2011, the Minimum Wage Ordinance came into effect in Hong Kong and introduced a statutory minimum wage.

VIII TAX LAW

Hong Kong’s competitive economy is reflected in the transparency, predictability and simplicity of its low-rate tax system. These attractive qualities mean that, unlike many other jurisdictions, Hong Kong tax is generally not the determining factor in the way in which a transaction is structured in Hong Kong. There is no capital gains tax on the disposal of assets, including the disposal of shares and property. In addition, dividends are not classified as taxable income, and there is no withholding tax on dividends.

Stamp duty on the transfer of Hong Kong shares is currently 0.2 per cent of the consideration paid (or market value), and is generally payable in equal shares of 0.1 per cent by both the seller and the buyer. Transactions that are structured as schemes of arrangement do not attract stamp duty. With effect from 23 February 2013, stamp duty on the transfer of immovable property in Hong Kong ranges from 1.5 per cent (for transactions up to HK$2 million) to 8.5 per cent of the amount or value of the consideration (for transactions over HK$21,739,130) and is usually paid by the purchaser. The Stamp Duty Ordinance is the principal source of legislation governing this area.

The Inland Revenue Ordinance sets out three separate and distinct taxes on income: profits tax, salaries tax and property tax. Liability to tax under these three heads, as a general rule, is limited to persons or entities carrying on a trade, profession or business in Hong Kong, and to income that ‘arises in or is derived from’ Hong Kong. To this extent, the residence status of persons and companies is irrelevant to income tax assessment. Previously, the profits tax rate in Hong Kong was 16.5 per cent for corporations and 15 per cent for unincorporated businesses. For the year of assessment from 2018–2019 onwards, a two-tiered profits tax rate will apply, which aims to benefit small and medium-sized enterprises. Corporations will be taxed at 8.25 per cent on assessable profits up to HK$2 million and 16.5 per cent on any

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13 A contribution account is an account mainly used to accumulate MPF contributions in respect of current employment and investment returns.

14 A preserved account is an account in which accrued MPF benefits in respect of former employment are held.
part of assessable profits over HK$2 million, whereas unincorporated businesses will be taxed at 7.5 per cent on assessable profits up to HK$2 million and 15 per cent on any part of assessable profits over HK$2 million.\(^\text{15}\)

In respect of loan repayments, as a general rule a borrower’s interest expenses will be deductible where the lender is subject to Hong Kong profits tax on its receipt of the interest. In addition, where a financial institution (whether onshore or offshore) makes a genuine loan, interest expenses will generally be deductible.

IX \hspace{1em} \textbf{COMPETITION LAW}

The Competition Ordinance, Hong Kong’s first cross-sector competition law, came into full effect on 14 December 2015. Previously, only the broadcasting and telecommunications industries were subject to competition law, as provided for in specific provisions of the BO and the TO (now largely repealed). The former TO provided a regulatory framework for the Communications Authority to consent to certain M&A involving carrier licensees in the telecommunications industry.

The Competition Ordinance retains a merger control regime in Hong Kong for the telecommunications industry known as the ‘Merger Rule’. Like the regime under the TO, the Merger Rule applies only to mergers involving carrier licensees, and the Communications Authority has concurrent jurisdiction with the Competition Commission in relation to the Merger Rule. However, unlike the merger regime under the TO, the Competition Ordinance does not specify thresholds upon which regulatory consent is triggered. Instead, the Merger Rule refers to the acquisition of ‘control’, which could apply even if the acquisition involves a minority interest not exceeding 30 per cent. A merger could be prohibited if it has or is likely to have the effect of substantially lessening competition in Hong Kong. It is worth noting that notification of mergers is voluntary rather than mandatory, but in practice the Communications Authority is consulted in most (if not all) cases, even when no competition concerns are expected.

Since the entry into force of the Competition Ordinance, the Communications Authority has reviewed three transactions under the Merger Rule to date. In each of these cases, the Communications Authority decided not to commence an investigation on the basis that each transaction was unlikely to have the effect of substantially lessening competition in Hong Kong. The first such decision under the Competition Ordinance, announced by the Communications Authority on 31 March 2016, was in respect of the indirect acquisition of New World Telecommunications Limited,\(^\text{16}\) a carrier licensee under the TO, by HKBN Ltd, the holding company of Hong Kong Broadband Network Limited, another carrier licensee under the TO.\(^\text{17}\) The second decision, announced on 10 November 2016, was in respect of the HK$9.5 billion acquisition\(^\text{18}\) by Green Energy Cayman Corp\(^\text{19}\) of the entire equity

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\(^{16}\) New World Telecommunications Limited is indirectly owned by Concord Ideas Ltd.


\(^{19}\) Green Energy Cayman Corp is indirectly owned by MBK Partners and TPG Capital.
interests of Wharf T&T Limited, a carrier licensee under the TO. Most recently, on 3 October 2017, the Communications Authority announced it had decided not to commence an investigation under the Competition Ordinance in respect of the acquisition by Asia Cube Global Communications Limited of the entire equity interests of Hutchison Global Communications Investment Holding Limited, which wholly owns Hutchison Global Communications Limited, a carrier licensee under the TO.

In the run-up to the drafting and passing of the Competition Ordinance, which, on the whole, was supported by the public, there was some debate about whether there is a need for merger control in Hong Kong to govern general M&A activity (outside the telecommunications sector). The Public Consultation Paper on Detailed Proposals for Competition Law in 2008 showed a softening of the government’s stance on this issue, from ‘we do not need a merger control regime’ to inviting views on three possible options regarding such a regime. The recommendation of the Commerce and Economic Development Bureau of Hong Kong (CED Bureau) was that merger activities are not to be regulated except in the telecommunications sector, which is already subject to such regulation under the former TO. The CED Bureau stated that this proposal would give the Competition Commission more time to focus on its initial work of implementing the proposed Competition Ordinance, and would allow for a more effective assessment of whether merger control provisions would be desirable in other (or all) sectors in the future once the Competition Commission has accumulated some experience in the operation of the competition regime. This was the position ultimately adopted in the Competition Ordinance. It has been suggested that the Competition Commission would seek to introduce a fully fledged merger control regime within ‘two to three years’ of the Competition Ordinance taking full effect.

X OUTLOOK

The government has forecast that Hong Kong’s GDP is likely to grow by 3 to 4 per cent in 2018. Hong Kong’s economic performance in 2018 will be influenced by developments in external demand, the performance of the global economy and political developments in major advanced economies.

Overall, deal appetite in Hong Kong is high and the M&A markets remained busy in the first quarter of 2018. During that period, the value of completed M&A transactions increased by 40.1 per cent compared to the first quarter of 2017.

While there was a notable decline in outbound investment from China in the first half of 2017 due to increased regulatory oversight in China of outbound transactions and tightened capital outflow controls, there has been recent policy clarification on outbound investment, and increased regulatory certainty in the form of outbound investment guidelines issued in

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21 Asia Cube Global Communications Limited is wholly owned by a fund managed by I Squared Capital, a private investment firm.
24 Source: Thomson Reuters.
August 2017 and streamlined administrative procedures introduced in December 2017 by the relevant authorities in China. These developments are expected to facilitate an increase in deal flow and enable China outbound M&A to regain momentum.

It is also expected that there will be increased participation by Hong Kong companies in One Belt, One Road initiatives in 2018, facilitated by efforts of the government and the Trade Development Council of Hong Kong. In December 2017, the government and the National Development and Reform Commission of China entered into an arrangement for advancing Hong Kong's full participation in and contribution to the One Belt, One Road initiative, which will serve as a blueprint for Hong Kong's continued participation and specifically focus on six key areas, including finance and investment, and economic and trade facilitation.

The global economy enjoyed a broad upturn in 2017, which has continued into 2018, and the overall outlook of the M&A market in Hong Kong for 2018 is optimistic. Nonetheless, there are several material variables that could impact on deal appetite in Hong Kong in 2018, including the economic development of China, the possible rise of trade conflicts, geopolitical tensions and other uncertainties relating to the global monetary environment.
Chapter 22

HUNGARY

József Bulcsú Fenyesi and Mihály Barcza

I OVERVIEW OF M&A ACTIVITY

Compared to 2016, the number of published M&A transactions increased by 21 per cent in 2017 to 133, which represents a peak since 2010.\(^2\)

The value of the Hungarian M&A market (calculations based on estimates relying on disclosed transactions) demonstrates an increase of 150 per cent compared to 2016, pushing the value of the M&A market up to US$4 billion.

II GENERAL INTRODUCTION TO THE LEGAL FRAMEWORK FOR M&A

The main source of legislation governing M&A activity and corporate governance in Hungary is Act V of 2013 on the Civil Code (the Civil Code), specifically Book Three, which contains the general rules applicable to all forms of legal persons, including high-level rules on the transformation, merger and demerger of legal persons, and sets forth definitions of the types of legal transformations allowed by Hungarian law.

The provisions constituting the legal framework for transactions in Hungary implemented by way of transformations, mergers or demergers may be found in Act No. CLXXVI of 2013 on the Transformation, Merger and Demerger of Certain Legal Persons (the Transformation Act). This contains the prerequisites and procedures to be followed in the case of a company transformation, and the documentation, transparency and financial requirements of mergers, demergers and spin-offs, prescribing specific rules for companies limited by shares, especially in the field of audit and management reports.

In the event that a company involved in a merger is not domiciled in Hungary but in another country of the European Union, in addition to the provisions of the Civil Code and the Transformation Act, the rules laid down in Act CXL of 2007 on Cross-Border Mergers of Limited Liability Companies (Cross-Border Mergers Act) shall also be observed. The Cross-Border Mergers Act serves the implementation of Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005.

The procedural aspects of registering M&A in Hungary are set forth in Act V of 2006 on Public Company Information, Company Registration and Voluntary Liquidation
Hungary

The Company Procedures Act lists the specific documents to be prepared and submitted to court to register a merger or acquisition, and sets out the applicable procedural requirements.

Part Three of Book Three of the Civil Code provides for the regulation of business associations, regulating in Chapter No. XV the aspects of the acquisition of majority interests (i.e., the direct or indirect purchase of 75 per cent of the voting rights) in limited liability companies and private companies limited by shares. These rules set forth a special ‘statutory tag-along right’ obliging a shareholder who acquires a majority interest to purchase the shareholdings of the other shareholders at least at equity value if such other minority shareholders wish to sell their stake after the acquisition.

Act CXX of 2001 on the Capital Market (the Capital Market Act) contains essential rules on issuing and offering securities. Such rules must be observed if any of the target companies concerned with an M&A transaction is a company limited by shares. In respect of publicly traded companies, the Capital Market Act sets forth the specific provisions for the acquisition of majority interests in public companies limited by shares, such as reporting obligations, IPOs and minimum offer prices. Tender offers and M&A activity in the financial sector are controlled and approved by the Hungarian National Bank, which became the general supervising authority of financial institutions and markets in 2013. Act CXXXIX of 2013 sets out the scope of activity and the procedural rules applied by the Hungarian National Bank.

In the field of M&A legislation, special rules apply to companies engaged in the energy, media and financial sectors. The acquisition and transformation of such companies may also require the prior approval of the competent regulatory bodies, setting further preconditions and documentation requirements for carrying out a successful merger. The competent authorities for these sectors include the Hungarian Energy and Public Utility Regulatory Authority, the National Media and Infocommunications Authority and the Hungarian National Bank, respectively.

Irrespective of the industry or sector concerned, M&A reaching a certain market threshold shall be reported to, or approved by, the Hungarian Competition Authority (GVH). The reporting obligations and the rules for approval are set forth in Act LVII of 1996 on the Prohibition of Unfair Trading Practices and Unfair Competition.

Besides the above acts and laws, significant parts of foreign investments in Hungary are also protected by way of bilateral investment treaties (BITs). BITs grant basic rights to foreign investors in compliance with international standards, and enable them to seek remedies before international fora if their right to fair and equitable treatment should be violated.

III DEVELOPMENTS IN CORPORATE AND TAKEOVER LAW AND THEIR IMPACT

i Amendments to the Civil Code

Amendments were made to the Civil Code to clarify or eliminate ambiguities in the new act, as well as to achieve compliance of the act with other laws.

After an essential amendment to the Civil Code in 2016 eliminating concerns about the undesired personal liability of managing directors in relation to third parties, which made it clear that (except in the case of a managing director causing damage intentionally) instead of a managing director being directly and personally liable, a legal entity shall be liable in relation to third persons if its managing director caused damage to a third person when acting...
in his or her capacity as managing director, and other notable modifications concerning rules of dividends and collateral, in 2017 further material amendments were brought about in relation to securities.

The regulation of securities was replaced with a new and simplified regime: on the one hand, legal rules outside the Civil Code will have to be observed in depth for detailed rules of securities; on the other, the new unified regulation for dematerialised and printed securities leaves room for legal interpretation as to whether certain rules pertain to dematerialised or printed securities only, or to both of them.

Although the Civil Code compiles the general rules of securities, and detailed rules are incorporated into other pieces of law, it is also worth mentioning that a new act regarding bills of exchange was introduced at the end of 2016, effective from 2017. Besides remaining compliant with the relevant convention regarding bills of exchange, such new legislation contains rules falling within the competence of the Member States, and modernised procedural rules applicable in lawsuits regarding bills of exchange.

ii  Financial and banking regulations

The most important drivers of recent changes in Hungarian financial regulations that can affect M&A transactions have been amendments of the law in relation to implementing EU rules and the introduction of national rules to supplement directly applicable EU regulations. With effect from January 2018, the Hungarian legislator transposed Directive 2015/2366/EU on payment services in the internal market, Directive 2014/65/EU on markets in financial instruments (MiFID II Directive), which led to the amendment of the Banking Act, the Investment Services Act and the Capital Markets Act, and to the adoption of new Decree 35/2017 (XII.14) of the Hungarian National Bank on the provision of payment services.

Amendments to the Investment Services Act include the transposition of the MiFID II Directive.

The Hungarian National Bank adopted amendments to its recommendations in connection with risk assessment of encumbered assets and the restructuring of jointly financed corporate debtors. Although these recommendations are not legally binding, they have soft law effect in the Hungarian financial sector due to the fact that the Hungarian National Bank is the supervising authority of the financial market.

Pursuant to these recommendations, the Hungarian National Bank set out a guideline to credit institutions regarding which assets are qualified as encumbered assets. Generally, any asset is deemed as encumbered if the asset is pledged or is subject to any dealing as security or for improving an institution’s credit rating, and cannot be freely withdrawn from such dealings. As a non-exhaustive list, the encumbrance may arise from, inter alia, secured payment guarantees, securities granted for dealings on derivatives, security agreements, secured financing agreements and secured bond issuing. Based on the recommendations, the Hungarian National Bank requires that the risk assessment of the encumbered assets includes an evaluation of risks arising from changes in the value of the encumbered assets, and the risks and characteristics of local markets. Furthermore, credit institutions are required to monitor the level of encumbrance over the encumbered assets, the reason for encumbrance, the amount of assets free of encumbrance and any changes thereof.

3 Act CCXXXVII of 2013.
5 Recommendations 6/2017 (V.30) and 14/2018 (III.6) of the Hungarian National Bank.
Upon the restructuring of jointly financed debts, the Hungarian National Bank requires constructive, good-faith negotiations between the creditors and the debtor. It is recommended that the creditors involve independent advisers in order to reach a mutual agreement in the restructuring phase, and credit institutions should develop internal policies about the restructuring of debts, which policies are in line with their general strategy in connection with non-performing corporate loans. The Hungarian National Bank recommends that credit institutions not only calculate the direct operation costs of the debtors when granting a bridge loan: they shall also evaluate whether the payment of any taxes and publicly due burdens may be included in the scope of the bridge loan in order to avoid any enforcement of such obligations, which could endanger the restructuring procedure. Creditors shall require that the debtor put forward a plan to maintain continuous operation and to give regular updates of its financial status. Creditors shall also check and ensure that the bridge loan does not breach any obligations of the debtor towards any creditors that are not participating in the restructuring procedure. In the event that such breach is threatening, the consent of that creditor to the bridge loan shall be required. The Hungarian National Bank considers a restructuring effective if the continuation of the debtor’s operation is restored and the debtor remains able to discharge its obligations following the restructuring.

iii Administration and proceedings

Pursuant to changes introduced in 2016, administrative aspects of transactions have become simpler and more client-friendly. Under an amendment in the Company Procedures Act, changes in company data (including the deletion of a company from the company registry) are now reported to all the competent authorities by the Hungarian court of registry, instead of the company (or its legal successor) having to notify all the relevant authorities separately. Furthermore, certain changes in company data may now be reported to the court of registry free of any procedural fees. In 2017, the registration of certain corporate changes became quicker for companies limited by shares, and a specific procedure was regulated for private companies limited by shares for going public.

As a consequence of a new codex on Hungarian civil proceedings, adopted in 2016 and coming into force as of 1 January 2018, further changes have arisen regarding certain aspects of company proceedings, and remarkable changes have been introduced regarding litigation that also affect potential litigation related to companies or transactions. Increased attention will have to be paid to such new rules to successfully proceed and litigate under the new civil proceedings regime.

Although it is not a new piece of legislation, a trend significantly affecting companies in 2017 was the increasing requirement of compliance with the General Data Protection Regulation. Such compliance is now thoroughly observed in the course of M&A transactions, and a number of investors and purchasers have required targets and sellers to ensure compliance to the best of their abilities.

IV FOREIGN INVOLVEMENT IN M&A TRANSACTIONS

Although the deals with the highest transaction value in 2017 involved foreign parties, as in previous years, the Hungarian market was dominated by domestic transactions (where both the target and the buyer were Hungarian), representing 63 per cent of all disclosed transactions in 2017 over foreign transactions, and Hungary demonstrated the highest rate of domestic transactions in Central Europe.

Regarding transactions related to foreign targets or buyers, inbound transactions were dominant (2,863 per cent of the disclosed transactions). Inbound foreign investments came from the UK, Austria and the Czech Republic, and in a smaller ratio from the United States and Germany.

Outbound transactions remained at a rather low level (9 per cent of all disclosed deals) and the most significant transaction was directed at Romania and Serbia.

V SIGNIFICANT TRANSACTIONS, KEY TRENDS AND HOT INDUSTRIES

Considering publicly disclosed transactions, the absolute leading sector in terms of the number of deals in 2017 was real estate, with the ratio of domestic deals also increasing as compared to 2016.

Media and telecom demonstrated a growth of 33 per cent, ranking second based on the number of deals.

IT and technology, which was the leading sector in 2015, but which dropped to third place in terms of the number of deals in 2016, retained its third-place ranking in 2017, seeing a decrease of 8 per cent in the number of closed transactions even as compared to 2016.

Further active sectors in 2017 were services, food and beverages, and energy and mining.

The transaction with the biggest deal value was closed in the real estate sector, while the other most significant transactions were implemented in the media and telecom, and banking and financial services sectors.

In a trend continuing from 2015, strategic investors dominated over financial investors in 2017: their ratio increased by 4 per cent as compared to 2016, and Hungary ranked second in the CEE region in this respect.

VI FINANCING OF M&A: MAIN SOURCES AND DEVELOPMENTS

In the past couple of years, financial institutions have cleared significant parts of their non-performing loan (NPL) portfolios from their balance sheets either by selling them to third-party bidders, or by restructuring them into subsidiaries to operate and manage the NPL portfolios separated from the parent financial institution. Consequently, in recent years, many transactions have focused on the restructuring of currently existing debts and
portfolios. In 2017, corporate lending increased by 10.4 per cent.\(^6\) Within such dynamic increase, the credit amount granted to SMEs increased by 12 per cent. The increase in the market was also influenced by sizeable single transactions. The largest expansion was seen in the energy sector, with a 38 per cent increase since 2016,\(^7\) which included the acquisition of the Mátrai Power Plant by Opus Global Nyrt.\(^8\)

Because of the divestment of the NPL portfolios and the financial crisis, several Hungarian financial institutions have adopted a more specialised focus and policy in relation to the projects and investments they are willing to finance. Knowing these policies and the drivers of credit institutions can be a key factor when selecting a financier. Therefore, choosing experienced advisers on the borrower side who can also support investors in selecting the right financier for their project has become even more important. Nevertheless, in general banks are competing for good projects and investors after years of deleveraging in the Hungarian economy. Based on a report of the Hungarian National Bank, in the last quarter of 2017 financiers loosened their strict criteria on corporate lending. Banks are calculating further growth in the outstanding credit amount (substantially as long-term credits). Subsidised loans and financing are also available to certain investments and projects (e.g., renewables). However, access to these is rather limited.

Interest rates for credits denominated in Hungarian forints or in foreign currency decreased in 2017. Credits are generally granted in Hungarian forints or in euros. However, changes in the currency exchange rate still pose a risk. Since the beginning of April 2018, the forint/euro exchange rate has deteriorated by 3.5 per cent and at the time of writing, it currently stands, with minor fluctuations, at 319 forints to one euro.\(^9\)

Equity funds are also active in Hungary. Such funds are mainly either financed by the state, state-owned institutions and entities, or by the European Union. Although private equity funds are present in Hungary, their activity level and net investments are still low in the whole CEE region. The share of private equity funds from the overall volume of transactions has not significantly developed in recent years.

To facilitate the lending activities of private equity, the Hungarian National Bank and the state-owned Exim Bank have launched several equity funds, including hedge funds. These funds have clear investment policies to support and promote projects and transactions that are beneficial for Hungary’s public affairs. Additionally, in 2017 multiple private equity funds were created to finance acquisitions of specific strategic companies (e.g., the acquisition of MKB Bank Zrt by Metis Private Equity Fund). Although these private equity funds took part in large transactions, the aggregate volume of funds held in such companies is still relatively low compared to other regions.

Furthermore, the government, co-financed by the European Union, is making new funds available to the investment market. Such new investment funds will support mainly SMEs and research and development projects.

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\(^7\) M&A Barometer Magyarország 2017, published by Ernst & Young Tanácsadó Kft.

\(^8\) https://index.hu/gazdasag/2017/12/14/meszaros_csh_ceggel_osszeallva_viheti_a_matrai_eromuvet/.

VII EMPLOYMENT LAW

There have been no major legislative changes in the employment rules in connection with corporate transformations in Hungary in the past couple of years. However, we are experiencing a slight change of focus when it comes to mergers or acquisitions of businesses also involving a transfer of personnel. The Hungarian labour market has always been sensitive to such changes. Corporate changes and reorganisations have often been associated with mass layoffs, and recently, in several instances, the closure of plants and business units as well. In general, trust in employers is usually lower than it is in Western Europe. Consequently, this may cause loss of talent or key personnel even before the conclusion of a transaction. Therefore, in the course of a transaction, communication is of paramount importance, and it is similarly vital to maintain good relationships with employee representatives, and to pay attention, to retain key personnel to safeguard operations and preserve the business potential of a target.

It is usual to decide early in the planning phase of a transaction whether the employees of the target will be retained by the purchaser. Rules pertaining to mass layoffs and transfers of undertakings, including the protection of employees’ rights, are harmonised with the respective EU directives and remained unchanged in 2017. However, beyond the general rules on the protection of employees, and consultation and announcing obligations, individual communication with employees is just as important both in the case of a mass layoff and in an M&A transaction in which the employees of the transferred business unit are intended to be retained.

Considering that shortages can be experienced on the Hungarian market for several key workforce positions, retention of key staff can sometimes be more challenging than layoffs. In several cases, interim loyalty or other types of incentive schemes may be of great help for a purchaser in retaining experienced and valuable staff. Sometimes, putting restrictive covenants in place specifically for the purposes of a transaction may also work well.

VIII TAX LAW

Under Hungarian law, specific rules regarding M&A, spin-offs and divisions of companies are regulated by Act LXXXI of 1996 on Corporate Tax and Dividend Tax, which has to be interpreted together with the general rules of the Hungarian Civil Law on business associations.

i Corporate tax

The biggest recent change in the legislation relevant to M&A and companies in Hungary is the change in the corporate income tax rate. Until the end of 2016, the corporate income tax rate was 10 per cent of the positive tax base (accounting profits adjusted with certain items) up to 500 million forints, and 19 per cent above 500 million forints. From the beginning of 2017, the corporate income tax rate is 9 per cent of the positive tax base, regardless of any threshold.

10 http://abt.hu/hu/adozasi-hirek/.
As of 2018, large companies in the central region of Hungary are entitled to a tax credit under certain circumstances, including for investment projects resulting in product diversification or new procedural innovation; and for investment projects with a value of at least 6 billion forints, and of at least 3 billion forints in the case of investment projects serving to create jobs.

Again as of 2018, favourable corporate tax rules for notified shares may be applied also for shareholdings under 10 per cent.

ii Revaluation of assets and tax base adjustments

In the case of a transformation of a company structure, fixed assets (+/-), liabilities (+/-), receivables (-) and provisions (+/-) can be revaluated.

The corporate tax base normally has to be adjusted by the revaluation difference mentioned above at the predecessor, and by the difference between the accounting net book value and fiscal net book value of tangible and intangible assets at the predecessor and in the case of a spin-off at the successor (in the tax year of the transformation).

However, in the case of ‘preferential company transformations’ it is possible to avoid corporate tax adjustments. The conditions for the preferential company transformation status are that both the predecessors and successors must be companies, none of the shareholders of the predecessors acquire more than 10 per cent cash over the acquisition of shares of the successor and there is no change in the proportion of the shareholders in the case of a spin-off (a merger into the only shareholder of a one-person company is also considered to be a preferential transformation).

In the case of a preferential company transformation, corporate tax adjustments may be avoided if the following conditions are met: the successor keeps a record of all assets and liabilities taken over from the predecessor as if no reorganisation had taken place (it has to continue the records with the same purchase value, and accounting and fiscal net value); the deed of foundation of the successor refers to this liability; and the preferential company transformation status is referred to in the corporate tax return of the predecessor.

iii Asset deals

A sale of assets of a company is usually subject to corporate tax. The taxable profit is the difference between the selling price and the fiscal net book value of the assets. However, it is possible to avoid corporate tax impacts in the case of a ‘preferential asset deal’ where an independent division of the company (with its own structure, assets and ability to operate) is sold to a buyer in exchange for the acquisition of shares.

Similar to a preferential company transformation, the special rules can be applied if:

\( a \) the asset transfer agreement lists all assets, liabilities and accruals (including purchase values, net accounting and fiscal book values), and has a declaration to apply special accounting rules;

\( b \) the buyer keeps all assets taken over in its books as if no asset deal had taken place (e.g., it continues the records with the same purchase value, accounting and fiscal net value as taken from the seller); and

\( c \) the seller reports the preferential asset deal status in its corporate tax return.

iv Real estate companies

A transfer of real estate may be subject to property transfer duty not only in the case of an asset deal but also a share deal, if a company is considered to be a ‘real estate company’ having
at least 75 per cent real estate property within its total assets (not including cash, receivables and accruals). The general transfer duty rate payable by the buyer is 4 per cent up to 1 billion forints and 2 per cent over such amount. This regulation is applicable to indirect owners as well, but there are exemptions for related companies having a registered principle business activity of real estate property selling, leasing or management.

v Transfer pricing
As of 2018, a new transfer pricing regulation came into force. The aim of the new regulation is to introduce changes to comply with the requirements set forth by the EU Joint Transfer Pricing Forum.

IX COMPETITION LAW
i New turnover thresholds
As of 15 January 2017, new turnover thresholds were introduced into the Hungarian merger control law. According to these, a concentration shall be notified to the GVH if the aggregate net turnover in and from Hungary of all undertakings concerned exceeded 15 billion forints in the last audited financial year, and the net turnover in and from Hungary of each of at least two of the undertakings concerned exceeded 1 billion forints in the last audited financial year (this latter threshold was raised from 500 million forints).

Even if the above thresholds are not met, the GVH may investigate a transaction within six months after its implementation if it is not obvious that the merger would not have a significant impediment on effective competition, in particular by creating or strengthening a dominant position; and the aggregate net turnover in and from Hungary of all undertakings concerned exceeded 5 billion forints in the last audited financial year. In such cases, however, no suspension obligation applies.

According to a GVH notice, a concentration shall be regarded as ‘obviously’ not significantly impeding effective competition if the parties’ combined market share does not reach 20 per cent on any overlapping (horizontal) markets or 30 per cent on vertically related markets (or, where such market shares are reached, the market share increment stemming from the concentration is below 5 per cent).

ii Calculation of turnover
The recent amendments have introduced a change in the calculation of turnover of Hungary-based companies. Prior to the amendments, in the case of entities incorporated in Hungary, all of their net turnover, whether from sales within or outside of Hungary, had to be taken into account. As of 15 January 2017, again in the case of Hungary-based entities, it is only the net turnover from sales into Hungary that shall be taken into account for the purposes of the turnover calculation (i.e., export sales shall be deducted).

iii Procedure and filing fee
Transactions that ‘obviously’ do not significantly impede effective competition will be cleared within eight calendar days (fast track procedure). A formal merger control procedure will
only be initiated in cases where, on the basis of a notification, such impediment on effective competition cannot be obviously excluded, where the notification is regarded as incomplete by the GVH or where the special approval of the Media Council is required.

In the case of fast track procedures, the filing fee is reduced to 1 million forints. The filing fee for regular Phase I and Phase II proceedings has remained unchanged (altogether, 4 million forints for Phase I procedures and 16 million forints for Phase II procedures).

### iv Recent developments in case law

Since 2016, the GVH has begun imposing significant procedural fines in merger control proceedings for incomplete or incorrect data supply. In cases Vj-33/2016 and Vj-1/2017, following the issuance of a clearance decision, the GVH discovered that the notifying parties had provided incorrect information regarding the group structure or the relevant markets. These clearance decisions were therefore revoked, and substantial procedural fines (7 million forints to 75 million forints) were imposed. The GVH has also been recently more vigilant in cases concerning a breach of the suspension obligation: for example, it imposed such fines in early 2018 in case Vj-44/2017.

### X OUTLOOK

As a consequence of a new codex on Hungarian civil proceedings adopted in 2016, which came into force as of 1 January 2018, further changes have arisen regarding certain aspects of company proceedings, and remarkable changes have been introduced regarding litigation that also affect potential litigation related to companies or transactions. Such new rules will have to be paid increased attention to successfully proceed and to litigate under the new civil proceedings regime. The coming months or years will be a notable period for the interpretation and practice of the new procedural rules to crystallise.

Legislation has been adopted to simplify registrations and make official proceedings simpler and quicker, which may have a positive impact on registration proceedings related to M&A transactions. Among others, in order to simplify registration of company data, commercial courts will be notified by certain other authorities to register changes in certain data of persons registered in a company’s registry automatically or *ex officio*, sparing the registration of such changes by the company in separate proceedings.

Compliance with the GDPR is foreseen as a continuing trend in the coming months, and some aspects are expected to be crystallised in practice.
Iceland

Hans Henning Hoff

I OVERVIEW OF M&A ACTIVITY

Since the capital controls were lifted in March 2017, having been in place for more than eight years, a number of Icelandic companies have acquired businesses abroad and others are returning to the international financial markets.

There were more domestic M&A deals in 2017 than in previous years. There has even been some public M&A, with the fishing company Brim acquiring a 34 per cent stake in publicly listed seafood company HB Grandi in April 2018 for US$215.5 million; this has made it necessary for a takeover bid to all shareholders.

As the restructuring of Icelandic banks is now almost complete, the question of ownership of these ‘new’ banks is even more in the limelight than before. Arion Bank, the successor to the infamous Kaupthing, is currently being listed on the Icelandic Stock Exchange. However, because of a relatively modest performance by Arion recently, the number of shares listed is estimated to be only between 20 and 25 per cent of the bank’s overall shares.

Away from banking, prosthetic producer Össur, which had been dually listed in Reykjavik and Copenhagen since 2009, decided to withdraw its listing in Iceland. Since December 2017, the company’s shares are listed only on the Copenhagen stock exchange.

While the restructuring and repaying of the national foreign debt is still happening much faster than scheduled initially, there are the first signs of the economy slowing down. The main source of earnings from abroad in the last couple of years was from tourists visiting Iceland in ever-increasing numbers. This sector has even outdone the fishing sector and the earnings from the power-intensive industry with its aluminium smelters and silicon metal plants. However, while the earnings from the latter two sectors have been significant for decades, the tourism sector has exploded in the past 10 years and many new hotels and guesthouses have opened in Reykjavik and in rural areas. Thus, it is not a huge surprise that Icelandair Group, which has had a strong foothold in the hotel business for many years, has put up its 13 hotels for sale and will also divest the 10 summer hotels it has under management and which are located in boarding schools during the long Icelandic summer holidays. In the future, Icelandair will concentrate on its main business but will keep its travel agencies, which it regards as being part of its core business.

The increasing number of aircraft operated by WOW air, Icelandair, Primera Air and the air cargo and leasing airlines Air Atlanta Icelandic and Bluebird were a direct consequence of the increasing number of tourists visiting Iceland and the ever-increasing importance of
airfreight services. To a smaller extent, however, it may have been a reaction to the demise of some of the low-cost airlines, such as Air Berlin and Monarch Airlines and Norwegian’s continuing struggles.

As in previous years, the four publicly listed real estate companies – Reitir, Eik Reginn and Heimavellir – have strengthened their property portfolios. Several new funds were set up to meet the increased demand for investment; for example, Icelandic Securities has set up a fund to invest in domestic companies. Other funds aim at financing infrastructure projects in public–private partnerships as, for example, investments infrastructure, which is financed to a large extent by Icelandic pension funds.

II  GENERAL INTRODUCTION TO THE LEGAL FRAMEWORK FOR M&A

The Icelandic legal system is similar to that of other Nordic countries, with particular influence from Denmark and Norway. However, it is influenced more by case law than its neighbouring Nordic jurisdictions, and thus its legal system is closer to a common law system. Even though Iceland is currently not aiming for membership of the European Union, it is obliged, with Norway and Liechtenstein as the other European Free Trade Association (EFTA) states that are also part of the European Economic Area (EEA), to adopt much of the EU legislation, as stipulated in the EEA rules.

Agreements regarding domestic deals up to a certain size are done mostly in Icelandic and are fairly short. Larger deals (e.g., with international parties or financing) are usually done in English, and the documents are more detailed. The expansion of Icelandic investors into Europe and other parts of the world before 2008, and the financial crisis bringing foreign creditors in close contact with Iceland, have contributed to bringing domestic M&A documents closely in line with international practice.

It is quite common for privately held companies to have a group of shareholders rather than being held entirely by one person. Therefore, negotiations usually include talks with several shareholders even though the more active shareholders lead the discussions and speak also for those who have only invested in the company but are not involved in its management.

The main sources of corporate law are the Icelandic Limited Act and the Stock Corporation Act. Transferring shares in a company does not require notarisation. Shareholder lists that have to be kept by a company’s board do not have to be submitted to the Register of Enterprises, but the Act on Financial Statements requires that the shareholders and their shareholdings at year-end are disclosed in the financial statements, which have to be published.

Under both Acts, a squeeze-out of the minority shareholders can be requested if one shareholder holds more than 90 per cent of the capital and votes in the company. Likewise, a minority shareholder can demand redemption of its shares if a single shareholder holds more than 90 per cent of the capital and votes in the company. The articles of association may contain rules about the redemption of shares and the valuation method; only in a stock corporation must there be a statement about this matter in the articles of association, even if there is no deviation from statute law. The redemption price offered by the requesting party can be challenged by the other party, and if no agreement is reached, court-appointed experts shall determine the price.

The main rules for public takeovers are to be found in Chapter 10 of the Act on Securities Transactions. A mandatory offer to the other shareholders shall be made if a shareholder has acquired 30 per cent of the votes in a listed company, either by its own shareholding or by acting in concert with other shareholders. A mandatory offer shall also be made if a
shareholder has gained the right to appoint the majority of the board members. A mandatory takeover bid must be made no more than four weeks after the shareholder knew or should have known that the relevant threshold had been crossed. The offer period ranges from four to 10 weeks. The decision to make a voluntary takeover offer must be announced without undue delay. If the target company faces financial problems, the Financial Supervisory Authority can grant an exemption from its duty to make a mandatory offer to a party that wants to save the company from serious financial problems or that wants to take part in the financial restructuring of the company if its board agrees to this. The breakthrough rule has not been implemented in Iceland. While the Icelandic Financial Supervisory Authority monitors compliance with these rules, the rules of the stock market NASDAQ Nordic regulate the trading of securities in listed companies.

New foreign direct investments may now again be eligible for tax and other benefits pursuant to the Act on incentives for initial investments in Iceland.

III DEVELOPMENTS IN CORPORATE AND TAKEOVER LAW AND THEIR IMPACT

Since only a handful of companies remained listed on the Icelandic stock exchange during the turbulences following 2008 and the modest size of the market in general, it is not surprising that there have been few changes in the legislation on takeovers since the modernised Act on Securities Transactions entered into force in November 2007. There have been only minor amendments since then.

The same applies to corporate law. While there were many changes and debates about changes in insolvency law and restructuring, and competition issues in general, there have been few changes to corporate law during the past few years. However, changes have been adopted as a result of the Shareholder Rights Directive and other changes in the legislative EU framework.

IV FOREIGN INVOLVEMENT IN M&A TRANSACTIONS

The first-ever Fortune 500 acquisition of an Icelandic software company was the purchase of Greenqloud ehf. by NetApp Inc. Greenqloud offers cloud computing software and services entirely driven by Iceland’s renewable energy.

It is also expected that foreign investors might purchase shares in the other banks, Íslandsbanki and Landsbankinn.

In public M&A, funds advised by US-based Wellington Management have recently purchased shares in software company Origo, gas station operator N1 and telecommunication firm Síminn, which are all publicly listed.

It is now many years since the generic drug producer Actavis (now part of Allergan) stirred the world with its extensive growth strategy. However, a number of mergers later, this chapter seems to have come to an end for the time being as far as Iceland is concerned because the former Icelandic production site has now been divested by Teva Pharmaceutical Industries in a management buyout by a company called Corinpharma, which is backed by some Icelandic investors.
V SIGNIFICANT TRANSACTIONS, KEY TRENDS AND HOT INDUSTRIES

With the initial public offering of Arion Bank, the privatisation of the banking sector has started for the second time since 2003 and the question of Landsbankinn's future ownership is of great interest because of the bank's eminent role in financing many of the larger companies in Iceland.

Because Icelandic pension funds have been allowed to invest abroad again, even before the capital controls were lifted, their traditionally large share in the listed companies of the Icelandic stock exchange did not increase further.

The concentration of the real estate market with large listed companies Reginn, Reitir, Eik and Heimavellir continues.

The most active industries are the booming tourism sector and the energy-intensive industries trying to attract new plants and data storage centres.

One of the most thriving sectors is still the life science sector. In addition to the pharmaceutical company Alvogen, which is led by former Actavis CEO Robert Wessman, there is a number of smaller companies which are increasing their international reach and may, mid-term, make a significant contribution to Iceland's earnings abroad. Often, development of this kind is accompanied by M&A activities, and it is likely that the large international players will also acquire some of the Icelandic start-ups in this field.

On the negative side is the possible closure of Icelandic operations by the innovative shipyard Rafnar, which is the brainchild of Össur Kristinsson, the founder of the prosthetic producer Össur. Mr Kristinsson is purported to have spent around US$50 million on the project, which received acclaim within the industry. But since the Icelandic krona is currently very strong and the main markets for Rafnar are outside Iceland, the operations are to be moved elsewhere.

Literally a hot industry is geothermal energy production and, in the European project Geothermica, up to 7 billion kronur is to be spent on research and demonstration projects. Iceland is participating in both this project and SET-Plan (the European Strategic Energy Technology Plan), which aims to improve low-carbon technologies. Iceland, with its wealth of renewable energies, is a preferred platform for such projects.

In terms of business success, Marel, the producer of fish and meat processing technology, is worthy of mention. Not only has Marel's annual turnover now exceeded €1 billion, but the company has increased its position in many of its key markets and has recorded good profits in recent years.

VI FINANCING OF M&A: MAIN SOURCES AND DEVELOPMENTS

The 'new' banks that took over the domestic businesses during the banking crisis in 2008 – Landsbankinn (successor of Landsbanki), Arion Bank (successor of Kaupthing) and Íslandsbanki (successor of Glitnir) – still have very strong market positions and their operations continue to be profitable. Privatisation in the banking sector will most probably also have an effect on the financing of deals.

Depending on the parties to an M&A deal, the financing varies. Pension funds and institutional investors often pay in cash. Companies either opt for traditional bank financing or issue bonds. The bond market in Iceland has picked up again, and more quickly than the stock market, following the 2008 crisis. The lack of opportunity for domestic investors to invest abroad seems to have helped the bond market in the past. The financing of growth in the parts of the economy that have been expanding also depends on the type of investment.
In the tourism sector, new hotel buildings have mostly been financed domestically, but investments by foreign entities in the energy-intensive industries seem to be financed from abroad to a considerable extent. Iceland is at a crossroads, with its decades-old tradition of linking almost all loan agreements to the consumer price index. However, it is a relatively new development for financing to be without an indexation of the loans, and it remains to be seen whether this trend becomes stronger.

VII  EMPLOYMENT LAW

The Transfers of Undertakings Directive 2001/23/EC was transformed into Icelandic law in 2002. In the event of a transfer of an undertaking, the Icelandic Act on the Legal Position of Employees is applicable if a business unit is transferred in such a way that it maintains its characteristics (i.e., the structure of assets that are used in an economic objective regardless of whether it is a main or ancillary part of the operations). If such a transfer occurs, the rights and obligations of the transferor transfer to the purchaser, and the purchaser shall observe the remuneration and work conditions according to the collective labour agreement until it expires, is terminated or is superseded by a new collective labour agreement. The same principle applies in the case of a transfer regarding a bankrupt entity, with the exception that rights relating to non-performance by the assignor do not transfer.

The transferor and the purchaser shall jointly inform the union workplace representatives (or the employees themselves if there are no representatives) about the date of the transfer, the reasons for the transfer, the legal, economic and social consequences of the transfer for the employees, and whether any measures are planned regarding the employees. All the aforementioned information shall be given well in advance, and if there are plans to take measures regarding the employees, the matter shall be discussed with their representatives (or otherwise directly with them) to reach an agreement. Both the transferor and the transferee are obligated under these provisions.

The Act on Mass Redundancies is applicable if (1) at least 10 employees are made redundant by a company that has between 21 and 99 employees, (2) if at least 10 per cent of employees are laid off by a company that has between 100 and 299 employees, or (3) if at least 30 employees are made redundant by a company that has 300 or more employees. The decision for the lay-offs shall be announced to union workplace representatives with the aim of reaching an agreement immediately, or to another representative elected by the employees for that purpose. Regarding cooperation, an attempt, at least, shall be made to avoid mass redundancies, to reduce the number of affected employees or to mitigate the consequences for them with the assistance of social measures that have, inter alia, the aim of facilitating a transfer to a new job or occupational retraining.

VIII  TAX LAW

A corporation is considered to be resident in Iceland if it is registered here and if it has its real management here, or if its main base, according to the company’s articles, is in Iceland. Because Iceland is not a Member State of the European Union, Council Directive 90/434/EEC on mergers is not applicable in Iceland.

There is the possibility of a tax-exempt merger if a company is completely absorbed by an absorbing company with all assets and liabilities, and the only consideration is shares in
the absorbing company, excluding any cash component. Under very strict requirements, a tax-exempt cross-border merger is possible. The main criterion for this is that the acquiring company is resident within the EEA or EFTA region or in the Faroe Islands.

Foreign individuals and legal entities have to pay a withholding tax on dividends received. The applicable rate is 18 per cent for legal entities and 20 per cent for individuals. If dividends are paid from an Icelandic corporation to a foreign limited liability company in the European Union or the EEA, the withholding tax can be partly or fully refunded after a tax assessment. The withholding tax rate may also be reduced if a tax treaty is applicable. Interest payments by an Icelandic company to a non-resident are generally subject to withholding tax; the tax rate is 10 per cent. If the recipient is a legal entity, the tax might be reduced according to a tax treaty to which Iceland is a party. If the recipient is an individual, a small tax-exempt amount is applicable. In a Supreme Court judgment of 2012, it was ruled that interest paid on a loan taken in an acquisition company to finance the acquisition of shares in the target company, and that was merged with the acquisition company in the target company, is not deductible.

Regarding thin capitalisation of companies, it should be noted that Iceland only has a general anti-avoidance provision that might be applicable. In addition, a regulation regarding transfer pricing was enacted on 1 January 2015. The regulation applies to businesses with more than 1 billion kronur in revenue or assets, and requires the documentation of transactions between related entities.

The tax base generally follows commercial accounts. The tax resident’s worldwide income is taxable, with the possibility of deducting expenses made to generate that income. Tax grouping rules allow for a tax consolidation in Iceland, the main prerequisite being a minimum shareholding of 90 per cent in the other companies of the tax group, which must all be in Iceland. There is no difference in the taxation of distributed or retained earnings. The new Act on Stamp Duties, which entered into force on 1 January 2014, provides only for the levying of a stamp duty for the transfer of ownership in real estate and in ships.

**IX  COMPETITION LAW**

Merger control proceedings are governed by the Icelandic Competition Act, and a notification of a merger is required if the combined revenues of the merging companies reach 2 billion kronur and if at least two of the merging parties have a revenue in Iceland of at least 200 million kronur. For the determination of the revenue, parent companies and subsidiaries are also relevant if they are directly or indirectly controlled by the merging companies.

If a merger has occurred that does not meet the above requirements for triggering a notification duty, but the relevant combined revenue is 1 billion kronur and the Icelandic Competition Authority is of the opinion that the merger may still reduce effective competition, it may order the merging parties to submit a notification of the merger.

The notification of a merger shall be jointly filed by the merging parties after the conclusion of an agreement, the announcement of a public bid or the acquisition of a controlling interest in a company, and before completion of the respective merger. It must not take effect while the Competition Authority is still examining the case. However, upon application, an exemption to this rule may be granted.

Upon receipt of an application, the Competition Authority will notify the parties within 25 working days as to whether it will further look into the case. This notification is a prerequisite to interdict a merger. If a merger is to be interdicted, this must happen
within 70 working days of the Competition Authority's announcement that it intends to investigate the matter. If further information is required, the period may be extended by up to 20 working days.

OUTLOOK

The economic outlook for Iceland is still positive, but the exchange rate of the krona already poses a threat to certain Icelandic businesses. Unlike the strategy of the Icelandic National Bank before 2008, there is now a much stronger minimum reserve policy in place, which should result in greater stability for the financial sector and following indirectly from it for other businesses.

The general investment climate is still very positive and the government that has been in office since the parliamentary elections in autumn 2017 is pursuing many long-term projects, including in infrastructure and the health sector, which should help to ensure that Iceland remains one of the European countries that are well prepared for the future.

The strong economy, an unemployment rate that is once again low and the highly educated population, along with the country's wealth of energy and natural resources, offer a stable environment for M&A activities.
I OVERVIEW OF M&A ACTIVITY

India is one of the fastest growing major economies and growth in its gross domestic product during 2018 and 2019 should be approximately 7.5 per cent. While aggregate M&A transaction volume has increased (1,022 transactions in 2017 compared to 895 in 2016), the aggregate transaction value in 2017 decreased by 12 per cent from the US$53.2 billion in 2016. The fall in the value is a result of fewer ‘big-ticket’ deals in 2017. This may be on account of regulatory changes such as demonetisation, implementation of goods and services tax (GST) and greater scrutiny by regulators.

During 2017, there were 682 domestic M&A transactions accounting for 67 per cent of the aggregate transaction volume. The aggregate volume of outbound M&A decreased to 340 in 2017 from 367 in 2016.

Communication, energy and natural resources, manufacturing and information technology and information technology-enabled services witnessed maximum traction in M&A in 2017 (see Section V for details). The acquisition of the government’s stake in Hindustan Petroleum Company by Oil and Natural Gas Corporation has been the largest M&A transaction so far in 2018, valued at around US$5.5 billion. While the communication sector was the forerunner in terms of aggregate transaction value, it was the financial services sector that witnessed the largest number of transactions.

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1 Justin Bharucha is a partner at Bharucha & Partners. The author would like to thank Ayesha Bharucha, managing associate, for her assistance in the preparation of the chapter.
II GENERAL INTRODUCTION TO THE LEGAL FRAMEWORK FOR M&A

The principal statutes governing M&A are the Indian Contract Act 1872 (the Contract Act), the Companies Act 2013 (the Companies Act), the Competition Act 2002 (the Competition Act), the Foreign Exchange Management Act 1999 (FEMA), the Insolvency and Bankruptcy Code 2016 (the Insolvency Code) and subsidiary legislation.

Listed entities must additionally comply with, inter alia, the SEBI S (Substantial Acquisition of Shares and Takeovers) Regulations 2011 (the Takeover Code), the SEBI (Prohibition of Insider Trading) Regulations 2015 (the Insider Trading Regulations) and the SEBI (Listing Obligations and Disclosure Requirements) Regulations 2015 (the LODR Regulations).

i The Contract Act

The Contract Act sets the paradigm for definitive agreements. Importantly, non-compete stipulations are relatively limited and damages will not be awarded in excess of the loss suffered. Concomitantly, liquidated damages are, effectively, a cap on damages that may be awarded depending on the extent of loss proved. Punitive damages are not awarded.

ii The Companies Act

The Companies Act addresses company law including mergers and restructuring, while the Insolvency Code applies to insolvency resolution and liquidation.

Public companies are subject to more onerous compliance requirements than private limited companies. This is further supplemented in view of the recent amendments to the Companies Act, the overarching theme of which seems to be improving ease of doing business.

The Companies Act was recently amended primarily with a view to creating greater transparency in corporate structures while also increasing the ease of doing business in India. While a few of the amendments are still to become effective, the key amendments include (1) the introduction of provisions to determine significant beneficial ownership and, therefore, significant influence or control over an Indian company, (2) simplification and liberalisation of the private placement process and (3) easing of the restrictions on providing loans to group companies.

The government has also recently enacted rules restricting the layers of subsidiaries that a company may have.

Authority and capacity

The board of an Indian company must approve any acquisition or divestment of shares. If the aggregate of the consideration (including for business or asset transfers) and the amount of guarantees or securities extended by the company (to a company other than any of its wholly owned subsidiaries), or proposed to be extended, exceeds the greater of 60 per cent of the acquirer company’s paid-up capital, free reserves and securities premium account, or 100 per cent of its free reserves and securities premium account, then at least 75 per cent of the shareholders must also approve.

5 Securities and Exchange Board of India.
6 This is further supplemented in view of the recent amendments to the Companies Act, the overarching theme of which seems to be improving ease of doing business.
7 Generally a company may have two vertical layers of subsidiaries. However, three layers are permitted if one layer includes a wholly owned subsidiary.

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Pre-emptive rights, restrictions on transfers, and puts and calls

The Companies Act mandates free transferability of shares of a public company but recognises private arrangements between its shareholders as valid contracts. Implicitly, pre-emptive rights and restrictions on transfer are enforceable *inter se* shareholders.

Types of companies

Public, private, sole trader and ‘small companies’ are permitted. The latter two are geared towards promoting domestic entrepreneurship.

Schemes of merger and demerger

The Companies Act permits schemes of compromise or arrangement between a company and all or a class of its creditors or members. Schemes can effect a restructuring, merger, demerger, hive-off or other reorganisation.

Every scheme must be approved by the board of each company concerned, at least 75 per cent of the shareholders of each company and at least 75 per cent of the creditors, and subsequently sanctioned by the relevant National Company Law Tribunal (NCLT).  

Schemes involving listed companies require SEBI and stock exchange prior approval at two stages: one month before the application to the NCLT for sanction and after NCLT sanction.

Schemes involving foreign companies require approval from the Reserve Bank of India (RBI) before filing with the NCLT. The transferee company must ensure that the valuation in respect of such schemes is conducted by recognised professional valuers in accordance with the internationally accepted principles on accounting and valuation.

Resident directors and independent directors

Under the Companies Act, every Indian company must have at least one director who was resident in India for at least 182 days in the financial year; this period is proportionately adjusted for newly incorporated companies at the end of the financial year of incorporation. Every public company, whether listed or unlisted, must additionally have at least two independent directors if its paid-up capital exceeds 100 million rupees, its turnover exceeds 1 billion rupees or its debt exceeds 500 million rupees.

Related-party transactions

The Companies Act defines a ‘related party’ as including a holding, a subsidiary and associate companies (including foreign companies) and entities in which directors are interested. All contracts with related parties that are not at arm’s length must be approved by the board in meeting and, where the consideration exceeds specified thresholds, by a shareholders’ resolution.

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8 Approval of the National Company Law Tribunal is not required for a merger of two or more small companies and a merger of a holding company and its wholly owned subsidiary.

9 Investing entities will be considered associate companies.
India

iii  The Competition Act

Regulation of combinations

The Competition Act prohibits persons or enterprises from entering into a combination that has or is likely to have an appreciably adverse effect on competition within the relevant market in India.

Separately, the Competition Commission of India (the Competition Commission) must approve a combination if the assets or turnover of the entities proposing to combine exceed prescribed thresholds. In March 2017, the government prescribed that, in the case of a business or asset transfer, the exemption from Competition Commission approval would be available if the value of the relevant assets being transferred or the turnover attributable thereto was within the threshold. This is a welcome change that brings the requirements of Indian competition law in line with global standards.

The Competition Commission publishes a summary of every notice of a combination received for stakeholders to review and submit their comments.

The Competition Commission approves a combination based on, *inter alia*, the actual and potential levels of competition in the market, barriers to entry, market share, perceived benefits and the perceived adverse impact of the combination.10

Mergers or amalgamations

The thresholds above which notice of a merger must be filed are:

<table>
<thead>
<tr>
<th>Enterprises considered for valuation</th>
<th>Thresholds in India</th>
<th>Aggregate global threshold</th>
</tr>
</thead>
<tbody>
<tr>
<td>Enterprise remaining after the merger or created as a result of the amalgamation</td>
<td>Asset value: more than 20 billion rupees</td>
<td>Asset value: more than US$1 billion, including at least 10 billion rupees in India</td>
</tr>
<tr>
<td></td>
<td>Turnover: more than 60 billion rupees</td>
<td>Turnover: more than US$3 billion, including at least 30 billion rupees in India</td>
</tr>
<tr>
<td>The group* to which the enterprise remaining after the merger or created as a result of the amalgamation will belong</td>
<td>Asset value: more than 80 billion rupees</td>
<td>Asset value: US$4 billion, including at least 10 billion rupees in India</td>
</tr>
<tr>
<td></td>
<td>Turnover: more than 240 billion rupees</td>
<td>Turnover: more than US$12 billion, including at least 30 billion rupees in India</td>
</tr>
</tbody>
</table>

* A ‘group’ means two or more enterprises that are directly or indirectly in a position to exercise at least 50 per cent of the voting rights in another enterprise, to appoint 50 per cent or more members on the board of directors, or control the management or affairs of the other enterprise.

10 The law with regard to filing of notices of combinations with the Competition Commission was revised on 29 June 2017. The contents of the notification will require consolidation.
**Acquisitions**

The thresholds above which notice of an acquisition of shares or a business must be filed are:

<table>
<thead>
<tr>
<th>Enterprises considered for valuation</th>
<th>Threshold in India</th>
<th>Aggregate global threshold</th>
</tr>
</thead>
<tbody>
<tr>
<td>Target aggregated with acquirer</td>
<td>Asset value: more than 20 billion rupees</td>
<td>Asset value: more than US$1 billion, including at least 10 billion rupees in India</td>
</tr>
<tr>
<td></td>
<td>Turnover: more than 60 billion rupees</td>
<td>Turnover: more than US$3 billion, including at least 30 billion rupees in India</td>
</tr>
<tr>
<td>Target aggregated with the group to which it will belong</td>
<td>Asset value: more than 80 billion rupees</td>
<td>Asset value: US$4 billion, including at least 10 billion rupees in India</td>
</tr>
<tr>
<td></td>
<td>Turnover: more than 240 billion rupees</td>
<td>Turnover: more than US$12 billion, including at least 30 billion rupees in India</td>
</tr>
</tbody>
</table>

An acquirer that already directly or indirectly controls another enterprise engaged in a business similar or identical to the target must notify the Competition Commission if the following thresholds are exceeded:

<table>
<thead>
<tr>
<th>Enterprises considered for valuation</th>
<th>Threshold in India</th>
<th>Aggregate global threshold</th>
</tr>
</thead>
<tbody>
<tr>
<td>Target aggregated with the enterprise controlled by the acquirer and engaged in the similar or identical business as the target</td>
<td>Asset value: more than 20 billion rupees</td>
<td>Asset value: more than US$1 billion, including at least 10 billion rupees in India</td>
</tr>
<tr>
<td></td>
<td>Turnover: more than 60 billion rupees</td>
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</tr>
</tbody>
</table>

**Combinations exempt from regulation**

The following combinations are, *inter alia*, exempt from the requirement of notifying the Competition Commission:

a) acquiring, solely as an investment or in the ordinary course of business, less than 25 per cent of shares or voting rights and not control. Acquiring less than 10 per cent of the total shares or voting rights of an enterprise will be ‘solely’ an investment if the acquirer is not a member of the board, has no right to nominate any director on the board, has only such rights as are exercisable by an ordinary shareholder, and does not intend to participate in the affairs and management of the target;

b) acquiring less than 5 per cent in a financial year when the acquirer already holds between 25 and 50 per cent of the shares or voting rights;

c) any acquisition in which the acquirer already holds 50 per cent or more shares or voting rights;

d) acquisitions of assets by an acquirer’s business or acquired solely as an investment or in the ordinary course of business, except where the acquisition represents substantial business operations or the acquisition leads to acquisition of control;

e) an amended or renewed tender offer where prior notice has been given to the Competition Commission;

f) an acquisition pursuant to a bonus issue or capital restructuring or buyback of shares or subscription to rights issue not leading to acquisition of control;
except for acquisitions of enterprises held jointly with enterprises not belonging to the same group, an intragroup restructuring involving an acquisition of control over a group company;

(h) merger or amalgamation of two enterprises where one has more than 50 per cent of the shares or voting rights of the other, or where 50 per cent of the shares or voting rights in each enterprise is held by enterprises within the same group;

(i) until March 2022, an acquisition or amalgamation in which the value of the assets being acquired, taken control of, merged or amalgamated is less than 3.5 billion rupees or turnover attributable to the assets is less than 10 billion rupees;\(^{11}\)

(j) until August 2022, any amalgamation of regional rural banks\(^ {12} \) mandated by the central government;

(k) until August 2027, any amalgamation, reconstitution or transfer of whole or any part thereof of nationalised banks under the Banking Companies (Acquisition and Transfer of Undertakings) Act 1970 and Banking Companies (Acquisition and Transfer of Undertakings) Act 1980; and

(l) until November 2022, any combination involving central public sector enterprises\(^ {13} \) operating in the oil and gas sectors under the Petroleum Act 1934 or under the Oilfields (Regulation and Development) Act 1948.

The exemptions in points b, c and h are not available if the transaction results in a change in control.

iv Exchange control regulations

The Indian rupee is not freely convertible, and the FEMA and its subsidiary rules and regulations restrict transactions between Indian residents and other persons.

Foreign direct investment (FDI), both primary subscription and secondary acquisition, is permitted in most sectors without prior approval and subject to compliance with conditions separate from licensing or domestic compliance of general application, including those relating to sectoral caps\(^ {14} \) and pricing. All FDI must be reported through the government’s online eBiz portal. Investment by a non-resident in less than 10 per cent of the capital of a listed entity will be considered foreign portfolio investment.\(^ {15} \)

FDI is subject to pricing guidelines. These guidelines require the purchase price of shares to be at least the fair value (in the case of an Indian selling shares) or not more than the fair value (in the case of an Indian acquiring shares) determined by any internationally accepted pricing methodology. The valuation must be contemporaneous with the transaction.

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\(^{11}\) This exemption was previously available only in the case of an acquisition, and the value of the assets and turnover of the enterprise as a whole were to be taken into account instead of the value of the assets and turnover being acquired.

\(^{12}\) Regional rural banks were established by the central government under the Regional Rural Banks Act 1976 with a view to strengthening the rural economy.

\(^{13}\) A central public sector enterprise consists of companies in which the shareholding of the central government exceeds 51 per cent.

\(^{14}\) Illustratively, foreign direct investment in defence is permitted only up to 49 per cent without the prior approval of the government.

\(^{15}\) Aggregate foreign portfolio investment in a company is restricted to 49 per cent or less.
Foreign investors may pay the entire consideration for an acquisition or subscription up front or defer, including through escrow, up to 25 per cent of the total consideration for up to 18 months. Similarly, indemnity obligations to a foreign investor of up to 25 per cent of the consideration are permissible without prior government approval.

v The Insolvency Code

The Insolvency Code is the first Indian legislation that contemplates a time-bound resolution of insolvency. The NCLT shall within 14 days of the application being submitted either admit or reject the application. The process under the Insolvency Code, once admitted, is required to be completed within 180 days of the date of it being admitted. If no resolution plan is admitted within these 180 days, the NCLT may pass an order for liquidation. A further extension of 90 days may be granted by the tribunal if 75 per cent or more of the committee of creditors approves the extension. No extension after the expiry of 270 days is permitted. If still no resolution plan is admitted within these 90 days, the NCLT may pass an order for liquidation.

Currently, certain lacunae exist as, among others, tribunals across the country have interpreted the provisions of the Insolvency Code differently. Additionally, applications, once accepted, may not be withdrawn without leave from the Supreme Court. However, recommendations have been made to resolve issues arising from the Insolvency Code and there continues to be hope that it will facilitate quick and effective resolution of financial stress.

vi The Takeover Code

The Takeover Code is a comprehensive code that applies to a change of control of listed companies (other than companies listed without making a public issue on the institutional trading platform) of a recognised stock exchange. ‘Control’ includes the right to appoint a majority of the directors, or control the management or policy decisions of a company, and applies to the acquisition of shares or voting rights.

Public offers
Mandatory offers and creeping acquisition

The Takeover Code mandates a public offer on acquiring 25 per cent or more of the shares of a listed company and, if a shareholder already holds shares to that extent, on acquiring more than 5 per cent of the shares of that company in any 12-month period ending on 31 March.

A public offer must be for at least 26 per cent of the voting rights or shares of the target company (excluding shares held by the acquirer), subject to maintaining the mandatory minimum public float of 25 per cent.

Voluntary offers

A shareholder with 25 per cent of the shares or voting rights of a listed company may make a voluntary public offer to acquire at least 10 per cent of the shares of that company, provided that the mandatory minimum public float of 25 per cent remains unaffected.

16 Illustratively, tribunals have taken conflicting views on the scope of moratorium vis-à-vis the properties of guarantors.
17 An institutional trading platform is a trading platform in a small or medium-sized enterprise (SME) exchange for listing and trading of securities of SMEs, including start-ups.
Conditional offers
A public offer may be conditional on a minimum level of acceptance and on regulatory approvals.

Consideration and performance surety
An acquirer may offer cash, shares of another listed company or listed debt securities, or any combination of these, as consideration for the shares tendered in response to the public offer.

The formula to calculate the minimum offer price is geared to the historical performance of the shares of the listed company. However, if the negotiated acquisition price is higher than the historical trading price, the negotiated price must be the minimum price of the public offer.

Every person making a public offer must deposit monies in an escrow account as performance surety. Indian banks may provide guarantees as surety for non-residents if such guarantees are covered by counter guarantees of a bank of international repute.

Disclosures of shareholding
Every person acquiring 5 per cent or more of the shares or voting rights of a listed company must disclose aggregate shareholding or voting rights to the concerned stock exchange within two working days of the acquisition.

Every person holding 5 per cent or more of the shares or voting rights of a listed company must disclose every subsequent acquisition or divestment of 2 per cent or more of the shares or voting rights of the company.

Separate annual disclosures must be made on 31 March each year.

Delisting of target company
A target company may be delisted in compliance with the delisting regulations.

The promoters may offer to purchase shares held by the public and delisting may be permitted if, following the offer, the promoters hold 90 per cent of the company and at least 25 per cent of the public shareholders have participated in the offer.

Schemes of amalgamation
The open offer process does not get triggered if the shares of the listed company are bought through a tribunal-approved scheme of amalgamation.

It was proposed in the HDFC Life–Max Financial Services reverse merger that the promoters of Max were to be paid a non-compete fee of approximately 8.5 billion rupees from which the minority shareholders of Max, a listed entity, would not benefit. Although the transaction was called off as the requisite regulatory approvals were not received, media reports suggest that the SEBI is considering inclusion of such mergers and acquisitions under the purview of the Takeover Code.

Non-compete payments

The Takeover Code provides for any non-compete fees paid to be included in the transaction value, while in a scheme of amalgamation, the same may be paid outside the deal value.

vii Insider Trading Regulations

The Insider Trading Regulations oblige shareholders, promoters, employees and directors of listed companies to disclose any transaction or series of transactions involving shares of a listed company having a trading value of 1 million rupees or more.

Insiders may also formulate irrevocable trading plans that are to be publicly disclosed and mandatorily implemented.

viii LODR Regulations

The LODR Regulations apply to listed entities that have listed ‘specified’ securities on an Indian stock exchange, and mandate event-specific disclosure and separately, periodic disclosure of, inter alia, changes in shareholding, proposals to change capital structure, information that may have a bearing on the operation or performance of the company, M&A activity, as well as transactions with group companies.

The LODR Regulations prevent directors and key management personnel of a listed entity from entering into compensation or profit-sharing agreements with shareholders or third parties in connection with shares of the listed entity without the prior approval of the board and the public shareholders. This proscription was specifically included to regulate arrangements between private equity investors and management of listed entities.

Certain mergers, demergers and schemes of arrangement involving a listed company require approval of the majority of the public shareholders of the listed company.

III DEVELOPMENTS IN CORPORATE AND TAKEOVER LAW AND THEIR IMPACT

i The Companies Act

The provisions of the Companies Act relating to mergers and acquisitions have recently been notified, changing the M&A landscape significantly.

Merger into a foreign company

Previously the Companies Act did not permit the merger of an Indian company with a foreign company and only permitted the merger of a foreign company with an Indian company. However, the Companies Act now permits cross-border mergers with foreign companies in certain jurisdictions, subject to RBI approval. The provisions with respect to cross-border mergers are effective from April 2017.

The RBI has recently implemented regulations for cross-border mergers. The Cross Border Merger Regulations primarily combine compliances under various regulations and statutes (e.g., pricing guidelines, sectoral caps, as discussed above).
Creditors’ objections
The Companies Act provides that a scheme can be challenged only by shareholders holding at least 10 per cent of the shareholding by value or by creditors representing 5 per cent of the outstanding debt of the company. This should shorten timelines and preclude frivolous objections.

Ease of Doing Business Index
India’s ranking has improved significantly from 131 in 2017 to 100 in 2018. This improvement can be attributed to the government’s consistent efforts in this regard, including the migration of several regulatory functions to e-portals, improving the country’s position in the Enforcing Contracts indicator, and the simplification of procedures for tax, labour and corporate regulatory compliance.

ii FDI policy and foreign investment
FDI of up to 100 per cent is allowed in single brand product retail trading under the automatic route for products branded during manufacturing with the same brand as is used globally. This initiative aims to attract a larger number of foreign investors engaged in production and marketing. However, given that local sourcing requirements remain for FDI over 100 per cent, it remains to be seen whether the liberalisation will lead to further FDI.

Further, foreign investment in a company engaged in the business of investing and registered with the RBI as a non-banking financial company would fall under the 100 per cent automatic route. However, foreign investment in core and other investment companies is permitted only under the government route.

iii Startup India
The Startup India initiative promotes entrepreneurship and innovation by helping start-ups secure funding. A ‘start-up’ is a new entity that is headquartered in India, is less than seven years old and has an annual turnover of less than 250 million rupees. Because of the muted success of this initiative, the government made several changes, the most notable being tax benefits to start-ups, as discussed later in this chapter. Certain additional benefits have also been introduced, such as self-certification, funding corpus of 100 billion rupees, concessions on patent and trademark filings, etc. The impact of these changes remains to be seen.

19 The press information bureau release by the government of India dated 6 April 2018 stated that the time taken for grant of recognition certificates has reduced from 10 to 15 days to one to four days, and, consequently, 7,968 start-ups were recognised in 2017–2018.
IV FOREIGN INVOLVEMENT IN M&A TRANSACTIONS

Although the value of inbound transactions has decreased by 71 per cent (US$ 6.5 billion in 2017 from US$ 20.9 billion in 2016), foreign investors continue to be key players in Indian M&A.

Below is country-wide summary of foreign involvement in Indian M&A:

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Mauritius</td>
<td>8,355</td>
<td>15,728</td>
<td>13,348</td>
<td>124,986</td>
<td>34%</td>
</tr>
<tr>
<td>2</td>
<td>Singapore</td>
<td>13,962</td>
<td>8,711</td>
<td>9,123</td>
<td>63,803</td>
<td>17%</td>
</tr>
<tr>
<td>3</td>
<td>Japan</td>
<td>2,614</td>
<td>4,709</td>
<td>1,263</td>
<td>26,938</td>
<td>7%</td>
</tr>
<tr>
<td>4</td>
<td>United Kingdom</td>
<td>898</td>
<td>1,483</td>
<td>720</td>
<td>25,311</td>
<td>7%</td>
</tr>
<tr>
<td>5</td>
<td>Netherlands</td>
<td>2,643</td>
<td>3,367</td>
<td>2,383</td>
<td>23,065</td>
<td>6%</td>
</tr>
<tr>
<td>6</td>
<td>United States</td>
<td>4,192</td>
<td>2,379</td>
<td>1,744</td>
<td>22,067</td>
<td>6%</td>
</tr>
<tr>
<td>7</td>
<td>Germany</td>
<td>986</td>
<td>1,069</td>
<td>1,012</td>
<td>10,710</td>
<td>3%</td>
</tr>
<tr>
<td>8</td>
<td>Cyprus</td>
<td>508</td>
<td>604</td>
<td>332</td>
<td>9,488</td>
<td>3%</td>
</tr>
<tr>
<td>9</td>
<td>France</td>
<td>598</td>
<td>614</td>
<td>457</td>
<td>6,182</td>
<td>2%</td>
</tr>
<tr>
<td>10</td>
<td>United Arab Emirates</td>
<td>985</td>
<td>675</td>
<td>628</td>
<td>5,332</td>
<td>1%</td>
</tr>
<tr>
<td></td>
<td>Total FDI inflows from all countries</td>
<td>40,001</td>
<td>43,478</td>
<td>35,941</td>
<td>368,053</td>
<td></td>
</tr>
</tbody>
</table>

V SIGNIFICANT TRANSACTIONS, KEY TRENDS AND HOT INDUSTRIES

i Significant transactions

Reliance/Adani

One of the biggest deals of 2017 is the sale of Reliance Infratel Limited’s Mumbai power business to Adani Transmission Limited. The sale will further Reliance Infratel Limited’s deleveraging strategy. The transaction is valued at around US$2.8 billion.

ONGC/HPCL

The biggest deal of 2018 so far has been the acquisition of the government’s stake in Hindustan Petroleum Company of about 51 per cent by Oil and Natural Gas Corporation, which is India’s largest producer of hydrocarbons. The transaction is valued at around US$5.5 billion. The acquisition aligns with the government’s strategy of managing investments in public sector enterprises and thereby improving the economic value of such enterprises.

Flipkart/eBay

In the biggest inbound transaction of 2017, Flipkart raised capital from a consortium comprising eBay Singapore, Microsoft and Tencent, and acquired the Indian arm of eBay as part of this transaction. The transaction was valued at US$1.4 billion.

RJio/RCOM

Reliance Communications, Reliance Infratel and Reliance Telecom propose to sell their tower, wireless spectrum, media convergence nodes and optical fibre assets to Reliance Jio. Media reports indicate that the transaction is valued at approximately US$2.7 billion and that the
proceeds will be used to repay the debts of these entities. The sale is pending insolvency and oppression and mismanagement proceedings before the NCLT and the National Company Law Appellate Tribunal.

**Motherson/PKC**

The automotive sector witnessed the biggest outbound transaction this year with Motherson Sumi System acquiring PKC Group for approximately US$604 million.

**ii  ‘Hot’ industries**

The telecom passive infrastructure sector was the focus of significant activity in 2018, with American Tower Corporation purchasing Idea Cellular and Vodafone’s stand-alone tower businesses for an aggregate consideration of US$1.2 billion, and Bharti Infratel and Indus Towers announcing a merger valued at approximately US$15 billion.

The financial services sector attracted the maximum number of deals in 2017. The biggest transaction in this sector was the merger of IndusInd Bank Limited and Bharat Financial Inclusion Limited, which was also the biggest transaction in Indian microfinance to date. The transaction was valued at approximately US$2.4 billion.

The infrastructure sector continued to grow in terms of value, which is essentially attributable to Reliance/Adani, and recorded an aggregated value of US$5.4 billion. Within the energy sector, clean energy was the forerunner in terms of value, which amounted to around 75 per cent of the volume.

**iii  Key trends**

Indian industry is experiencing a digital revolution with each sector capitalising on technology. Media reports suggest that convergence across sectors will be key in dictating, *inter alia*, restructurings and M&A deals. The growth in the technology sector can be primarily attributed to increased internet penetration and government initiatives facilitating the same.

The technology sector recorded the highest inbound activity in 2017. Some notable deals include Google Inc’s acquisition of Halli Labs, a start-up that is engaged in developing artificial intelligence.

Fintech firms witnessed healthy activity; some notable deals include the acquisition of Accelyst Solutions and Freecharge Payment Technologies (collectively, the ‘FreeCharge’ brand) by Axis Bank, which marks the first acquisition of a digital payments company by a bank in India.

**VI  FINANCING OF M&A: MAIN SOURCES AND DEVELOPMENTS**

**i  Indian banks**

Indian banks are precluded from funding M&A other than providing guarantees as surety for offshore acquirers if such guarantees are covered by counter-guarantees of a bank of international repute.

**ii  Non-banking financial companies**

Non-banking financial companies (NBFCs) provide acquisition finance, but are subject to exposure norms that apply to business sectors, a single borrower and affiliated companies. Therefore, the available finance is limited and expensive.
While a foreign investor may encumber shares of the relevant Indian company to secure credit facilities raised outside India, prior RBI approval is required if the proceeds of the credit facilities are to be used for further acquisition, and the required approval is not forthcoming.

iii Leveraged buyouts
Leveraged buyouts (LBOs) are limited in Indian M&A as the Companies Act prohibits a public company from providing financial assistance to any person for the purposes of acquiring the shares of that public company. While this structure does not apply to private companies, LBOs are rare, although slowly gaining ground.

iv Structured investments and structured payouts
Given the difficulties in raising finance from more ‘traditional’ sources, structured equity and quasi-equity investments are the preferred routes to raise acquisition finance. Consideration may be paid over time on the basis of earn-outs or other specific deliverables being achieved, but as Indian law requires delivery of shares of a public company against payment, transactions must be carefully structured.

VII EMPLOYMENT LAW
Contracts of employment cannot be specifically enforced under Indian law. Therefore, if an employer company undergoes a change in control, there is a de facto requirement to obtain employee consent.

Employees’ consent must be handled sensitively, but as long the terms and conditions of their employment are not adversely affected by the transaction, they are likely to give their consent. In larger industrial establishments, the prior consent of the relevant state government may be required, and this, too, is generally forthcoming.

As contracts of employment are not enforceable by the specific performance of Indian law, key personnel may be offered a retention bonus or other incentive as appropriate.

VIII VIRTUAL CURRENCIES
The RBI prohibits all entities regulated by it (i.e., banks, NBFCs and payment system providers) from dealing with virtual currencies, or providing services20 to facilitate any person or entity dealing with virtual currencies. Regulated entities that are currently dealing with or facilitating dealing with virtual currencies were required to discontinue such activities by 6 July 2018. The RBI’s proscriptions are currently being challenged before the Indian courts.

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20 Services include maintaining accounts, registering, trading, settling, clearing, giving loans against virtual tokens, accepting them as collateral, opening accounts of exchanges dealing with them and the transfer and receipt of money in accounts relating to purchase or sale of virtual currencies.
M&A in India is subject to income tax, stamp duty and, in the case of asset sales (including certain business transfers), GST. However, a business transfer structured as a transfer of an undertaking as a going concern with no specific consideration allotted to each transferred assets (a slump sale) is exempt from GST.

Indian law subjects any gains accruing on the transfer of a capital asset to tax. Capital gains arising from both share transfers (of unlisted shares) and asset transfers are taxed as long-term capital gains if the shares or assets are held for more than 24 months prior to completion of the transaction. In the case of a transfer of listed shares, short-term capital gains tax arises if the shares were held for less than 12 months; if held for more than 12 months, capital gains tax does not arise. A transfer of listed shares on the market, whether long-term or short-term, is subject to securities transaction tax. From 1 April 2019, capital gains arising from the sale of listed equity shares, units of equity-oriented funds or units of business trust will be subject to long-term capital gains tax if the shares have been held for more than 12 months and the gain exceeds 100,000 rupees.

<table>
<thead>
<tr>
<th>Taxable income</th>
<th>Short-term capital gains</th>
<th>Long-term capital gains</th>
<th>Obligation to deduct tax at source†</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Resident assessee</td>
<td>Non-resident assessee</td>
<td></td>
</tr>
<tr>
<td>Unlisted equity shares</td>
<td>Gain on transfer</td>
<td>30%‡</td>
<td>40% or 30%§</td>
</tr>
<tr>
<td>Listed equity shares on market</td>
<td>Gain on transfer</td>
<td>15%</td>
<td>15%</td>
</tr>
<tr>
<td>Listed equity shares off market</td>
<td>Gain on transfer</td>
<td>30%‡</td>
<td>40% or 30%§</td>
</tr>
<tr>
<td>Asset transfer</td>
<td>Gain i.e. (Difference between sale consideration minus cost of acquisition/indexed cost of acquisition)</td>
<td>30%‡</td>
<td>40% or 30%§</td>
</tr>
<tr>
<td>Business transfer (undertaking as a ‘going concern’)</td>
<td>Gain i.e. (Difference between sale consideration minus net worth of undertaking transferred)</td>
<td>30%‡</td>
<td>40% or 30%§</td>
</tr>
</tbody>
</table>

* This will change where the asset is a business asset and is subject to depreciation. The cost of acquisition would also be increased by indexation benefit as available
‡ For individuals, HUF, AOP and BOI, at progressive slab rates
§ 40% in the case of a corporate entity and 30% for all other persons
¶ Indexation benefit not available
Il Where tax payable in respect of long-term capital gains on listed securities exceeds 10% of the amount of capital gains before giving indexation benefit, such excess has to be ignored
** In the case of a slump sale, the mode of computation of capital gains will be subject to the mode of computation prescribed as per Section 50B of the Income Tax Act 1961

Note: In the case of non-residents, the benefits of the Double Taxation Avoidance Agreement will be available.
The rates in the table opposite may be subject to a surcharge at the following rates:

<table>
<thead>
<tr>
<th>Individual</th>
<th>Total income</th>
<th>Surcharge</th>
<th>Health and education cess</th>
</tr>
</thead>
<tbody>
<tr>
<td>5 to 10 million rupees</td>
<td>10%</td>
<td>4%</td>
<td></td>
</tr>
<tr>
<td>Above 10 million rupees</td>
<td>15%</td>
<td>4%</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Company</th>
<th>Total income</th>
<th>Surcharge</th>
<th>Health and education cess</th>
</tr>
</thead>
<tbody>
<tr>
<td>Domestic company</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>0 to 10 million rupees</td>
<td>Nil</td>
<td>4%</td>
<td></td>
</tr>
<tr>
<td>10 to 100 million rupees</td>
<td>7%</td>
<td>4%</td>
<td></td>
</tr>
<tr>
<td>Above 100 million rupees</td>
<td>12%</td>
<td>4%</td>
<td></td>
</tr>
<tr>
<td>Foreign company</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>0 to 10 million rupees</td>
<td>Nil</td>
<td>4%</td>
<td></td>
</tr>
<tr>
<td>10 to 100 million rupees</td>
<td>2%</td>
<td>4%</td>
<td></td>
</tr>
<tr>
<td>Above 100 million rupees</td>
<td>5%</td>
<td>4%</td>
<td></td>
</tr>
</tbody>
</table>

### i. Tax efficiencies

For foreign investors, immediate tax efficiency is achieved if the applicable double taxation avoidance agreement permits a lower rate of taxation.

No stamp duty applies to transfers of dematerialised shares, and a common condition precedent to completion is that the vendor dematerialises the shares.

A slump sale is more tax efficient than an asset transfer simpliciter, as it allows for business losses to be carried forward and, as long as the undertaking has been held for more than three years prior to completion of the transaction, gains are subject to long-term capital gains tax notwithstanding that individual assets may have been more recently acquired.

The Bombay High Court has held that the transfer of a business undertaking as a going concern against bonds or preference shares issued was an exchange and not a sale, and was, therefore, not subject to capital gains tax.\(^{21}\) ‘Slump exchange’ structures are gaining popularity on account of their tax efficiency.

A court-sanctioned scheme is also tax efficient if, \textit{inter alia}, shareholders holding at least 75 per cent by value of the original entity become shareholders in the resulting entity.

The recently enacted General Anti Avoidance Rules (GAAR) may also prove to be problematic. Essentially, the GAAR enable the tax authorities to declare an arrangement as an ‘impermissible avoidance arrangement’ if they are of the view that the arrangement has been entered into with the primary intention of avoiding tax. The law provides that there is a presumption of an arrangement being an impermissible avoidance arrangement and it is for the taxpayer to demonstrate that it has commercial substance. As the GAAR provisions are recent, the approach of the tax authorities is not yet known and, consequently, jurisprudence is yet to evolve.

ii Developments

After years of uncertainty, attempts are being made to make the tax regime in India more transparent and investor friendly. While intention is articulated frequently, progress on the ground is, arguably, slow.

Reduced rate of corporate tax

From 1 April 2018, income tax rates of Indian companies having a total turnover or gross receipts of less than 2.5 billion rupees have been reduced from 30 per cent to 25 per cent of the total income.

Tax benefits for start-ups

For start-ups set up between April 2016 and March 2021, a 100 per cent deduction of profits is proposed for three out of seven years. Further, start-ups and investors may seek exemption from tax payable out of ‘income from other sources’ in respect of issuance of shares at more than fair market value, subject to fulfilment of the required thresholds.

Deemed business connection

Indian law deems a foreign company to have a business connection in India if a dependant agent of that foreign company habitually concludes contracts or has a principal role in concluding contracts for and on behalf of the foreign company. This is in relation to contracts that are in the name of the non-resident, or for the transfer of ownership of, or granting the rights to the property owned by the non-resident, or for the provision of services by the non-resident.

IX OUTLOOK

India looks to FDI as a significant driver of economic development and the legislative support for easing business process should facilitate further investments.

M&A activity should increase throughout the rest of 2018 and in 2019, and inorganic growth is likely to rise exponentially. Domestic players are expected to dominate the M&A market. Media reports indicate that the market will most likely witness greater divestments, particularly in sectors that are capital intensive, illustratively real estate, infrastructure, power and cement.

Indian assets continue to suffer financial stress. The Insolvency Code, the resolution process prescribed by it and the revamping of the debt restructuring framework by the RBI, have created opportunities for revival of these stressed assets. It seems likely that insolvency will drive a substantial portion of Indian M&A activity in 2018.
I OVERVIEW OF M&A ACTIVITY

In 2018, Indonesia’s mergers and acquisitions (M&A) landscape is expected to accelerate, continuing the positive trends in 2017. An annual report entitled ‘Transaction Trail’, issued by Duff & Phelps in 2017, provides an insight into transaction and capital market activities – M&A, private equity, venture capital and initial public offerings – including those in Indonesia that year. The country has contributed significantly to the growth in deal-making, driven by inbound investments, representing 68 per cent of M&A deals in Indonesia, Singapore and Malaysia. According to the report, Indonesia recorded 81 M&A deals in the period from January to June 2017, with a total value of approximately US$4 billion, compared with 71 deals worth US$1.9 billion in the first half of 2016. Technology was the largest sector in value terms, representing 26 of the 81 deals. In terms of volume of deals, financial technology and the sectors associated with it has been the most active in the past 12 months, driven by new regulatory frameworks on peer-to-peer lending and payment systems. In terms of value, M&A in the manufacturing and energy sectors still lead in most transactions.

Since being elected in 2014, President Joko Widodo has initiated various regulatory reform measures, packaged under a series of ‘deregulation policies’ (or economic deregulation packages (EDPs), aimed at combating regulatory complexities and bureaucratic hurdles. The first EDP was launched in September 2015, since when there have been revisions to support the objectives of EDP reforms.

The government launched Government Regulation No. 91 of 2017 on the Acceleration of Business Implementation on 4 December 2017, which was followed by the head of the Capital Investment Coordinating Board (BKPM) issuing Regulation No. 13 of 2017 on Guidelines and Procedures for the Implementation of Capital Investment Licensing and Facilities (BKPM Regulation 13/2017). The Indonesian government aims to simplify investment licensing and investment facilities procedures with the issuance of this regulation. Among the key changes are the possibility of simplified licensing for services sector by allowing certain companies to apply a full licence directly and simplification of merger approval from a two-stage to a one-stage process.

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1 Yozua Makes is the managing partner at Makes & Partners Law Firm.
2 BKPM is an investment service agency of the Indonesian government.
II GENERAL INTRODUCTION TO THE LEGAL FRAMEWORK FOR M&A

In general terms, the statutory framework for combining businesses through a limited liability company is set out in Law No. 40 of 2007 on the Limited Liability Company (the Company Law) and various implementing regulations, such as Government Regulation No. 27 of 1998 on Mergers, Consolidation and Acquisition of Limited Liability Companies.

In addition to the aforementioned ‘umbrella’ laws and regulations, the practice and procedure for implementing particular transactions must comply with other specific laws and regulations relating to the status or nature of business of the target company and is regulated by specific bodies. For instance, banks, financial institutions and public listed companies are regulated by the Financial Service Authority (OJK). The OJK is a body established by virtue of the Financial Authority Law (Law 21/2011) merging the authority previously held by the Capital Market and Financial Institution Supervisory Board or Bapepam-LK (Bapepam) and the bank oversight authority of the Central Bank (BI) to supervise all activities in the financial services industries under one agency, with the exception of payment services that are still under BI. Further, companies with foreign share ownership are regulated by the BKPM and for tax purposes, all companies are subject to the relevant M&A regulations of the Directorate General of Tax and the OJK, which also regulate share custodian services and securities broker-dealers. In addition, for M&A in the insurance sector, companies are required to comply with the Insurance Law and its implementing regulations; for M&A in the broadcasting sector, companies are required to comply with the Broadcasting Law and its implementing regulations; and for M&A in the telecommunication sector, companies are required to comply with the Telecommunication Law and its implementing regulations, and other sector-specific regulations to govern the respective M&A in the industry.

In general, the requirements pertaining to M&A in Indonesia are as follows:

a announcement of an M&A proposal prepared by the acquirer and the target company or the merging companies, as the case may be, in newspapers;

b an extraordinary general meeting of shareholders (GMOS) of the target company or each of the merging companies (as the case may be) in which a quorum of at least 75 per cent of the total number of shares with voting rights are present (unless otherwise stipulated in a specific regulation), and in which approval is obtained from shareholders holding at least 75 per cent of the number of votes cast;

c approval from creditors in respect of the proposed M&A transaction and waiver of their rights for claims to be settled prior to the effectiveness of the merger or acquisition;

d a valuation of shares to determine the fair market value of the merger shares conversion formula;

e approval from third parties, including but not limited to approval from third parties required by prevailing law as well as pursuant to agreements entered into by the companies involved;

f approval from the relevant agencies having jurisdiction over the merging or the acquired company or companies (e.g., the OJK, the BKPM and the Ministry of Law and Human Rights); and

g consent from any relevant industry regulator, depending on the nature of the target company’s business.

An M&A transaction involves different companies, which can potentially result in a conflict of interest among directors, commissioners, majority shareholders and affiliates. Thus, with regard to the acquisition of a public company, in order to provide legal certainty and
In the banking sector, banks are subject to Government Regulation No. 28 of 1999 regarding Merger, Consolidation and Acquisition of Banks. Indonesia has acknowledged the single-ownership principle of the Indonesian banking industry known as the Single Presence Policy pursuant to BI Regulation No. 14/24/PBI/2012 on Single Presence Policy. Pursuant to this policy, albeit only certain requirements and exceptions, a controlling shareholder of an Indonesian bank is allowed to be the controlling shareholder of only one bank. Another important regulation of bank ownership is BI Regulation No. 14/8/PBI/2012 on Share Ownership of Commercial Bank. The rule sets out maximum share ownership over Indonesian banks, around 20 to 40 per cent, differentiated based on the specific nature of the shareholders (whether the shareholder is also a bank, a financial institution or an individual). The rule allows ownership that exceeds this limit, subject to OJK approval. Further, there is a specific requirement for prospective foreign investors to commit to the country's economic growth, obtain approval from the authority of the respective country of origin, and be subject to certain ratings set out by the BI.

Recently there have been regulatory discussions within the OJK to issue a new regulation on holding companies for financial conglomeration activities, which requires companies operating across different financial sectors to form a holding company that is also subject to OJK supervision. Financial industry stakeholders are waiting for the introduction of this new regulation.

III DEVELOPMENTS IN CORPORATE AND TAKEOVER LAW AND THEIR IMPACT

In general, developments in corporate and takeover laws aim to make the process more transparent, taking into consideration concerns of different stakeholders such as creditors, employees, minority shareholders and consumers, and within the framework of environmental protection and fair competition.

The government is concerned about maintaining fair competition among business players in Indonesia. Consequently, regulations governing fair trade practices are frequently issued or amended. In connection therewith, the Business Competition Supervisory Commission (KPPU) recently issued implementing regulations to the Antimonopoly Law, namely KPPU Rule No. 10 of 2010, Rule No. 11 of 2010 and Rule No. 13 of 2010, which govern the consultation and post-notification requirements for mergers, consolidations and acquisitions, along with guidelines that, inter alia, provide for scrutiny of contemplated M&A transactions. These rules were issued as the implementing regulations of Government
Regulation No. 57 of 2010 (GR 57/2010) on the Merger or Consolidation and Acquisition of Enterprise Share which may Result in Monopolistic Practices and Unfair Business Competition, which was recently issued by the government (see Section IX).

With respect to acquisitions of public companies (also known as takeovers), Bapepam-LK regulations are still applicable, namely Rule IX.H.1 regarding Takeover of a Public Company, which was issued on 31 May 2011, amending the previous rule enacted in June 2008. This regulation introduces the concept of mandatory tender offer (MTO), which is triggered by a takeover of a public company. The rule requires the relisting obligation of shares obtained as a result of an MTO by 20 per cent. However, the OJK can grant an extension of the time period for a relisting of shares to the stock exchange in certain cases. The OJK also introduced OJK Regulation No. 54/POJK.04/2015 on Voluntary Tender Offer, which can be a tool for acquisitions for public companies with no controlling or simple-majority shareholders, amending the previous Bapepam-LK Rule IX.F.1 of 2011.

In December 2016, the OJK introduced a revision to the regulation concerning merger and consolidation of public companies by virtue of OJK Regulation No. 74/OJK.04/2016. This regulation provides new documentary requirements for OJK approval in the event of a merger or consolidation of public companies. The required documents include corporate shareholding and management documents, an appraisal report, a business plan, notes on the new controller, and a management analysis report. The aim of this Regulation is to further promote investor protection and disclosure of information.

IV FOREIGN INVOLVEMENT IN M&A TRANSACTIONS

Foreign direct investment in Indonesia is regulated by Law No. 25 of 2007 on Capital Investment (the Investment Law) and its implementing regulations issued by the BKPM. As the appointed regulator of direct capital investment in Indonesia, the BKPM has mainly focused on the efforts by the government to attract foreign investors and to build an international economic environment.

The most recent rules on foreign equity restrictions are stipulated in Presidential Regulation No. 44 of 2016, which determines which business sectors are open or closed for foreign investors and, if open, to what extent foreign direct investment is permitted (the Negative List). The Negative List is the first and most important regulation that any foreign investor contemplating investment in Indonesia should consult. If the business of the companies in the contemplated M&A is in a field of business that is closed to foreign investment as provided in the Negative List, then the foreign investor cannot invest in that business field in Indonesia. However, if the business is one of the listed business fields that are conditionally open for investment, then foreign investment in that business is permitted but the contemplated M&A involving foreign investors will be limited regarding the level of foreign ownership of shares allowed in the Negative List. As a consequence of the involvement of foreign investors in an M&A transaction, the Indonesian company will be required to convert its status from a domestic company into a foreign investment company within the framework of the Investment Law.

The following are representative examples of general application of current Negative List provisions regarding foreign investment, which are also subject to other specific regulations:

- finance companies: maximum foreign ownership is 85 per cent;
- insurance: maximum foreign ownership is 80 per cent; and
- plantation: maximum foreign ownership is 95 per cent.
Most private foreign direct capital investments in Indonesia are administered and supervised by the BKPM. Consequently, most matters relevant to M&A transactions must be reported to and will require approval of the BKPM chairman. BKPM Regulation 13/2017 sets out the procedures for obtaining BKPM approval for new investments, changes in shareholders, mergers or business expansions.

Public companies, on the other hand, are regulated by the OJK. Unlike private companies, unless specifically provided under a separate regulation, public listed companies have no restriction on foreign ownership of shares provided the investment involves foreign passive portfolio investors and not strategic or controlling foreign investors. Moreover, the provisions under the Negative List are not applicable to a public company whose shares are acquired by foreign investors in portfolio transactions made through the domestic capital market.

V SIGNIFICANT TRANSACTIONS AND HOT INDUSTRIES

For years, Indonesia has been substantially relying on the energy and mining sector, being a strong force in the oil and gas business and the world’s largest exporter of thermal coal. More recently, the rise of the middle class means increased consumer spending, and therefore consumer sectors such as retail, consumer technology, consumer goods, transportation (including aviation) and property are the main targets.

The biggest deals in 2017 were made in the digital economy and technology sector. This was a stark shift from 2016, in which the mining sector led most of the deals following the acquisition of Newmont Nusa Tenggara by Medco Energy. In general, based on the latest studies conducted by various companies, such as Bain & Company or Solidiance, the number of M&As in Indonesia’s technology sector has been rising during the past couple of years. For example in 2017, China’s e-commerce giant Alibaba Group Holdings injected US$1.1 billion into Indonesian e-commerce platform Tokopedia. The Indonesian ride-hailing start-up Go-Jek benefited from a US$1.2 billion injection, led by Chinese internet giant Tencent Holdings Ltd in a move to maintain competition. GrabPay has been rebranded ‘GrabPay, powered by OVO’ following a partnership between GrabPay’s in-app cashless features and Lippo Group’s OVO, a licensed e-money provider, which somewhat overlaps with its rival Go-Jek announcing the acquisition of three of the largest fintech companies in Indonesia.

Outside the e-commerce industry, another big deal involved the tobacco industry. Japan-based cigarette manufacturing company Japan Tobacco Inc bought 100 per cent of the shares in Karyadibya Mahardika and Surya Mustika Nusantara, both of which are subsidiaries of Gudang Garam (Indonesia’s second-largest tobacco manufacturer).

VI FINANCING OF M&A MAIN SOURCES AND DEVELOPMENTS

As in other jurisdictions, the financing of M&A in Indonesia is generally derived from internal cash flow, bank loans (provided such financing is not intended for investment in speculation on shares), issuance of new shares (share swaps) and issuance of financial derivative instruments.

Various regulations are applicable depending on the nature of the financing scheme, including the reporting requirement to BI for foreign currency denominated loans from offshore banks or entities, submission of registration statements to the OJK if the transaction involves conducting a rights issue and approval by the BKPM for an increase in equity to finance expansion (growth by acquisition instead of organic growth).
The prevailing regulations that affect the financing of M&A are as follows: BI Regulation No. 12/24/PBI/2010, regarding Offshore Debt Reporting Obligation; BI Regulation No. 12/10/PBI/2010 regarding Offshore Borrowing of a Non-Bank Corporation, BI Regulation No. 10/28/PBI/2008 regarding the Purchase of Foreign Currency Against Rupiah through Banks, and BI Regulation No. 14/16/PBI/2012 regarding Short-Term Financing Facility for Commercial Banks which, *inter alia*, prescribes reporting and credit rating requirements in some cases. BI also issued Regulation No. 7/1/PBI/2005 regarding Offshore Borrowing of Banks, which has been further amended by BI Regulation No. 13/7/PBI/2011, BI Regulation No. 15/6/PBI/2013 and BI Regulation No. 16/7/2014, containing, among other things, an obligation for banks to limit the daily balance of short-term offshore borrowing to a maximum of 30 per cent of capital.

Another key regulation on the matter is BI Regulation No. 16/21/PBI/2014 on Implementation of Prudential Principles for the Management of Foreign Loans of Non-Bank Corporations to make improvements to BI Regulation No. 16/20/PBI/2014, which previously regulated the same. This Regulation aims to prevent foreign loans and excessive foreign debt from hampering macoconomy stability, by providing guidelines for non-bank corporations to implement prudent principles in managing their loans with foreign parties. In managing foreign loans, companies must implement prudential principles by complying with the prescribed hedging and liquidity ratios, and credit ratings. Hedging and liquidity ratios are based on foreign-currency assets (receivables) and liabilities (obligations) from forwards, swaps or options transactions.

Mandatory use of rupiah as the transaction currency is another hot regulatory topic in Indonesia. On 28 June 2011, the government issued Law No. 7 of 2011 on Currency (Mata Uang). Article 21(1) of Law No. 7/2011 provides that the rupiah shall be used in every payment transaction, fulfilment of other monetary obligations, or other financial transactions within Indonesian territory, with certain exceptions. In 2015, BI issued BI Regulation No. 17/3/PBI/2015 on the Mandatory Use of Rupiah within the Republic of Indonesia. The regulation basically strengthens the Currency Law, and provides clearer guidance that the Law applies to both cash and non-cash transactions. The Regulation also explains in details the five exceptions to the rule.

**VII EMPLOYMENT LAW**

Law No. 13 of 2003 on Employment (the Labour Law) provides the framework for rights of employees and employers in the M&A context. Basically, since M&A is only related to the change in ownership or control of a company, it should not in any way affect employee status. In general, there are two possibilities with respect to an employee's continuance in the company with new controlling shareholders (in an acquisition) or with the surviving company (in a merger), which could be either the extension or renewal of the employee's term of employment. In the case of renewal of employment, the employee will have his or her contract terminated from the previous company (before it was merged or acquired) and then be rehired by the surviving company under new terms and conditions. Accordingly, there is a requirement under the Company Law for boards of directors of companies undergoing M&A transactions to publish a summary of the proposed M&A in at least one newspaper and announce it in writing to the employees of the surviving or acquired company no later than 30 days before the invitation of shareholders to the GMOS.

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Should an employee not wish to maintain his or her employment with the surviving company, then he or she has the right to refuse the new employment. Thus, the employee can resign from the company and demand a special severance payment, long-service payment package and accrued compensation (such as untaken annual leave or housing allowance, if applicable) as set out in the Labour Law, Article 163(1). It should be noted that the Labour Law does not specify the percentage of ownership that triggers the entitlements but simply refers to a ‘change of ownership’. There is a risk that the employees or their union (if any) will take the position that any change of ownership will qualify under Article 163(1), even where there is less than a 50 per cent change in shareholding. Any substantial change in management and employment policies, however, could also trigger Article 163(1), even though the new shareholder is not a controlling shareholder, as this may directly or indirectly affect the employees.

However, under Article 163(2) of the Labour Law, employers (both the buyer and the seller) also have the right to terminate employment in the event of a change in a company’s status, a merger or a consolidation, subject to the payment of severance and long-service payment as set out in Article 163(2), which is set at a higher level than under Article 163(1) mentioned above.

In addition to the above, the rights of employees in M&A transactions are also governed by the provisions relating to M&A transactions in a collective labour agreement entered into by and between the company and the company’s labour union. In the event of inconsistency between the provisions of the Labour Law and the collective labour agreement, the provisions that are more favourable to the employees will prevail.

VIII TAX LAW

i Corporate income tax in mergers

As in other jurisdictions, the accounting method used in mergers is generally a ‘pooling of interest’ method and a book value transfer approach.

Article 1(3) of Minister of Finance Decree No. 43/PMK.03/2008 of 13 March 2008 on the Use of Book Value for Transfer of Assets in Relation to Merger, Consolidation or Spin-off (MOF Decree 43/2008) defines a ‘business merger’ as a merger of two or more taxpayer entities with capital divided into shares in a manner that maintains the existence of one of the companies having no residual loss or having a smaller residual loss.

Furthermore, Article 2 of MOF Decree 43/2008 provides that taxpayers conducting a merger using book value must fulfil the following requirements:

a submission of an application to the Director General of Tax, including the reason and purpose for conducting the merger or spin-off;

b payment of all tax owed by each of the companies involved; and

c fulfilment of requirements of the ‘business purpose test’ (described below).

In addition, Article 3 of MOF Decree 43/2008 provides that a taxpayer conducting a merger using book value may not compensate the loss or residual loss of the merged taxpayer.

In general, one could conclude that there will be no capital gains tax (corporate income tax) if the Directorate General of Taxation has issued the approval for a merger with book value. In the event that the transfer of assets using book value is not approved by the
Indonesia

Directorate General of Taxation, then the transfer of assets shall be valued at the market price and the difference between the book value and the market value (capital gains) will be subject to corporate income tax at the rate of 25 per cent (flat rate).

ii  Value added tax

The transfer of assets is subject to VAT at 10 per cent of the market value, pursuant to Articles 4(1) and 7(1) of Law No. 42 of 2009 on Value Added Tax and Sales Tax on Luxury Goods (the VAT Law).

The VAT should be imposed by a ‘taxable business entity’ on the delivery of assets, the initial purpose of which is not to be traded, except assets on which the VAT cannot be credited because the acquisition of such assets has no direct relation to the business activity, and for acquisition and maintenance of sedan or station wagon motor vehicles when made for a trading inventory or for rental purposes.

iii  Tax on transfers of land

Government Regulation No. 41 of 2016 provides that the disposal of land and buildings is subject to final income tax at the rate of 2.5 per cent of the transfer amount that is stated in the deed, which is a reduction from the previous 5 per cent rate (the transferor’s tax obligation). Moreover, the transfer of land or buildings in a merger is subject to land or building title acquisition duty (BPHTB) of 5 per cent of the taxable value (NJOP) (the surviving entity’s tax obligation). The acquisition value of the tax object (NPOP) in the merger is the market value or the same as the NJOP.

The taxpayer who carries out the merger and obtains approval for the use of book value for the merger from the Director General of Taxation may apply for a 50 per cent reduction in the BPHTB.

iv  Sale of shares

Article 17 of Law No. 36/2008 on Income Tax provides that the maximum tax rate for individual taxpayers is 30 per cent and the tax rate for corporate taxpayers is a flat rate of 25 per cent. Public companies that satisfy a minimum listing requirement of 40 per cent along with other conditions are entitled to a tax discount of 5 per cent off the standard rate, giving them an effective tax rate of 20 per cent.

For transfer of shares in general, the difference between the acquisition of shares and the selling price of shares will be subject to capital gains tax at the rate of 30 per cent (maximum) if the seller is an individual and at the rate of 25 per cent (flat rate) if the seller is a corporate taxpayer in Indonesia.

If the seller of the shares is a non-Indonesian taxpayer, then the capital gains tax from the selling of the shares will be regulated based on the applicable tax treaty between the seller’s country of domicile and Indonesia.

For a transfer of shares of a public listed company, a final tax of 0.1 per cent of the transaction value will be applicable to the seller and 0.5 per cent tax on the founder shares (if the seller is holding the shares from the initial public offering).
IX COMPETITION LAW

Certain provisions of Law No. 5 of 1999 on the Ban on Monopolistic and Unfair Business Practices (the Antimonopoly Law) deal specifically with M&A. Essentially, pursuant to Article 28 of the Antimonopoly Law, M&A transactions are prohibited if they result in monopolistic or unfair trade practices. Therefore, all efforts should be made to ensure that any contemplated M&A transaction does not give rise to a monopolistic or unfair practice.

The Antimonopoly Law uses a market share standard as a parameter for ascertaining the presumption of a monopoly (if a business player has more than a 50 per cent market share), for ascertaining the presumption of an oligopoly (if a group of business players has more than a 75 per cent market share) and for determining the dominant position (if a business player has more than a 50 per cent market share, and as a group, those business players have more than a 75 per cent market share unless the dominant position is not abused).

The government’s issuance of GR 57/2010 was followed by KPPU Rules No. 10 of 2010, No. 11 of 2010 and No. 13 of 2010 (the latter being revised by Rule No. 11 of 2011) (the KPPU Rules). GR 57/2010 and the KPPU Rules provide that companies conducting an M&A transaction with the following criteria shall fulfil the post-notification requirements as described below:

a the total value of assets of the companies concerned is more than 2.5 trillion rupiah; or
b the total turnover of the companies concerned is more than 5 trillion rupiah.

It should be noted that subscription to newly issued shares (capital increase) shall also be deemed acquisition.

The KPPU provides for a consultation procedure and post-notification within 30 days of completion of the contemplated deal. In addition, GR 57/2010 provides that a bank conducting an M&A transaction shall submit a post-notification of the transaction to the KPPU if the total value of assets of the bank concerned is more than 20 trillion rupiah. Any non-compliance with this requirement will be sanctioned with administrative penalties.

After receiving a post-notification, the KPPU will conduct an assessment to determine whether the transaction has violated the Antimonopoly Law, taking into account:

a market concentration;
b market entry barriers;
c potential for unfair trade;
d efficiency; or
e whether an M&A transaction is necessary to prevent a company’s bankruptcy.

It should further be noted that pursuant to Article 47(2.E) of the Antimonopoly Law, the KPPU has the authority to cancel an M&A transaction if it has elements of monopolistic or unfair trade practices. Moreover, the Antimonopoly Law may apply to foreign entities that are not doing business in Indonesia but have entered into agreements with Indonesian entities that may result in monopolistic or unfair trade practices within Indonesia. Hence, it would be advisable for investors contemplating an M&A transaction to file for a consultation prior to completion of the contemplated transaction with the KPPU to avoid cancellation of the transaction at a later stage.
OUTLOOK

There was a major and unprecedented shift of M&A deals dominated by the technology sector during 2017, in contrast to 2016 when the mining sector still dominated. Consistent political support by the new government has generated renewed optimism about Indonesia’s potential growth, as there is substantial untapped potential for M&A, given Indonesia’s consumer market, to cater for the needs of the rising middle class. Natural resources (coal, palm oil, natural gas, petroleum and mineral resources) remain an important sector, but telecommunications, retail, property, construction, technology and financial services have proven to be the sectors that have led the market.

As a democratic country that has undergone significant reform in the last two decades, challenges still remain. Bureaucratic red tape and corruption have become the main obstacles to sustainable growth. However, several reform initiatives have been introduced to restore confidence in the business climate. Investors are still waiting for the effects of new procedures introduced by Government Regulation No. 91 of 2017 and the subsequent BKPM regulation at the end of 2017 to streamline business processes. Financial and securities regulations, as well as corporate governance rules, have been set up to provide a more sophisticated and modern regulatory environment for foreign investors.

In light of the foregoing, it appears that recent economic development shows market confidence that the Indonesian government will continue to maintain and improve transparency, the certainty of stakeholders’ involvement, fair competition and a more friendly environment for foreign investment.
Chapter 26

ISRAEL

Clifford Davis and Keith Shaw

I OVERVIEW OF M&A ACTIVITY

There were significant levels of M&A activity in the Israeli marketplace during 2017, with 159 requests for merger approval received by the Israeli Antitrust Authority (the Authority). This represented a decrease of approximately 17 per cent compared with 2016. The Authority approved 94.6 per cent of the requests and conditionally approved 2.4 per cent. None of the requests in 2017 were rejected. Nineteen per cent of the requests were international deals, which was the largest share in more than a decade.

Israel is known as the start-up or innovation nation and it comes as no surprise that, just as in 2016, most of the Israeli companies acquired during 2017 were in the high-tech field and high-tech-related industries, in particular the software and technology sector and the pharmaceutical and life sciences sector. Industrial research and development (R&D) is hotly pursued in Israel, and chief among those encouraging this is the government-funded Israel Innovation Authority (IIA). The IIA, established and governed by the Law for the Encouragement of Industrial Research and Development 1984 (R&D Law), nurtures and develops Israeli innovation resources, while creating and strengthening the infrastructure and framework needed to support the industry.

Israel’s high-tech industry has been the source of many technological breakthroughs, particularly in the fields of water irrigation, medicine and transport: drip and micro-irrigation systems (Netafim), Pillcam, the gold standard for intestinal visualisation (Given Imaging), WoundClot bandages, which stop severe bleeding within minutes, a wearable robotic exoskeleton that provides powered hip and knee motion to enable individuals with spinal cord injuries to stand upright and walk (Rewalk), and Mobileye, driver assistance technology to prevent accidents, are just a few examples of technologies that Israeli companies have pioneered or were among the first to commercialise. Israeli start-ups continue to drive innovation globally across all major technology sectors and more than 90 Israeli companies are currently traded on NASDAQ. Israel has also consistently been a leader in categories such as expenditure on R&D as a percentage of gross domestic product (according to the OECD).

In 2017, 94 Israeli high-tech companies were acquired or merged, slightly fewer than in 2016.2 The average M&A deal size (excluding the two largest – the acquisition of Mobileye by Intel for US$15.3 billion, and the acquisition of Neuroderm by Mitsubishi Tanabe Pharma for US$1.1 billion – which skews the data upwards) in 2017 of approximately

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1 Clifford Davis and Keith Shaw are partners at S Horowitz & Co. The authors would like to thank their colleagues at S Horowitz & Co, Adam Levitan and Gal Nir, for their significant assistance in preparing this chapter.

2 The figures quoted in this chapter are based on reports issued by the IVC Research Centre.
US$51.8 million was 8 per cent higher than 2016’s average deal size of US$47.8 million. Overall, including the two aforesaid outlying deals, total deal value reached US$23 billion, an increase of 18 per cent on 2016.

The number of high-tech initial public offerings (IPOs) in 2017 was substantially higher than 2016, attracting US$440 million. Thirteen high-tech companies conducted IPOs in 2017, up from five in 2016. Three IPOs were carried out in Israel, one in the United Kingdom and another three in the United States, with ForeScout raising US$116 million on NASDAQ. In what was an interesting development, six IPOs were carried out on the Australian Securities Exchange (ASX), which appears to have become a hotbed for innovative Israeli tech companies looking for new ways to raise capital.

As regards fund investments, the most active venture capital (VC) fund in 2017 was Vertex Israel, ranked at the top of the list with 12 first investments. In a close second, aMoon Partners, a life sciences fund managed by Check Point founder Marius Nacht, took on 11 new investments. Third place was shared by three funds – F2 Capital, IAngels Seed Fund and Mindset Ventures – each with 10 new investments.

Israeli VC funds raised US$1.3 billion in 2017 and four more funds with US$550 million were under management in early 2018. However, foreign VC activity slowed down during 2017 compared to previous years, as reflected in the ratio between Israeli and foreign funds, which decreased, with Israeli funds holding 48 per cent of total new investments, a new record in the last five years. On the inward investment side, US$5.24 billion was raised by 620 Israeli high-tech companies in 2017, an increase of 9 per cent compared to the US$4.83 billion raised in 2016, from both local and foreign investments; this is the highest amount ever recorded, exceeding the previous record of US$4.4 billion raised in 2015. The increase derived from four large deals (Cybereason, Via, Lemonade and Skybox) of more than US$100 million each, amounting to 12 per cent of the total amount raised. The average financing round has been increasing since 2013, from US$3.6 million to an average of US$8.5 million in 2017.

Six notable acquisitions in 2017 were:

\(a\) the acquisition by Intel of Mobileye, which specialises in cutting-edge driver assistance technology to prevent accidents, for US$15.3 billion;

\(b\) the acquisition by Mitsubishi Tanabe Pharma of Neuroderm, a clinical-stage pharmaceutical company developing treatments for disorders of the central nervous system, for US$1.1 billion;

\(c\) the sale of Israeli game developer Plarium to Australia’s Aristocrat for US$500 million;

\(d\) the acquisition by auto giant Continental AG of Argus Cyber Security for US$430 million;

\(e\) the purchase of Tel Aviv-based customer identity management firm Gigya by German software giant SAP for US$350 million; and

\(f\) the acquisition by Gett of Juno Labs for US$200 million, which was the largest deal among Israeli acquirers.
II GENERAL INTRODUCTION TO THE LEGAL FRAMEWORK FOR M&A

The Companies Law 1999 (the Companies Law) is the main body of legislation governing almost every field of corporate activity, save for insolvency and debenture matters, which are governed by the Companies Ordinance 1983 (though a new set of insolvency laws will come into force in 2019, following the enactment of the Insolvency and Rehabilitation Law, 2018). The Companies Law permits mergers without court approval provided that approval has been given by the board and shareholders (subject to certain exceptions). Complementary regulations dealing with acquisitions made by way of a tender offer were also enacted in the form of the Securities Regulations (Tender Offer) 2000.

On the public side, transactions are also governed by the Securities Law 1968 and the regulations enacted thereunder, including the Securities Regulations (Periodic and Immediate Reports) 1970, which include regulations concerning the reporting of mergers. Israeli corporate law also contains provisions applying to targets that are Israeli public companies, which mandate the making of a compulsory tender offer in which an acquirer builds up a stake in the target over a certain percentage holding. Accordingly, under the Companies Law (with certain limited exceptions), an acquisition of more than 25 or 45 per cent of a target (with no shareholder holding more than 25 or 45 per cent in the target, as applicable), including where the acquirer is already a shareholder but by way of the proposed acquisition it crosses the relevant threshold, must be made by way of a ‘special’ tender offer, pursuant to which existing shareholders are entitled to sell their shares to the acquirer in equal parts. In addition, more than 90 per cent of a target must be performed by way of a ‘full’ tender offer, in which at least 95 per cent of the existing shareholders must agree to sell their shares; in such a case, even if the remaining 5 per cent are opposed to the merger, they may be ‘squeezed out’ by the acquirer via a statutory compulsory purchase mechanism. Relatively recently, another requirement was added to the effect that at least half the offeree shareholders without any personal interest in the transaction must agree to sell.

As mentioned above, perhaps the most recent significant legal reform affecting M&A in Israel is the possibility of effecting an acquisition by way of a merger under the Companies Law. Although, as a result of the burst of the dot.com bubble in 2000, there was little use of the merger procedure at the beginning of the subsequent decade, that picture has since changed. In particular, as found in the United States, mergers are now typically structured in Israel by way of a ‘reverse triangular merger’.

This method has mainly been used by foreign companies wishing to gain full ownership of an Israeli company to avoid having to obtain the high level of acceptances required under the provisions of the Companies Law that would otherwise apply if an acquisition were to be made by way of a tender offer. Pursuant to the tender offer route, for the acquirer to effect a compulsory purchase of dissenting minority shareholders would require 80 per cent acceptances, if the target is an Israeli private company (or, if incorporated before 2000, 90 per cent acceptances), or 95 per cent acceptances if the target is an Israeli public company, as noted above.

By contrast, a reverse triangular merger will, subject to certain exceptions, only require, inter alia, the approval of a simple majority of the shareholders of the target. In a reverse triangular merger, the acquirer will establish a wholly owned special-purpose subsidiary in Israel, which is then merged into the target company. The target company is the surviving entity and, as a result of the merger, the shares in the target are cancelled and converted into the right to receive cash or securities of the acquirer.
III DEVELOPMENTS IN CORPORATE AND TAKEOVER LAW AND THEIR IMPACT

The Control of Financial Services (Regulated Financial Services) Law, 2016 (FSL) came into force in June 2017 (save for certain provisions which come into force in 2018). It seeks to regulate the provision of non-banking credit services and financial asset services in Israel. It was introduced both to encourage the development and progress of the non-institutional financial services field and to provide an appropriate alternative to the financial services banking system, but also to protect customers and clamp down on illegal activities in an area that was previously barely regulated or supervised.

In general, inter alia, the FSL imposes a licensing requirement on individuals or companies that wish to offer either financial asset services (including currency exchange and certain virtual or pre-paid currencies commonly used in the fintech sector), or provision of credit, defined in a broad manner as ‘providing credit by way of occupation’. There are a number of entities that are exempt from this licensing requirement, such as financial institutions that are already regulated under existing legislation. In addition, newly published draft regulations propose to exempt certain types of entities, including banks located in an OECD member country.

On the side of cryptocurrencies, the Committee for the Examination of the Regulation on Cryptocurrencies, within the Israeli Securities Authority (the Committee), published an interim report in March 2018 regarding its main recommendations in respect of the question of whether a cryptocurrency should be deemed a security or a regular coin. The Committee recommended that cryptocurrencies intended solely for payment, clearing or exchange, other than a specific venture, and that do not confer additional rights and are not controlled by a central entity, should not be considered securities. Conversely, it recommended that cryptocurrencies that grant rights to a security similar to that of shares or bonds (voting rights and participation rights) should be deemed as a security (those cryptocurrencies that are usually referred to as security tokens or investment tokens). From another angle, as expected, the Committee said that it would act to ban companies in the cryptocurrency business from being included in the Tel Aviv Stock Exchange’s share indices. The robust debate in Israel concerning the regulation and taxing of cryptocurrencies continues but it appears that the Committee has taken a more gentle approach compared with some other jurisdictions.

IV FOREIGN INVOLVEMENT IN M&A TRANSACTIONS

Foreign companies continued to be involved in many major transactions during 2017, with foreign funds, particularly from the United States, leading in terms of the number of deals. Canadian and US corporations acquired 39 Israeli high-tech companies, amounting to 42 per cent of the total number of deals. European corporations (including the United Kingdom and Russia) were purchasers in 13 per cent of all M&A deals and three were led by Chinese acquirers (one fewer than in 2016).

Foreign funds made 233 investments amounting to 52 per cent of first investments, and the remaining 48 per cent comprised 212 investments made by Israeli VC funds. This was the lowest share for foreign funds in five years.

The largest M&A deal in 2017 involved an American multinational corporation and the technology company, Intel, and the second largest was the acquisition by Mitsubishi Tanabe Pharma Corporation, a Japanese public company trading on the Tokyo Stock Exchange, of Israeli pharmaceutical company NeuroDerm. German companies also took part in the biggest
deals, with automotive manufacturing company Continental AG acquiring Israel's Argus Cyber Security, whose technology guards connected cars against hacking, and German-based multinational software corporation SAP’s purchase of Israel's Gigya, a customer identity management technology company.

Successful local private equity activity has, in recent years, attracted large global private equity funds and investment companies such as Berkshire (Iscar), Apax Partners (Bezeq, Psagot, Tnuva), Permira (Netafim), Francisco Partners (NSO and ClickSoftware), KKR (Alliance Tyre Group), Oaktree (Veolia) and XIO Group (Lumenis).

V SIGNIFICANT TRANSACTIONS, KEY TRENDS AND HOT INDUSTRIES

Exits and other M&A deals involving Israeli and Israel-related high-tech companies that were acquired or merged in 2017 totalled US$23 billion. Disregarding the two largest deals, the total value was US$6.6 billion. This reflects an increase of 18 per cent from 2016, yet is still lower than 2014 and 2015. There were fewer deals in 2017 compared to 2016, and fewer still compared with the numbers recorded in 2014 and 2015. The Software and Life Sciences exit activity slightly increased in 2017 compared to 2016, yet the number of exits in the communications and internet sector dropped significantly compared with the previous four years. There was also a decrease in the number of exits in the cybersecurity cluster. Nevertheless, the high values of the deals in 2017 are indicative of Israel’s superpower status in the cyber sector.

The downward trend from 2016 in the number of capital raising deals continued, with a decrease of 8 per cent during 2017. According to the IVC Research Centre, the decline is due to two main factors. First, compared to 2016, investors, such as incubators and accelerators, were involved in 49 per cent fewer deals than in 2017. Second, VC funds have been avoiding R&D companies, which have continued a noticeable downturn during the past five years. In 2017, they reached their lowest level of involvement, with 40 per cent fewer deals involving VC funds, compared to 2013.

The first quarter of 2018 continued the positive trends in Israeli high-tech industry, with US$1.52 billion being raised in 181 deals. Both the number and the value of deals grew compared to the previous quarter (US$1.46 billion in 161 deals) and compared to the first quarter of 2017 (US$1.06 billion in 155 deals).

There was a lot of hype concerning blockchain technology and cryptocurrencies during 2017. While, as noted above, Israeli regulators have published interim reports relating to the possible implementation of laws and regulations dealing with the taxation of cryptocurrencies and initial coin offering (ICO) procedures, this has not stopped Israeli companies from already raising funds through ICO offerings; and the sums are big. A number of start-ups have raised more than US$150 million and, in 2017 alone, 10 Israeli start-ups raised a total of US$480 million through ICOs. For instance, Bancor, a decentralised liquidity network that allows the holding of any Ethereum token (a cryptocurrency) and its conversion into any other tokens in the network, on-chain, with no counter party, raised US$153 million worth of ether in a matter of three hours by selling its digital tokens.
VI FINANCING OF M&A: MAIN SOURCES AND DEVELOPMENTS

The number of Israeli private equity deals grew in the first half of 2017 by 17 per cent compared to the first half of 2016. Israeli and foreign private equity funds were involved in 68 deals in the sum of US$807 million in the first half of 2017. Among the largest deals in 2017 was the buyout of R2Net by Francisco Partners, the buyout of Telefire Fire & Gas Detectors by Tene Growth for US$76 million and the buyout of Ace Auto Depot by Kedma for US$50 million.

In the second quarter of 2017, foreign private equity funds invested US$248 million, up from the US$90 million invested in the first quarter (the lowest quarterly amount in the past three years), but substantially below the US$1.1 billion invested in the second quarter in 2016, when foreign funds led with 87 per cent of all private equity investments. In the first half of 2017, only Sky Private Equity III closed its fund, raising capital in the amount of US$200 million.

In terms of sectors, software companies had a productive year raising US$1.9 billion in 208 deals in 2017, similar to 2016 figures. US$1.2 billion was raised by life sciences companies, which is a 41 per cent increase on the US$850 million raised in 2016. Communication companies, though, registered a decline in the number of deals and total capital raised with US$569 million in 72 deals, compared to US$872 million in 106 deals in 2016.

According to the IVC Research Centre, 41 Israeli private equity management companies are currently active, managing a total of US$13 billion, with an estimated US$1 billion available for investments.

VII EMPLOYMENT LAW

Labour protection laws in Israel regulate certain rights of employees regarding a new employer (such as preservation of seniority and the responsibility of the new employer to make payments to the employees and into savings funds with respect to the employment with the previous employer) in the event of a merger or an acquisition. In a merger or an acquisition involving only share transfer, the general rule is that the continuity of the employment relationship is maintained (as opposed to an asset acquisition, where employees are transferred from one employer to another (subject to their consent to the transfer). However, if as a result of the transaction there is a worsening of working conditions, or other circumstances arise in which the employee cannot be expected to continue in employment, he or she may resign with an entitlement to severance pay. In a merger or acquisition, the consequence of which is the transfer of employees to a new employer, the general rule is that an employee cannot be transferred without consent. If the employee does not consent to be employed by the new employer, he or she remains the employee of the original employer, and if the latter wishes to end the employment relationship, it must dismiss the employee and pay such entitlements as are in accordance with the law.

In addition, whenever a transaction involving changes that may affect employees is contemplated, the employer must consult and negotiate with the employees’ representatives (where these exist) with a view to reaching an agreement with respect to the employees’ rights. For example, in a transaction involving the transfer of only some of the employees to a new employer, with the consequent redundancy of those employees who are not transferred, and there is uncertainty as to the future of those employees who are transferred, it is not unusual...
to reach an agreement affording those employees special benefits such as retirement payments and retention payments, thereby securing their cooperation in ensuring a smooth transaction and preventing industrial actions such as strikes or slowdowns.

VIII TAX LAW

During the past few years, major tax reforms have been implemented and adopted into Israeli tax legislation, particularly in the areas of capital market transactions and commercial activities on an international scale. In light of these changes within its fiscal regime, Israel today offers a variety of tax benefits to foreign residents wishing to structure their business operations through Israel, or conduct activities there. Benefits include a reduction in the various income tax rates, and a variety of tax exemptions and other benefits specifically directed to attract foreign resident investors. For example, corporate income taxes have been reduced from 36 per cent to 23 per cent in 2018.

Likewise, taxpayers have the right to request a tax pre-ruling. Tax rulings are key in M&A transactions, especially as, under Israeli law, the acquirer is responsible for withholding from the merger or share sale consideration monies on account of withholding tax. Typical rulings that are required in an Israeli M&A transaction (a procedure that has been assisted by the new amendment to the tax legislation referred to above) include rulings on:

a the tax treatment of the conversion of a target’s option scheme into an option scheme of the acquirers or, if option holders are to be ‘cashed out’, the tax treatment of cashing out of options that are still within their ‘restricted period’ (this being the minimum period that an option must be held by a trustee for the holder to receive certain tax benefits);

b the payment and rates of withholding to be made by the acquirer from the merger or share sale consideration on account of Israeli income tax, and how such withholding is to be effected if the merger consideration includes securities;

c in the event any of the merger or share sale consideration is to be deposited into escrow as security for the warranties or indemnities under the sale agreement or plan of merger, a ruling to the effect that no withholding on account of Israeli income tax need be made except on that part of the escrow fund eventually released to the selling shareholders, and deferring the withholding until its release from escrow; and

d in the circumstances of certain types of mergers (e.g., one in which the shares in an Israeli company are exchanged for shares of a public non-Israeli company), subject to certain terms determined by the law and the Israeli tax authorities, a ruling exists that gives a deferral of the tax event and an exemption from withholding liability during the date of signature and the date of closing of the transaction.

IX COMPETITION LAW

M&A are regarded as prima facie restrictive practices and are regulated by the Restrictive Trade Practices Law 1988 (RTP). All mergers with regard to which there exists a public interest in their review, as determined by the relevant thresholds based on the market share or turnover of the merging companies, are notified to, and reviewed by, the Authority. These decisions can be appealed before the RTP Tribunal, although a fast-track procedure now exists for mergers in respect of which there is no reasonable concern of substantive harm to competition.
Mergers are defined under the RTP as either the acquisition of most of the assets of one entity by another entity, or the acquisition by one entity of shares in another entity that would give the acquiring entity:

a. more than 25 per cent of the nominal value of the issued capital;
b. the voting power;
c. the right to appoint more than 25 per cent of the directors; or
d. the right to participate in more than 25 per cent of the entity’s profits.

An acquisition that falls within this definition must be notified to the Authority (i.e., a merger filing is a mandatory requirement) if any of the following thresholds are met: (1) as a result of the merger, the merged entity would be regarded as a monopoly; (2) in the fiscal year preceding the merger, the aggregate sales turnover in Israel of the merging entities exceeded 150 million shekels, and the sales turnover in Israel of at least two of the merging entities exceeded 10 million shekels each; or (3) one of the merging entities is already a monopoly in any relevant (product and geographical) market.

The parties are globally barred from closing (a carveout is also prohibited) or carrying out any action that might be regarded as constituting performance of the merger until the transaction has been approved by the Authority.

There are two types of notification forms – a long form and an abbreviated one, which may be used if certain conditions are met.

Given that mergers between international entities fall within the purview of the RTP if these entities conduct business in Israel and meet any of the necessary thresholds (in relation to their activities in Israel only) as detailed above, it is not surprising that major cross-border mergers are notified in Israel.

In March 2015, the Authority published a proposed amendment to the RTP stipulating a general prohibition of mergers raising a reasonable concern of substantially harming competition. This proposal did not progress, however, and in light of the recent Draft Restricted Trade Practices Law (Amendment No. 20) (Strengthening Enforcement and Reducing the Regulatory Burden), 2018 (the Draft Amendment), it is now unlikely to do so. Under the Draft Amendment there are two main issues that concern mergers. One is that it raises the financial threshold of merger notification to 360 million shekels. Second, it extends the duration of the merger examination period to 30 days and gives the Authority the possibility to extend the merger examination period for another 120 days, without the need to obtain the consent of the parties.

X OUTLOOK

The overall average growth rate in Israel during 2017 was 3.1 per cent, which is less than the 4 per cent seen in 2016. Nonetheless, the expected growth rate for 2018 (3.5 per cent) still looks promising. The unemployment rate is at a record low, as job creation has remained robust and according to the Bank of Israel, by the end of 2018, inflation is expected to be 1.5 per cent. Prices of domestic products are expected to continue to rise moderately as certain factors, such as increased competition and government measures to reduce the cost of living, will continue to slow the pace of price increases. On the other hand, the proximity to full employment is expected to continue to support a rise in salary, which may serve to raise domestic inflation.

Despite some concerns in Israel about potential instability regarding the geopolitical situation in the Middle East, it is business as usual.
I OVERVIEW OF M&A ACTIVITY

In 2017, the Italian M&A market saw a consistent number of transactions compared to the previous year (around 800) but a 26 per cent decrease in the overall corresponding value, amounting to around €43 billion. The M&A market trend was characterised by several large prospected transactions, some of which, however, have yet to be completed.

II GENERAL INTRODUCTION TO THE LEGAL FRAMEWORK FOR M&A

M&A of unlisted joint-stock companies, limited liability companies and limited partnerships are regulated by the Italian Civil Code (the Civil Code). The rules applicable to listed companies are set forth in the Civil Code and in the Italian Securities Act (Legislative Decree No. 58/1998) and implemented by secondary regulations adopted by the Italian Securities and Exchange Commission, the public overseeing authority of mergers and takeovers, and the Italian Stock Exchange (Borsa Italiana), the private company in charge of the management of the Italian securities market.

Listed companies may also adhere to the Code of Corporate Governance issued by Borsa Italiana, which, for the signatories, follows the ‘comply or explain’ model.

Certain transactions are subject to merger control clearance, which, depending on the nature of the companies involved and the sector in which they operate, is issued by the Bank of Italy, the Italian Antitrust Authority (IAA) or the Insurance Regulation Authority.

In terms of structure, M&A transactions can come in the form of acquisitions of companies through share (and quota) deals, asset deals, leveraged buyouts, tender offers, turnarounds, equity carve outs, mergers and demergers, or combinations of these.

The main forms of transactions covered by Italian law are asset deals, share and quota deals, and mergers and demergers. The choice of one structure over the others entails different consequences in terms of legal implications and tax consequences.

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1 Mario Santa Maria and Carlo Scaglioni are corporate partners at Santa Maria Law Firm. The authors would like to acknowledge the contributions of fellow partner Edoardo Gambaro, senior associate Caterina Napoli and associates Alessandra Boffa and Pietro Missanelli.

Asset deals concern the direct transfer of a business (inclusive of employees, assets, know-how, contracts, etc.). The Civil Code, as a rule, provides for the continuity of such business – agreements related to the activity are automatically transferred, except for those having personal connotations, pursuant to Article 2558 of the Civil Code, and the seller remains jointly and severally liable with the buyer for debts accrued before the transfer pursuant to Article 2560 of the Civil Code. Depending on the number of employees involved, prior notice of the transfer of a business to the union representing its employees is required (while such notice is not required in a stock deal). An advantage of asset deals lies in the possibility to choose the perimeter of the business to transfer, with the option of expressly excluding certain assets while including others, and of excluding certain liabilities. This may represent an advantage, for example, to the buyer, who may so be protected from risks connected to the previous management of operations by excluding their transfer.

As to the transfer itself, an asset transfer agreement must be executed before a notary public and registered at the relevant company register.

A potential disadvantage in choosing an asset deal is the application of stamp duties in proportion to the value of the business while, on the other hand, the buyers may enjoy a step-up in the value of the transferred assets (see Section VIII).

Share and quota deals
In share and quota deals, the underlying business is the ‘indirect’ object of the transfer, which, instead, directly concerns the shares or quotas. Thus, no specific protection is given by the Civil Code on the company assets and on the continuity of the business activity unless specific representation, warranties and covenants are carefully drafted in the stock purchase agreement.

Italian case law now tends to admit that the duration of the contractual representations and warranties may exceed the duration of the shorter annual statutory guarantees related to sale and purchase agreements provided by law.³

As to the transfer itself, share certificates representing the capital of joint-stock companies must be transferred through an endorsement before a notary public, whereas if the transfer involves the quotas of limited liability companies, the agreement must be executed before a notary public and registered at the company registry to be validly enforced towards third parties.

Newco share deals
Recent trends in business transfers have included the use of an M&A structure consisting of the creation of a wholly owned newco from the part of the seller to which the latter transfers, by means of a contribution in kind, a business, with the subsequent transfer of the shares or quotas of the newco to a buyer. Setting aside the tax effects (see Section VIII), compared to an asset deal, such structure allows for a clear separation of the business on the part of the seller and its direct dealing with employees and other stakeholders (creditors, suppliers, customers) prior to closing. On the other hand, in the case of a breach of agreement and a refusal to close

³ Italian Supreme Court Decision No. 16963/2014.
by either party, the enforcement and specific performance of the M&A agreement, with the transfer of the business by judicial order, might be more difficult, leaving an option to claim for damages.

iv Mergers and demergers

The Civil Code regulates mergers (Article 2501 to Article 2505 quater) and demergers (Article 2506 to Article 2506 quater). Mergers can be in the form of mergers by acquisition or mergers by incorporation. In both cases, pursuant to the principle of ‘continuity’ set forth by Article 2504 bis Civil Code, the company resulting from the merger assumes the same rights and obligations as the companies participating in the merger. Despite the above principle, in reality, real estate assets falling into the realm of a merger still require registration for tax purposes, pursuant to Article 4 of the attachment to Legislative Decree No. 347/1990; and a cadastral transfer pursuant to Article 1, Paragraph 276 of Law 244/2007.

The merger procedure set out by the Civil Code entails:

a the drafting of a merger project by the directors of the companies participating in the merger;

b approval of the merger project by the relevant shareholder assemblies (for unlisted companies, with a majority of at least one-third of the outstanding share capital also in a second call of the assembly);

c the drafting of financial statements;

d directors’ reports describing the economic and legal reasons underlying the merger project;

e an expert’s appraisal on the exchange ratio of the shares or quotas of the company resulting from the merger to be attributed to the shareholders; and

f the execution of the merger deed before a notary public.4

Article 2501 bis Civil Code expressly provides for mergers by means of a leveraged buyout. Before the introduction of this provision in 2003, implementation of this type of transaction was heavily jeopardised by the provision of Article 2358 of the Civil Code, which, at that time, did not allow for a company to provide securities or issue loans for the purchase of its own shares.

As to the limits, companies that are in a winding up procedure may not participate in a merger if the distribution of their assets has already begun, pursuant to Article 2501 of the Civil Code. Such limit only concerns joint-stock companies.

A delicate aspect to consider in mergers and demergers is the protection of the minority shareholders, if present. To this end, the exchange ratio, which represents the ‘price’ of the transaction and is determined by the directors of the companies participating in the merger, is a crucial aspect of the merger itself. It is important to note that such ratio has to be described by the directors in their report pursuant to Article 2501 quinquies Civil Code, and appraised by an expert appointed by the court pursuant to Article 2501 sexies Civil Code. Minority shareholders might challenge the validity of a merger until the deed of merger is registered. Thereafter, their claim is switched to a claim for damages.

4 If the merger is carried out by incorporation in a company that is totally owned (or 90 per cent owned) by the other merging company, the procedure may be simplified with the omission of some of the above-mentioned documents.
III DEVELOPMENTS IN CORPORATE AND TAKEOVER LAW AND THEIR IMPACT

Recently, new measures have been introduced to accelerate credit recovery procedures of non-performing loans and facilitate the issuance of new credit, also to the benefit of M&A transaction financing, and new guidelines have been adopted aimed, *inter alia*, at favouring the business continuity of insolvent or distressed companies. Among the most significant innovations are the following.

i Insolvency law

Law No. 155/2017 (Enabling Law) introduced the guidelines and criteria for the amendment of the current insolvency law and the system of privileges, to be implemented by November 2018. The main principles set out in the Enabling Law are the following:

a regarding the process of ‘judicial liquidation’ aimed at the sale of a debtor’s assets:

• the adoption of one sole judicial procedure for the assessment of a debtor’s state of crisis or insolvency, with a view to reduce the current duration and costs of the process, irrespective of the nature, dimension and characteristics of the debtor (provided it is not a public entity);

• the abolition of special enforcements and special privileges (i.e., the land-backed privilege), allowing individual enforcement by a secured creditor even pending insolvency proceedings, will be repealed after the second year following the entry into force of the implementing decrees of the Enabling Law; and

• the hardening period in insolvency claw-back actions is extended: the latter shall be calculated backward from the filing date of the request for judicial liquidation and not from the formal bankruptcy declaration, provided there are certain exceptions;

b a general favouring of pre-bankruptcy agreements that allow for business continuity, also with the perspective of the better satisfaction of creditors;

c the introduction of alert measures and quick, out-of-court procedures for crisis settlement upon the initiative of a debtor or others before a competent body set up at the relevant chamber of commerce (chamber of commerce body). The Enabling Law provides for an obligation to inform of the existence of crisis indicators on:

• the debtor’s supervisory body, which has to promptly inform its board of directors; it must also eventually inform the chamber of commerce body of such indicators. The auditors shall not be held jointly liable with the directors if they put in place such alerts; and

• qualified creditors (such as the Tax Authority) that have to promptly inform the supervisory body of the company and the chamber of commerce body of the default of the debtor, under penalty of ineffectiveness of the securities granted over their credits towards the debtor. If the chamber of commerce body does not settle the crisis and certifies the debtor’s insolvency, it shall inform the court’s public prosecutor;

d groups of companies under the Italian jurisdiction are now admitted to file one joint debt restructuring agreement or judicial liquidation request, provided that the assets and liabilities of each company shall remain separate; and
on securities:

• a reduction of the number of privileges (both general and special privileges), with special reference to the 'retention privileges': that is, those privileges that allow the creditor to be satisfied with priority over the secured asset; the creditor to keep the asset until full satisfaction of his or her credit; and the sale of the asset, in cases of debtor default, outside the ordinary execution procedures; and

• the introduction of security over movable assets without divestment of the debtor, with an agreement that he or she may dispose of an asset in good faith in the continuation of his or her business, allowing the creditor to execute the security out of court, again in contrast to Article 2744 of the Italian Civil Code, as long as the creditor, in the event that the appraised value of the security exceeds the relevant outstanding debt, corresponds to the debtor, or the other creditors, the difference in value.

ii Privacy and data protection

The new EU General Data Protection Regulation (GDPR), aimed at unifying the privacy policies of Member States with the purpose of ensuring stronger and broader protection of data, entered into force on 24 May 2016. From 25 May 2018, the GDPR applies directly in all Member States. The Italian Parliament recently passed a law enabling the government to adopt the legislative decrees necessary for alignment of the national rules to the GDPR.

iii Transfer of title over real estate assets upon default

Law No. 119/2016 introduced Article 48 bis to Law Decree No. 385/1993, the Banking Law, which provides financial institutions with a more direct, less costly, out-of-court enforcement procedure of guarantees on loans by allowing banks to satisfy their credits over a debtor's real estate by means of a direct transfer of such security to the creditor upon default of the borrower. Such transfer had previously been admitted by Italian courts only with reference to specific transactions, as an exception to the general rule pursuant to Article 2744 of the Civil Code. In particular, this new legal provision admits that loan agreements executed between banks or other financial institutions authorised to issue credit and entrepreneurs may be guaranteed by a registered transfer of title over the debtor's real estate assets, conditioned to the breach of his or her obligations pursuant to the loan agreement, and complies with Italian law principles through the provision of the patto marciano (Article 48 bis Paragraph 2 of the Banking Law). The latter allows a lender, for loans secured by property, to obtain the transfer of such property upon default by the borrower, but requires that the creditor, in the event that the appraised value of a real estate security exceeds the relevant outstanding debt, shall have to correspond to the debtor the difference in value directly in his or her bank account. Under certain conditions, this transfer procedure may also apply if a court enforcement is initiated, and if the debtor undergoes bankruptcy.

5 Pursuant to Article 2744 of the Civil Code, an agreement providing that the creditor becomes the owner of the secured asset in the case of a debtor’s breach of his or her obligations is null and void.

6 EU General Data Protection Regulation No. 2016/679.
iv New security interest over movable assets
As a general rule, Article 2786 of the Civil Code provides that a security interest over movable assets is executed by delivering the relevant asset to the secured creditor, with a few relevant exceptions (such as the pledge over financial instruments pursuant to Legislative Decree No. 170/2004 and the special privilege pursuant to Article 46 of the Banking Law). To render credit transfers more flexible, in line with other jurisdictions, Article 1 of Law Decree No. 59/2016 introduced the possibility for entrepreneurs to grant a pledge over non-registered, movable company assets to creditors, without losing the right to trade or use the relevant movable asset. The entrepreneur is expressly allowed to dispose of the secured asset (e.g., by transforming or selling it), and the assets deriving from such use will be subject to the same security interest without having to carry out any formality for the constitution of a new security.

IV FOREIGN INVOLVEMENT IN M&A TRANSACTIONS
With respect to cross-border transactions, inbound deals amounted to 32.8 per cent of the total number of deals in 2017, whereas outbound deals slightly decreased with respect to the previous year, representing 19 per cent of the total number in 2017. The main foreign investors in Italy are still the United States and France, although China and Russia have significantly increased their investments.7

V SIGNIFICANT TRANSACTIONS, KEY TRENDS AND HOT INDUSTRIES
In 2017, the financial services sector alone represented around one-third of the Italian M&A market in value, with increasing values in the banking and insurance markets. This was followed by the support, services and infrastructure sector at 18.2 per cent, industrial markets at 17.5 per cent, and energy and utilities at 15.7 per cent.8

Among the most relevant deals of the past year are the following:

a the banking industry experienced the reorganisation or dissolution of certain banking groups, resulting in the transfer of good assets to incumbent players, the transfer of distressed portfolios to interbank funds and the dissolution of bad banks. This situation involved, among others, Banca Popolare di Vicenza SpA and Veneto Banca SpA, whose assets were transferred to Banca Intesa Sanpaolo SpA; Cassa di Risparmio di Cesena SpA, Cassa di Risparmio di Rimini SpA and Cassa di Risparmio di San Miniato SpA, whose assets were transferred to Credit Agricole Cariparma SpA; and Monte dei Paschi di Siena SpA, which is part of a reorganisation driven by the Ministry of Economy and Finance;

8 According to the recent 2017 M&A presentation ‘Il mercato M&A in Italia: trend e prospettive’, with the cooperation of KPMG and Fineurop Soditic and sponsored, among others, by Università Commerciale Luigi Bocconi and AIFI.
in the infrastructure sector, the Ministry of the Economy underwrote a capital increase of around €2.86 billion of ANAS SpA, a company operating in the road and infrastructure field, and subsequently transferred the shares to FS Italiane, the national railway company;

Atlantia SpA, a company operating in the field of infrastructure and mobility networks, signed an agreement for the acquisition of the whole share capital of a vehicle owning around 15.5 per cent of the share capital of Groupe Eurotunnel SE (Getlink), which manages the Channel Tunnel between France and the UK, for around €1.1 billion;

the insurance company Cattolica Assicurazioni Società Cooperativa acquired a 65 per cent participation in Avipop Assicurazioni SpA and in Popolare Vita SpA, and initiated a business partnership in the fields of life and non-life insurance on the former Banco Popolare network, for €853.4 million;

2i Rete Gas SpA, the leader in the methane gas distribution sector, acquired from Spanish Gas Natural Fenosa 100 per cent of the share capital of Nedgia SpA and Gas Natural Italia SpA, two companies operating respectively in the fields of gas distribution and services, for €720 million; and

in the financial services sector, banking groups continued their strategy to sell and outsource some of their non-core activities: among others, Unicredit SpA sold its Italian pawnbroking business to Dorotheum, and Banca Carige SpA sold a majority share in its consumer credit company, Creditis Servizi Finanziari SpA, to Chenavari Investment Managers.9

VI  FINANCING OF M&A: MAIN SOURCES AND DEVELOPMENTS

Bank loans still represent an important instrument in M&A financing. In 2017, the stock of non-performing loans was smaller, both as a result of bad loan sales and because fewer defaults occurred. Expansionary monetary conditions contributed to a reduction in funding costs, which fell to very low levels in historical terms.10

The issuance and refinancing of debt have also increasingly grown as means of M&A financing, along with the issuance of straight equity (although this is generally more expensive for the company) and shareholders’ loans. The latter are usually subordinated to bank financing.

Recent changes in the above-described rules governing the granting of security, aimed at facilitating the enforcement of mortgages and pledges, might increase the amount of asset-based financing in the near future in connection with M&A transactions.

VII  EMPLOYMENT LAW

The reform programme initiated by the government with delegation Law No. 183/2014 (Jobs Act) was definitively implemented in 2015 and 2016 through the approval of the final four implementing decrees. The main scope of the reform, which has been favourably welcomed by employers, is to provide an overall reorganisation, and a higher level of simplification and flexibility of employment contracts.

9  Santa Maria Law firm assisted the purchasers in both transactions.
10  See Bank of Italy's Annual Report dated 29 May 2018.
In this framework, Legislative Decree No. 81/2015, which came into force on 25 June 2015, replaced, among other things, the rules on fixed-term contracts previously included in Legislative Decree No. 368/2001 (implementing EU Directive No. 70/1999).

Before the introduction of the new discipline, employees could be hired on a fixed-term contract for specified organisational and productive reasons only. Further to the implementing Decree, no specific reason is now required for entering into a fixed-term employment contract.

Fixed-term contracts (including any extension thereof) can have a duration of up to 36 months (or any longer duration provided for by the various national collective labour agreements), and cannot be entered into in certain circumstances, such as to replace employees involved in a collective dismissal in the previous six months.

The overall number of fixed-term contracts entered into by an employer (having a workforce of more than five people) cannot exceed the 20 per cent of the indefinite duration contracts that are in place on 1 January of the year in which a fixed-term employee is hired. Specific quantitative limit requirements are normally set forth by the national collective labour agreements.

Fixed-term contracts entered into in certain areas of industry or under certain circumstances do not suffer quantitative restrictions; for example:

- in the start-up phase of new activities;
- for innovative business start-up companies for a period of four years from the establishment of a company;
- for the performance of specific seasonal activities;
- for certain radio or television programmes;
- to cover employees on maternity leave; or
- for employees over 50 years of age.

Renewal of a fixed-term contract can be agreed upon using certain terms and conditions provided for by law. Other employees are generally employed with indefinite duration contracts, which are granted different protections depending on whether they were entered into before or after the approval of the Jobs Act.

The Jobs Act also introduced the possibility for employers to modify the job duties assigned to workers in view of a significant company reorganisation. For employees, this may result into a concrete possibility of demotion, or movement to other production units, departments or work sites. However, in the event that a change of job has a ‘punitive’ character, the employee is entitled to appeal to the labour judge, who may determine that the employer is obliged to reinstate the worker in the duties he or she previously carried out, or in a similar position and role.

A further novelty is provided by the introduction of a wider possibility for employers to perform remote control over employees in the performance of their work. It is now possible, for example, to check the placement of a worker who operates off-site by controlling company vehicles, or company laptops and mobile phones. However, such control of workers must be carried out without violating their privacy, and a prior communication to workers on how the personal data is collected and processed is required.

With Law No. 81, dated 22 May 2017, the Italian legislator introduced ‘smart working’ in Italy, which is a new system of flexible labour aimed at increasing productivity, and enabling the better conciliation of workers’ private and professional lives without the imposition of limits related to time and workplace. Smart work is based on phases, cycles and objectives, and has no fixed work hours or fixed workplace, although it has to
be executed within the limits of normal working hours. Smart work is based on the use by employees of technological devices that are under the responsibility of the employer. Agreements for smart working shall be entered into in writing, and may be either fixed-term or non-fixed term; in the latter case, termination shall be with notice of at least 30 days. Smart workers shall enjoy treatment at least equivalent to that of employees who work in at an employer’s premises.

VIII TAX LAW

i Asset deals and mergers

In terms of tax implications, asset deals are generally characterised by:

a direct taxation on the seller’s capital gain (i.e., the difference between the sale price and the fiscal cost of the business). If the seller is a joint-stock company or limited liability company, the capital gain is subject to corporate income tax, with the application of the 27.5 per cent tax rate;
b exclusion from indirect taxation (no application of VAT); and
c application of stamp or registration duties in proportion to the value of the business.

Contributions of going concerns, mergers and demergers allow for a step-up in the tax basis of the target’s underlying assets\(^{11}\) and goodwill\(^{12}\) through the payment of a sum ranging from 12 to 16 per cent, thus reducing the taxable income by means of deductions and depreciations.

The buyer of a going concern, pursuant to Article 14 of Legislative Decree No. 472/1997, is jointly and severally liable, with the seller, for the tax liabilities concerning the transferred assets. However, these liabilities (due taxes and penalties) are limited to:

a the value of the assets;
b those relating to the two fiscal years prior to the year of transfer and the year of transfer itself; and
c those audited in the two fiscal years prior to the year of the transfer or in the year of the transfer itself, even if the liabilities relate to previous years.

These limitations do not apply in cases of tax fraud.

Furthermore, a buyer’s liabilities may be further limited by the issuance of a tax certificate by the Tax Authority prior to the closing of the transaction.

Article 1, Paragraph 87 of Law No. 205/2017 amended Articles 20 and 53 bis of Presidential Decree No. 131/1986 (the Consolidated Stamp Duty Act) with the intent of clarifying that deeds to be registered are not to be requalified on the basis of the overall economic effects achieved within a framework of several connected deeds. The new Article 20 provides that, for the purposes of correctly applying the stamp duty, the registered deed has to be interpreted by exclusively considering the deed in itself, without taking into account any external element such as, for example, connected deeds or other elements beyond the text of the deed at issue.

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\(^{11}\) See Law No. 244/2007.

\(^{12}\) See Law Decree No. 185/2008.
For example, deeds concerning a contribution of a going concern followed by a sale of the shares of the transferee company are not be requalified as asset deals. Law No. 205/2017 also amended Article 53 bis of the Consolidated Stamp Duty Act in terms of the enhancement of the powers of the Financial Administration with reference to the abuse of stamp, mortgage and cadastral duties.

ii  **Share and quota deals**

Share and quota deals are instead characterised by:

a  the ‘participation exemption’, applicable subject to certain conditions, with reference to 95 per cent of the capital gain obtained by the sale by joint-stock companies or limited liability companies (or less);

b  the application of a flat rate registration duty; or

c  a VAT tax exemption.

However, if the deal concerns the shares of a joint-stock company resident in Italy, a Tobin tax of 0.2 per cent applies, with the exception of shares of listed companies whose average market capitalisation in November of the previous year of the transfer was less than €500 million.

iii  **Newco share deals**

The M&A structure by which the seller constitutes a newco to which he or she transfers, by means of a contribution in kind, a business, with the subsequent transfer of the shares or quotas of the newco to a buyer, is expressly admitted by Article 176 Paragraph 3 of Presidential Decree No. 917/1986 and is qualified as non-elusive of direct taxes. As for indirect taxes (VAT, register or both), recent case law has confirmed the non-elusive effects.

IX  **COMPETITION LAW**

Except in specific circumstances, under Law No. 287 of 10 October 1990 (the Law), the filing of a request for clearing a concentration (e.g., a merger, a joint venture or an acquisition of control over another company) before the IAA is mandatory when two cumulative turnover thresholds are met. Said thresholds were recently modified by Law No. 124/2017 (the Yearly Competition Act) and subsequently updated in March 2018. As a result of these changes, Section 16(1) of the Law requires prior notification of all M&A involving undertakings whose aggregate turnover in Italy exceeds €495 million, and where the aggregate domestic turnover of each of at least two of the undertakings concerned exceeds €30 million.

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13  The conditions of the application of the participation exemption are (1) the participation has been owned continuously for at least 12 months prior to the sale, (2) the participations were classified as financial fixed assets in the financial statements relating to the first tax period of uninterrupted ownership, (3) the subsidiary company is resident for tax purposes in a white list country, and (4) the subsidiary is actually carrying out a business activity.

14  See Law No. 228/2012 Paragraphs 491 et seq.

15  Italian Supreme Court Decision No. 2054/2017.
Concerning the above-mentioned requirements, prior to the reform of January 2013, the turnover thresholds were alternative rather than cumulative. As a result, the number of concentrations assessed by the IAA dropped considerably (only 52 in 2016). In addition, the reform also abolished the filing fees to be paid upon the filing of a transaction, and replaced it with an annual tax on the turnover of all corporations based in Italy. However, the revision of the turnover thresholds by the Yearly Competition Act was precisely aimed at broadening the scope of merger control by the IAA, with particular reference to joint ventures and acquisitions of joint control over targets with a low turnover.

The filing of a transaction must precede execution. The IAA may also consider receivable notifications that concern non-binding agreements, insofar as they are supported by solid documentary evidence. It would therefore be possible to notify a concentration on the basis of a memorandum of understanding or preliminary agreement. The deadline for the notification is the closing of the operation.

Contrary to what occurs under Regulation (EC) 139/2004, Italian merger control law does not impose an automatic standstill obligation on the parties. Therefore, in theory it would be possible to realise a concentration after filing but before the authorisation, while accepting the risk of a de-concentration order from the authority. However, the absence of an automatic standstill obligation does not exclude the possibility that the IAA will directly require the parties to suspend their concentration following a specific decision.\textsuperscript{16} With the aim of facilitating the evaluation of an assessment by the IAA and reducing risks that could delay the duration of the procedure, the IAA suggests the discussion of possible issues related to the operation even before notification of a concentration (the ‘pre-notification phase’).

Once the request for the clearance of a transaction is filed before the IAA, the procedure continues in two distinct phases, a first (necessary) step and a second (possible) step. The first step begins with the filing and shall end within 30 days. At the end of this phase, the IAA may decide to clear the transaction, or to initiate a more in-depth investigation in the event that it considers that an operation is likely to be prohibited. The delay is suspended if the parties communicate inaccurate or false information, and will begin again only from the reception of additional information (‘stop the clock’). For the same reason, the IAA may decide to postpone the opening of the second phase beyond the delay of 30 days. The second step begins with the IAA notifying the parties of a decision to initiate proceedings. This second phase has a 45-day duration of and can be extended only once for a maximum duration of a further 30 days. In 2016, the IAA decided to initiate proceedings in only five cases.

The IAA may authorise a concentration subject to commitments undertaken by the parties to address its concerns. Contrary to procedures before the European Commission, these commitments may be both proposed by the parties and prescribed directly by the authority. In any event, commitments are generally available only in the second phase of the procedure, this being another difference with the procedure applied under Regulation (EC) 139/2004. In 2016, three concentrations were cleared subject to commitments.

\textsuperscript{16} Note that the scope of the obligations arising from interim covenants, which are concluded by the merging parties in order to regulate their relationship during the period from the signing to the closing, are currently under the scrutiny of the European Court of Justice in case C-653/16, \textit{Ernst & Young}.
X OUTLOOK

The outlook for the rest of 2018 is very positive, with around €10 billion worth of transactions having been carried out in the first quarter. In particular, in the first quarter of 2018, the Italian M&A mid-market was characterised by around 300 deals with a rank value of about €6 billion.\textsuperscript{17} Projections for the end of 2018 indicate that if the deals announced so far are closed by the end of the year, this would represent the best result recorded in Italy since 2008.\textsuperscript{18}

\textsuperscript{17} Industrials represented 25 per cent of the deals, financials 16 per cent of the deals. Energy and power followed with 14.1 per cent, then real estate with around 10 per cent. As to small cap M&A, the first quarter of 2018 was characterised by around 270 deals with a rank value of around €0.8 billion. Industrials represented 35.7 per cent of the deals, high technology 25.5 per cent, financials 13.7 per cent and real estate 8.5 per cent (see Thomson Reuters Mid-Market M&A Review, First Quarter 2018, and Thomson Reuters Small Cap M&A Review, First Quarter 2018).

\textsuperscript{18} According to the recent 2017 M&A presentation ‘Il mercato M&A in Italia: trend e prospettive’, with the cooperation of KPMG and Fineurop Soditic and sponsored, among others, by Università Commerciale Luigi Bocconi and AIFI.
I OVERVIEW OF M&A ACTIVITY

In view of the changing Japanese and global economy, the level of M&A activity involving Japanese companies overall continued to be moderate throughout 2017. Thanks partly to ‘Abenomics’, a set of measures introduced by Japanese Prime Minister Shinzo Abe after his re-election to the post in December 2012 and designed to revive the sluggish economy with ‘three arrows’ – a massive fiscal stimulus, more aggressive monetary easing from the Bank of Japan and structural reforms to boost Japan’s competitiveness – Japanese stock has risen and the yen has weakened significantly since early 2013.

Thus far, this apparently has not had a significant effect on overall M&A activity involving Japanese companies but it has the potential to significantly alter the Japanese M&A landscape over the years.

II GENERAL INTRODUCTION TO THE LEGAL FRAMEWORK FOR M&A

The Companies Act and the Financial Instruments and Exchange Act (FIEA) provide the fundamental statutory framework for M&A transactions. The Companies Act provides fundamental rules concerning companies and applies to both public and closed companies, whereas the FIEA makes provision for, inter alia, public offers of securities, tender offers and insider trading, and is an important source of rules regulating M&A transactions involving public companies. There are other important laws, such as the Antimonopoly Act, in which Japanese merger control rules are contained. In relation to foreign investment in Japanese companies, the Foreign Trade and Foreign Exchange Act requires the approval of, or reporting to, relevant ministries in certain circumstances.

The listing rules promulgated by the Japanese stock exchanges provide for, inter alia, timely disclosure obligations, corporate governance codes and delisting requirements, which are also important for deals involving public companies.

Finally, a number of recent court cases have the potential to significantly affect the M&A framework: see Section V.

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III DEVELOPMENTS IN CORPORATE AND TAKEOVER LAW AND THEIR IMPACT

i Amended Companies Act of 2014
The Amended Companies Act of 2014 (Amendment Act) came into effect in May 2015, following its promulgation in June 2014. The following briefly focuses on one major point that concerns M&A transactions.

Buyout by a special controlling shareholder
The Amendment Act has a new provision that allows a special controlling shareholder (SCS) – a person who holds at least 90 per cent of the voting rights of all shareholders of a company – to demand that all other shareholders of the company sell their shares to the SCS.2

An SCS who intends to make such a demand is first required to notify the company about the conditions of the sale, including the amount of money to be paid to selling shareholders and the date on which the SCS will acquire the shares. If the company consents to the conditions, it must give notice to the selling shareholders no later than 20 days prior to the acquisition date, stating, inter alia, the details of the SCS and the conditions of the sale. When the company gives such notice, the SCS is deemed to have made the demand to the other shareholders for the sale of their shares and the SCS will acquire all the shares on the date of acquisition.

For an SCS who intends to carry out a cash-out of the remaining shareholders, this new rule will speed up the process as it does not require a shareholders’ meeting to be held, unlike general cash-out techniques that were used under the former Companies Act. Therefore, it was expected that this new rule is likely to be used in practice.

In M&A transactions in Japan today, this provision is very commonly used by persons or entities who are categorised as SCSs. For a person or entity who has a shareholding of less than 90 per cent of the voting rights of all shareholders of a company, a squeeze-out by consolidating its shares (reverse stock split) is generally used as an M&A scheme.

ii Tax reform and amendment to Industrial Competitiveness Enhancement Act
The 2018 Tax Reform Bill was enacted in March 2018. This Bill and the amendment to the Industrial Competitiveness Enhancement Act (Enhancement Act) enacted in May 2018 are expected to facilitate M&A by the acquisition of shares using a company’s own shares as consideration.

Special rules allowing deferral of recognition of capital gains derived from share transfer
The acquisition of shares using a company’s own shares as consideration (i.e., a stock-for-stock acquisition) is not a popular scheme for a number of reasons, one of the main ones being tax issues arising from such a scheme. Under current tax rules, when a company (Acquirer) uses its own shares as consideration in a share acquisition to acquire another company (Target), the taxation of capital gains arising from the share transfer occurs when the acquisition takes effect. The 2018 Tax Reform Bill allows the shareholders of the Target to defer the taxation of capital gains derived from the share transfer if certain requirements are met. This tax deferral will be applied to a transaction that has been conducted in a manner which is certified as

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2 The Amendment Act provides that these new cash-out rules also apply to share options.
a ‘special business restructuring plan’ pursuant to the Enhancement Act. The certification must be obtained during the period between the effective date of the Enhancement Act (no later than December 2018) and 31 March 2021. In order to be certified as ‘special business restructuring plan,’ the business restructuring is required to be a transaction that requires a certain large amount of funds for acquisition and falls under one of the following categories:
ea developing new markets business (e.g., autonomous vehicle business and fintech);
b establishing value creation infrastructure business (e.g., platform business); or
c enhancing main business (e.g., conglomerate’s restructuring).

iii Interim Proposal for Amendment to Companies Act – share delivery
In February 2018, the Ministry of Justice released an Interim Proposal for an Amendment to the Companies Act (Interim Proposal). With regard to M&A activity, the key topic that has been raised in the Interim Proposal is the proposed introduction of a new type of reorganisation, known as ‘share delivery’, which is also expected to facilitate stock-for-stock acquisition.

Share delivery
As mentioned above, stock-for-stock acquisition schemes are rarely used. As well as the tax issue described above, such transactions also tend to encounter other hurdles related to the Companies Act. Under the current Companies Act, a subscription of shares in exchange for the Target’s shares contributed in kind must be involved and, therefore, a partial acquisition is likely to face the following obstacles:
ea an investigation of the Target’s shares contributed in kind must be conducted by a court-appointed inspector, which has time and cost implications;
b shareholders of the Target and directors of the Acquirer may be obliged to compensate for the insufficiency of value of the shares contributed in kind.

Such obstacles will not be applied to share delivery.

The Interim Proposal was available for public comment between 28 February 2018 and 13 April 2018. The Bill may be submitted to the Diet in 2019. For companies considering M&A transactions with Japanese companies, close attention must be paid to future trends in the amendments made to the Companies Act.

IV FOREIGN INVOLVEMENT IN M&A TRANSACTIONS
i Outbound transactions
In view of the increasing recognition of the importance of overseas operations among Japanese companies, there continue to be large-scale outbound M&A transactions in which Japanese companies are acquiring high-value businesses outside Japan. Last year’s notable examples are as outlined below.

3 The Japanese term for share delivery is kabushiki-kofu.
4 For the acquisition of whole shares of a Target, the current Companies Act has a statutory reorganisation ‘Share Exchange’, in which the rules regarding contribution in kind will not be applied.
Takeda Pharmaceutical Company Limited/ARIAD Pharmaceuticals, Inc

In February 2017, Takeda Pharmaceutical Company Limited (Takeda), a leading Japanese pharmaceutical company, announced the completion of ARIAD Pharmaceuticals, Inc (ARIAD), a US oncology company for US$24 per share in cash. Takeda completed the acquisition through a tender offer and the subsequent merger of ARIAD with Kiku Merger Co, Inc, a wholly owned subsidiary of Takeda Pharmaceuticals USA. ARIAD is now an indirectly wholly owned subsidiary of Takeda. The total transaction value was approximately US$5.2 billion. Takeda believes this transaction will significantly enhance its global cancer treatment and research portfolio.

Seven & i Holdings Co, Ltd/Sunoco LP

In January 2018, 7-Eleven, Inc (7-Eleven), a wholly owned subsidiary of Seven & i Holdings Co, Ltd, a leading Japanese company in the convenience-retailing industry, announced that it had completed the acquisition of 1,030 stores owned by Sunoco LP (Sunoco), a US limited partnership that distributes motor fuel and operates convenience stores and retail fuel sites. In the asset purchase agreement entered into between 7-Eleven and Sunoco in April 2017, approximately 1,100 Sunoco stores were supposed to be acquired by 7-Eleven for approximately US$3.3 billion; however, the Federal Trade Commission (FTC) ruled that the proposed transaction would harm competition in local markets. The parties and the FTC were subsequently able to arrive at a consent agreement under which the acquisition could proceed. Under this agreement, 7-Eleven was required to sell 26 retail fuel outlets to Sunoco and Sunoco was further required to retain 33 fuel outlets that 7-Eleven otherwise would have acquired.

ii Inbound transactions

Toshiba Memory Corporation/K K Pangea

In September 2017, Toshiba Corporation (Toshiba) announced that it had approved the sale of Toshiba Memory Corporation (TMC), a wholly owned subsidiary of Toshiba, to K K Pangea (Pangea), a special-purpose acquisition company formed and controlled by a Bain Capital Private Equity, LP-led consortium (including its affiliates, Bain Capital) and entered into a share purchase agreement with Pangea. The acquisition was completed in June 2018 with a total transaction value of approximately US$18 billion. The completion of the acquisition had been delayed by a prolonged review by the Chinese antitrust authority. The Bain consortium includes Hoya Corporation, a Japanese medical technology company; SK hynix, Inc, a South Korean chip maker; Apple Inc; Dell Technologies Capital; Seagate Technology plc; and Kingston Technology Corporation. Toshiba has reinvested in Pangea and accordingly acquired approximately 40.2 per cent of the voting rights in Pangea. With Toshiba and Hoya’s investments, Japan-based companies will hold more than 50 per cent of the voting rights in Pangea.

USJ Co, Ltd/Comcast Corporation

Comcast Corporation (Comcast), a US-based technology and media company, announced in February 2017 that it had agreed to purchase (from Goldman Sachs, MBK Partners and others) 49 per cent of stocks in USJ Co, Ltd (USJ), a Japanese leisure company that operates a theme park, Universal Studios Japan, for US$2.3 billion. Upon completion of the deal, Comcast, which already owns 51 per cent of stocks in USJ, will become the sole owner of USJ.
V SIGNIFICANT TRANSACTIONS, KEY TRENDS AND HOT INDUSTRIES

i Court decisions
There were a number of notable court cases in 2016 and 2017 that may affect future M&A transactions. As an example, we discuss a case regarding a petition for the determination of the stock acquisition price in the context of squeezing out the remaining shareholders in a going-private transaction.

Jupiter Telecommunications case
In July 2016, the Supreme Court of Japan issued a landmark judgment with respect to a petition for the determination of the stock acquisition price filed by shareholders of Jupiter Telecommunications Co, Ltd (J:COM), a Japanese CATV operation and telecommunication business company. In this judgment, the Supreme Court made it clear that when a petition for the determination of the stock acquisition price has been filed by a minority shareholder in connection with a cash-out transaction, the court should focus primarily on the fairness of the tender offer process; and if the process was fair, the court should respect the acquisition price determined by the offeror.

A typical scheme for the acquisition of all outstanding shares of a public company is usually a two-step process: the offeror initiates the tender offer, followed by a cash-out transaction. In J:COM, just as other usual cases at that time, after completion of the tender offer, the 'shares subject to call' methodology was used as a cash-out transaction in the second step. In this arrangement, dissenting minority shareholders are granted a right to file a petition for the determination of the stock acquisition price. As the overall stock market had risen following the announcement of the tender offer to the acquisition, the shareholders of J:COM filed a petition, claiming that the price offered in the tender offer was too low for the acquisition price.

Tokyo District Court held that the acquisition price should be determined based on the 'objective value' of the shares at the time of the second step cash-out transaction, then adding a premium reflecting the expected increase in value through the cash-out transaction, the portion of which the Court deemed fair to allocate to minority shareholders. The Court also held that in determining 'objective value', it is fair to adjust the offer price upwards, based on the overall stock market in this case.

Tokyo High Court maintained the same decision as the District Court.
However, the Supreme Court reversed the lower courts' decisions that followed the traditional framework. The Supreme Court held that, if the tender offer was made in accordance with a process generally accepted to be fair, and the offeror has offered the same acquisition price as the first step tender offer for the second step cash-out transaction, then the court should approve that same price as fair value for the minority shares in the cash-out transaction as long as there are no exceptional circumstances.

As regards the process that needs to be followed to satisfy a 'process generally accepted as fair', in J:COM, the Supreme Court made references in its opinion to the fact that J:COM had obtained the opinion of an independent committee that it had set up, that the offeror had

5 Before the Amendment Act became effective, almost all cash-out transactions in the second step used the 'shares subject to call' methodology. Under the Amendment Act, it is common to use the right of an SCS to compulsorily acquire the shares of the target held by all other shareholders in the second step.
announced in the tender offer process that the acquisition price for the cash-out transaction in the second step would be the same price as the offer price, and that the offeror would acquire the minority shares at that price.

This new framework established by the Supreme Court decision is likely to increase foreseeability and certainty of total acquisition prices in buyouts. Further, the scope of this decision is likely to also cover other cash-out transactions, including those using the right of the SCS method. Notwithstanding the foregoing, the scope of what would constitute a ‘process generally accepted as fair’ or ‘exceptional circumstances’ remains to be seen.

ii M&A transactions

JX Holdings Inc/TonenGeneral Sekiyu KK

In December 2015, JX Holdings Inc (JXHD), a leading energy company in Japan, announced that JXHD and TonenGeneral Sekiyu KK (TonenGeneral), an oil company in Japan, entered into a memorandum of understanding in which they agreed on a business integration. JXHD used its 100 per cent subsidiary to acquire TonenGeneral under a scheme of triangular merger. In August 2016, JXHD and TonenGeneral announced that they had entered into a definitive agreement on the business integration. The deal amount of this acquisition was approximately US$6.2 billion. JXTG Holdings, Inc, the new integrated company, has become by far Japan's largest oil distributor.

Canon Inc/Toshiba Medical Systems Corporation

Canon Inc (Canon) announced in March 2016 that it had concluded a share transfer agreement with Toshiba concerning the acquisition of shares held by Toshiba in Toshiba Medical Systems Corporation (TMSC). In December 2016, Canon then announced that it had completed the acquisition of the shares and that TMSC is now a subsidiary of Canon. The deal amount of this acquisition was approximately US$5.9 billion.

VI FINANCING OF M&A: MAIN SOURCES AND DEVELOPMENTS

Leveraged buyouts (LBOs) have become more common in Japan in recent years. Banks operating in Japan extend loans to acquisition vehicles funded partly by equity so that these vehicles may make a tender offer over a Japanese-listed target to acquire all the issued shares (first-tier transaction), followed by a squeeze-out transaction for the remaining shareholders with the approval of the shareholders of the target at a shareholders’ meeting or the approval of the board of directors (second-tier transaction: see Section III.i regarding the Amendment Act’s introduction of the new cash-out rule). LBOs are also often used in the context of private acquisitions. The extension of loans is often made in the form of syndicated loans, which involve a number of banks in the case of large-scale buyouts.
VII EMPLOYMENT LAW

i Amendments to the Ordinance for Enforcement of the Act on the Succession to Labour Contracts upon Company Split

The Ordinance for Enforcement of the Act on the Succession to Labour Contracts upon Company Split (Succession Act Ordinance) and the Guideline for Appropriate Implementation of Measures to be Taken by a Split Company or Succeeding Company Related to the Succession to Labour Contracts or Collective Agreements Executed by a Split Company (Succession Act Guideline) have been amended, with effect from 1 September 2016.

ii Succession of labour contracts upon a company split

With respect to the succession of labour contracts upon a company split, the individual consent of employees to be succeeded is not required; however, under the Act on the Succession to Labour Contracts upon Company Split and other relevant laws and regulations, the split company must take the following measures to protect employees (among other matters): (1) consult with a labour union or a person representing the majority of employees; (2) conduct individual consultations with employees; and (3) issue notices to the employees. The outline of these procedures has not been changed by the amendments. However, there are some changes to further promote the protection of employees (among other matters) as follows:

a under the amended Succession Act Ordinance, matters that need to be notified to employees have been broadened. The new provision stipulates that, if the labour contracts of relevant employees are to be succeeded, the successor company is required to notify the employee of the fact that the conditions of his or her employment will be maintained after succession so that the employees properly understand the succession procedure; and

b under the amended Succession Act Guideline, a successor company is required to conduct individual consultations with employees who are not involved in the succeeded business but whose labour contracts will be succeeded upon the company split.

iii Establishment of Business Transfer Guideline

A guideline on the succession of labour contracts upon the transfer of a business and mergers, the Business Transfer Guideline, came into effect on 1 September 2016. Because, unlike with a merger, the consent of each employee is required for succession upon the transfer of business, it was not regarded as important to set out the statutory regulation for the protection of employees in such a case. However, a transfer of business often has severe effects on employment and the conditions of employment, and can also cause conflicts in connection with the succession or any interruption of labour contracts. Thus, the Ministry of Health, Labour and Welfare has begun to recognise that a guideline is necessary to ensure the substantial consent of each employee and to enhance active communication between a company and its employees.

The Business Transfer Guideline stipulates that companies that intend to obtain the consent of employees are required to take into account the principle that the consent of each employee is required upon the succession of a labour contract, and to adequately explain the transfer of business and provide an outline of the assignee of the business. In addition, the Business Transfer Guideline provides some guidance in connection with the procedures to engage with labour unions and collective bargaining.
The importance of the 2018 Tax Reform Bill in M&A transactions has been discussed in Section III.ii. In this section, we illustrate the new rules concerning tax-free spin-offs, one of the notable changes in the 2017 Tax Reform Bill enacted in March 2017, that are most relevant to M&As.

Under the former rules, the scope of spin-offs (i.e., restructuring schemes for business carve-outs) that qualify as tax-free reorganisations was narrowly defined. To be categorised as a tax-qualified company split, for example, the transferor and the acquirer had to be related parties. In contrast, the 2017 Tax Reform Bill provides two key alternatives for spinning off a business with tax deferability for capital gains, losses and dividends, making it easier for Japanese companies (especially public companies) to restructure businesses.

i Carve-out by a company split of a target business to a new company

When a listed company (transferor) wishes to carve out a target business for the purpose of restructuring its businesses, the transferor may use the company split under the Companies Act to form a new entity (newco) from the target business, whereby the shares of the newco will be distributed to all the public shareholders of the transferor in a proportion that reflects the number of shares held by the public shareholders in the transferor company as a payment in kind (split-off type of company split).

Under the new rules, the above structure will be tax-qualified, subject to certain conditions. The conditions include the following: (1) the transferor should not have a controlling shareholder prior to the spin-off, nor should the newco have a controlling shareholder upon completion of the spin-off; (2) about 80 per cent or more of the employees engaged in the target business should be employed by the newco after completion of the spin-off; and (3) following completion of the spin-off, the board of directors of the newco shall include a director who is an officer or employee of the transferor.

ii Carve-out of a subsidiary by a distribution of a subsidiary’s shares

The second alternative is in relation to the carve-out of an existing subsidiary by a distribution of shares in that subsidiary. When a transferor wishes to carve out a target business engaged in by a wholly owned subsidiary of the transferor (subco), the transferor may use a distribution in kind of the subco’s shares to all the public shareholders of the transferor in a proportion that reflects the number of shares held by the public shareholders in the transferor company.

Under the new rules, the above structure will be tax-qualified, subject to certain conditions, including the following matters: (1) the transferor should not have a controlling shareholder prior to the distribution in kind, nor should the subco have a controlling shareholder upon completion of the distribution in kind; (2) about 80 per cent or more of the employees employed by the subco should remain employed by the subco after completion of the spin-off; and (3) at least one of the directors on the board of directors of the subco prior to completion of the spin-off should remain after completion of the spin-off.

As illustrated above, the 2017 Tax Reform Bill provides more flexibility for companies (in particular for public companies) in separating or disposing of non-core business. By expanding the tax-qualified spin-off options, the new rules are likely to result in an increase in the popularity of this type of business restructuring. However, the conditions that need to be met to qualify as a tax-free spin-off are still considered to be strict.
IX  COMPETITION LAW

In June 2016, the Japan Fair Trade Commission (JFTC) announced the result of its review of the proposed acquisition by Canon of shares in TMSCTMSC held by Toshiba, concluding that it would not have the effect of restraining competition in any particular field of trade. However, in the same announcement, the JFTC also issued a caution6 pointing out that the scheme of the acquisition could violate the Antimonopoly Act.

Before submission of the notification to the JFTC, Canon acquired, *inter alia*, share options whose underlying shares were common shares of TMSCTMSC, and, as consideration for those share options, etc., Canon in effect made a payment to Toshiba of an amount equal to the value of the underlying common shares. Further, a third party had participated in owning the voting shares of TMSCTMSC until Canon exercised the share options.

This series of actions had been considered likely to give rise to the formation of a joint type of relationship7 between Canon and TMSCTMSC through the above-mentioned third party, resulting in part of a structure premised on Canon ultimately acquiring the voting shares of TMSCTMSC, which the JFTC stated was subject to approval being obtained as a business combination review under the Antimonopoly Act.

Since this series of actions was considered by the JFTC to be likely to lead to an activity that could violate the provisions of Article 10(2) of the Antimonopoly Act, and this had been undertaken before Canon made a notification to the JFTC, which the JFTC stated was inconsistent with the purpose of the prior notification system, the JFTC had cautioned Canon not to carry out such actions in the future, and had urged Toshiba, which engaged in the implementation of the above structure, not to engage in activity in the future that may be inconsistent with the purport of the prior notification system.

Therefore, in the future, if companies planning a business combination need to adopt a structure such as that described above, they shall be requested to make a notification to the JFTC prior to implementing any part of such a structure.

X  OUTLOOK

Thanks to the ‘Abenomics’ measures, Japanese stock remains high and the yen continues to be relatively weak. It remains to be seen how long these trends will continue and how much they will eventually affect the level of activity of M&A transactions involving Japanese companies.

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6 The JFTC issues a ‘caution’ when it does not find sufficient evidence to support the existence of illegal conduct but finds that such conduct may lead to a possible violation.

7 ‘Joint type of relationship’ means the relationship among two or more companies where they operate a business in a united form, whether fully or partially, by shareholding, merger or other transaction.
Chapter 29

KOREA

Ho Kyung Chang, Alan Peum Joo Lee and Robert Dooley

I OVERVIEW OF M&A ACTIVITY

Korean M&A activity in 2017 was very lively, with 1,087 completed cases and a total value of US$75.4 billion (a 53.9 per cent increase from 2016). Note, however, that the number of transactions decreased by 5.4 per cent from 2016, which suggests that the increase in overall M&A deal value was driven by larger deals.

Domestic M&A activity involving Korean companies showed a marked increase, with 505 acquisitions of Korean companies by other Korean companies (up from 468 in 2016) worth US$39.4 billion (up from US$24 billion in 2016). This increase in domestic M&A activity is generally credited to continuing global economic growth and economic recovery in Korea. There was a particular uplift in domestic M&A transactions in the electronics, petrochemicals, pharmaceuticals, distributions, logistics and communications industries.

The deal value of inbound M&A (i.e., overseas companies acquiring Korean companies) increased, while the number of transactions decreased, with 41 transactions (down from 47 in 2016) worth US$8.8 billion (up from US$2.9 billion in 2016). More detailed discussion about foreign direct investment into Korea follows in Section IV.

II GENERAL INTRODUCTION TO THE LEGAL FRAMEWORK FOR M&A

Acquisitions of private companies are primarily governed by the Korean Commercial Code (KCC), the Financial Investment Services and Capital Markets Act (the Capital Markets Act) and the Monopoly Regulation and Fair Trade Act (MRFTA).

The KCC contains the main rules for corporate structure and governance, including requirements for, and limits on, mergers, share acquisitions, spin-offs and asset transfers. As such, the KCC influences the transaction structure and dictates corporate approval requirements for both public and private companies. The KCC also governs directors’ fiduciary duties, regulations on self-dealing and other corporate conflicts of interest.

1 Ho Kyung Chang is a partner, Alan Peum Joo Lee is an associate and Robert Dooley is a foreign attorney at Bae, Kim & Lee LLC. The authors would like to thank their colleagues Ben Gu, Namwoo Kim and Eun Hong Lee for their significant assistance in preparing this chapter.


3 References to M&A activity are based on the deals notified to the Korea Fair Trade Commission (KFTC) during 2017 and reported in a press release issued by the KFTC on 19 February 2018 providing merger notification data for fiscal year 2017 (KFTC’s 2017 M&A Review).
The Capital Markets Act applies to public companies listed on the Korea Exchange (KRX), which includes the KOSPI, KOSDAQ and KONEX markets. The Capital Markets Act imposes disclosure requirements and other restrictions on trading in KRX-listed shares. It also prescribes rules for tender offers. Further, M&A deals involving public companies are subject to KRX disclosure rules and scrutiny by the Financial Supervisory Service (FSS), the enforcement arm of the Financial Supervisory Commission (FSC). The FSC, through the FSS, generally administers the financial, banking and securities system.

Under the MRFTA, which is the main antitrust statute, acquisitions and other combinations involving companies satisfying certain revenue and assets thresholds will require an antitrust review by the KFTC.

The Foreign Investment Promotion Act and Foreign Exchange Transactions Act govern foreign direct investments (FDIs) and foreign exchange transactions involving foreign investors in Korea. Foreign investments generally require a report to a foreign exchange bank, which is in most cases a formality, and acceptance of the report is usually granted within a few days.

While foreign investors are, in principle, not prohibited from acquiring shares in a Korean company, there are prohibitions or limits on foreign ownership in Korean companies engaging in certain industries considered to be vital to the national interest, such as defence, broadcasting, telecommunications, publishing and public utilities.

III  DEVELOPMENTS IN CORPORATE AND TAKEOVER LAW AND THEIR IMPACT

i  Recent amendments to KCC

Major amendments to the KCC were passed on 1 December 2015 and came into effect on 2 March 2016. These amendments were drafted with the explicit intention of invigorating the M&A market by enabling the use of M&A structures previously unavailable in Korea.

The KCC amendments provided for triangular share swaps, reverse triangular mergers and triangular spin-off mergers. Under those structures, parent company shares can be offered as consideration. Specifically, (1) parent company shares of the acquiring company are provided as consideration to target company shareholders in a triangular share swap or a reverse triangular merger, and (2) parent company shares are provided to spun-off subsidiary company shareholders under a triangular spin-off merger. Those amendments are expected to facilitate more flexibility in M&A transactions by enabling cash-free mergers, as well as opening up new possibilities for structuring cross-border M&A transactions involving entities in overseas jurisdictions.

Further, the KCC amendments relaxed the threshold for small-scale share swaps (which can be approved by a board of directors instead of the more onerous requirement of shareholder approval) from 5 per cent of total issued and outstanding shares to 10 per cent of total issued and outstanding shares.

Lastly, the KCC amendments have introduced a simplified business and asset transfer, whereby a transfer can be approved by a board of directors’ resolution if the counterparty to the transaction owns more than 90 per cent of the transferring company’s shares.

ii  Recent amendments to Capital Markets Act

Amendments to the Capital Markets Act came into effect on 1 May 2018 to tighten the disclosure obligations for shareholding dilution. Before the amendment, if a listed company
offered new shares other than by way of pro rata subscription by existing shareholders, entailing dilution of existing shareholders, an exemption from the usual requirement of two weeks' prior notice under the KCC applied, which meant that most shareholders discovered the dilution after the fact. Under the amended Capital Markets Act, disclosure is required at least one week before the payment date in respect of the subscription price.

Before its expiry in 2018, owing to the sunset clause in the Capital Markets Act, the Korea Securities Depository (KSD) was allowed to exercise the unused voting rights of the shares deposited in the KSD, mirroring the actual votes exercised at the general shareholders meetings of listed companies. This ‘shadow voting’ was allowed because minority shareholders usually did not attend the general shareholders’ meeting and it was a common occurrence that the quorum of 25 per cent of the issued and outstanding shares (required under the KCC) could not be satisfied. The difficulty in achieving a quorum is more serious in relation to the appointment of statutory auditors, as each shareholder’s voting right for the appointment of a statutory auditor is limited to 3 per cent, and even if the controlling shareholder holds more than 25 per cent of the shares, the quorum can only be satisfied if other minority shareholders exercise their rights to surpass the quorum threshold of 25 per cent. Yungjin Pharmaceuticals, a KRX-listed company, was unable to appoint a statutory auditor at its 2018 annual general shareholders’ meeting, as only 9 per cent (of minority holdings of 47.55 per cent) of its minority shareholders attended, and the quorum for appointing a statutory auditor could not be satisfied. Currently, the solutions being discussed for this issue are (1) to introduce an electronic voting system for general shareholders’ meetings to facilitate minority shareholder participation, and (2) to encourage companies to more actively court minority shareholders to participate or grant proxies.

iii Recent amendments to employment law, tax law and competition law
See Sections VII.i, VIII.i and IX.ii, respectively.

IV FOREIGN INVOLVEMENT IN M&A TRANSACTIONS

In 2017, FDI into Korea reached an all-time high of US$22.94 billion (a 7.7 per cent increase from 2016) and has surpassed US$20 billion for three consecutive years from 2015 to 2017.5

Within the total FDI amount above, which includes both M&A investments and follow-up investments by foreign investors in Korea, FDI by way of M&A was US$7.24 billion (a 15.4 per cent increase from 2016, on the basis of publicly filed information).

Considering the major geopolitical risks associated with Korea during 2017, this increase in FDI is interpreted as showing worldwide recognition of Korea as a stable investment destination, as well as reflecting an increase in foreign investment in Korean conglomerates and increasing investment in new IT technologies such as blockchain technology and self-driving vehicle technology.

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4 In this context, FDI means the investment by foreign individuals or entities into Korean entities (1) of more than 100 million won (approximately US$92,500) and (2) representing 10 per cent or more of the voting shares of the Korean entity.

As of June 2017 (half-year basis), the top 10 countries investing in Korea are as follows:6

<table>
<thead>
<tr>
<th>Ranking</th>
<th>Country</th>
<th>Investment amount (US$ million)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>United States</td>
<td>2,446</td>
</tr>
<tr>
<td>2</td>
<td>Singapore</td>
<td>1,181</td>
</tr>
<tr>
<td>3</td>
<td>Hong Kong</td>
<td>1,152</td>
</tr>
<tr>
<td>4</td>
<td>Japan</td>
<td>819</td>
</tr>
<tr>
<td>5</td>
<td>Philippines</td>
<td>505</td>
</tr>
<tr>
<td>6</td>
<td>China</td>
<td>479</td>
</tr>
<tr>
<td>7</td>
<td>Netherlands</td>
<td>431</td>
</tr>
<tr>
<td>8</td>
<td>United Kingdom</td>
<td>390</td>
</tr>
<tr>
<td>9</td>
<td>Germany</td>
<td>347</td>
</tr>
<tr>
<td>10</td>
<td>Ireland</td>
<td>323</td>
</tr>
</tbody>
</table>

V SIGNIFICANT TRANSACTIONS, KEY TRENDS AND HOT INDUSTRIES

i Significant transactions

Among others, notable significant transactions in the Korean M&A market announced in 2017 included the following:

<table>
<thead>
<tr>
<th>Transaction</th>
<th>Industry</th>
<th>Deal amount (US$ million)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Acquisition of Toshiba’s semiconductor business by Bain Capital consortium, including SK Hynix of Korea</td>
<td>Semiconductor</td>
<td>19,000</td>
</tr>
<tr>
<td>Unilever’s acquisition of Carver Korea from Bain Capital consortium</td>
<td>Cosmetics</td>
<td>2,710</td>
</tr>
<tr>
<td>KKR’s acquisition of LS Automotive from LS Group</td>
<td>Auto parts</td>
<td>943</td>
</tr>
<tr>
<td>Acquisition of Lock &amp; Lock by Affinity Equity Partners</td>
<td>Consumer goods</td>
<td>561</td>
</tr>
<tr>
<td>Joint venture investment by Texas Pacific Group consortium on Kakao Mobility</td>
<td>Mobility platform</td>
<td>450</td>
</tr>
</tbody>
</table>

ii Key trends

One notable development in the Korean M&A market in 2017 was the rapid growth in the participation of private equity fund (PEF) players, in comparison with more conservative activity by domestic conglomerates. As seen in the table above, large PEFs such as Bain Capital, MBK Partners, KKR and Affinity Equity Partners were the most active participants in the market, being involved in seven of the top 10 M&A transactions in 2017.7 Their market activity in 2018 is also expected to be significant, utilising funds from global capital markets or exiting from their previous investments. Further, while PEFs in the Korean M&A market previously tended to focus on buyouts to ensure short-term returns, PEFs are now starting to show interest in long-term investments in medium-sized firms, especially in consortiums with strategic investors. Notable examples are the acquisition of Hyosung Packaging (a PET

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7 2017 Invest Chosun league table (announced transaction size).
bottle company) by a Standard Chartered private equity consortium in partnership with Samyang Group, and the acquisition of Tapex (a taping company) by an NH Investment and Securities consortium in partnership with Hansol Chemical.

Another development is the increase in carve-out transactions, in which the parent company spins off a subsidiary and sells a minority stake in the spun-off subsidiary to outside investors. Korean companies are using carve-out structures to achieve various goals, for example, to divest non-core businesses and focus on core businesses or to attract investments to certain particular business divisions, and it is expected that carve-out transactions will comprise a significant portion of the Korean M&A market in 2018. One recent example is the sale of existing shares by Kakao Corp and issuance of new shares by Kakao Mobility, which had been established by Kakao Corp by way of in-kind contribution of Kakao Taxi and other auto-related businesses to a consortium led by TPG. With the new capital raised from the consortium, Kakao Corp and Kakao Mobility strengthened their position to develop and launch new premium taxi app services.

Finally, inbound transactions in 2017 showed a volume increase of 79 per cent over 2016, with an aggregate value of US$7.3 billion over 42 transactions.\(^8\) Notable inbound transactions in 2017 were Unilever’s acquisition of Carver Korea (a cosmetics company) and the acquisition of Lock & Lock (a food container maker) by Affinity Equity Partners.

### iii Hot industries

According to the KFTC’s 2017 M&A Review, large domestic conglomerates invested in companies driving the fourth industrial revolution while foreign companies increased their investments in domestic cosmetics and bio-pharmaceutical companies. Specifically, while the share of M&A transactions (on the basis of number of deals) in the electronics, petrochemicals and pharmaceuticals, distribution and telecommunications industries has increased, the share of M&A transactions in the machinery, metals and non-metals, finance and construction industries has declined.

### VI FINANCING OF M&A: MAIN SOURCES AND DEVELOPMENTS

#### i Leveraged buyouts

Korean statutory law and court precedents prohibit certain forms of leveraged buyout (LBO) as illegal asset-stripping, and a clear-cut standard on whether a given financing structure is permissible for a given transaction structure has not been provided to date.

Based on recent court precedents, it is generally understood that LBO financing structures that directly use the target company’s assets as collateral are likely to be prohibited. However, a 2015 Korean Supreme Court judgment\(^9\) ruled that an LBO that involved establishing security on target company assets can be allowed, considering, among other things, that:

- \(a\) the acquiring company acquired 100 per cent of the target company and as such no minority shareholders were harmed by the transaction;
- \(b\) a critical portion of the funding for the transaction (approximately 43 per cent) was supplied by the acquirer;

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\(^8\) Mergermarket, ‘South Korea Trend Report Q1–Q4 2017’.

the acquiring company was not a ‘paper company’ but a listed company with substantive assets; and

d) there was no substantive or procedural defect in the merger following the acquisition.

While this judgment does not seem to rule that LBO financing structures that use the target company’s assets as collateral are generally allowed, it can be seen that in certain cases such financing structures are permissible, depending on the entirety of the circumstances.

On the other hand, indirect LBO financing in cases where (1) the acquiring company (which borrowed the purchase price) is merged with the target company, or (2) the target company provides funding to the acquiring vehicle by capital reduction, are likely to be allowed, assuming that the necessary corporate approvals and procedures are obtained and observed.

Overall, LBO financing is being used more often in the Korean M&A market compared with previous years.

**Total return swaps**

A total return swap (TRS) is an instrument under which (1) the total return payer (who will acquire a partial stake in the target company) agrees to pay the total return recipient the increase in the value of the stake or dividends derived from the stake, and (2) in exchange, the total return recipient agrees to pay a fixed fee to the total return payer or any decrease in the value of the stake.

Although it is arguable whether a TRS constitutes a true sale, M&A transactions using the TRS are being seen more commonly in the Korean M&A market. For the acquisition of KT Rental in 2015, Lotte Group financed approximately US$290 million (of a total purchase price of US$1.1 billion) using the TRS structure.

**VII EMPLOYMENT LAW**

**Recent amendments to employment law**

Nearly four years after revisions to the law were first proposed, the Korean National Assembly passed a Bill on 28 February 2018 to amend the Labour Standards Act to reduce Korea’s maximum weekly working hours. The new law will reduce maximum weekly working hours from 68 per week to 52. The new law became effective on 1 July 2018; currently, it applies only to large companies but will be rolled out in stages to smaller companies. Employers who fail to comply with this new law will be subject to criminal penalties of imprisonment for up to two years or a fine of up to 20 million won.

In this regard, based on the foregoing, when entering into M&A transactions, buyers will need to confirm whether the working conditions of target companies are in compliance with the new laws to avoid any such criminal penalties or compliance issues.

**Recent court decision**

The Act on the Protection of Dispatched Workers (the Dispatched Workers Act) regulates the use of employees of another company by way of ‘worker dispatch’. Under the Dispatched Workers Act, worker dispatch refers to a system in which a dispatching company, while maintaining the employment relationship with its employee, causes its employee to work for another company under the supervision and direction of the receiving company in accordance with a dispatch agreement between the two companies.
Outsourcing is similar to worker dispatch in that the receiving company uses the employees of the outsourcing company for the work of the receiving company. However, there is a general distinction between outsourcing of work, which is not subject to the Dispatched Workers Act, and worker dispatch regulated under the Dispatched Workers Act, based on whether the employee is supervised or controlled by his or her own employer or the receiving company. If the employee is supervised or controlled directly by the receiving company for the performance of his or her work, he or she will be regarded as a dispatched worker under the Dispatched Workers Act.

In September 2017, as a result of a labour inspection it conducted, the Ministry of Employment and Labour (MOEL) discovered that Paris Baguette had been retaining bakers at its franchise stores via illegal worker dispatch and ordered Paris Baguette to directly hire 5,378 bakers. The MOEL regarded Paris Baguette as a receiving company under the Dispatched Workers Act in relation to the bakers, principally, on the grounds that, among others, (1) Paris Baguette established and put into place uniform criteria for general management of personnel matters, including recruitment, promotion, evaluation and wage levels, and (2) Paris Baguette’s quality manager managed the attendance times of bakers and generally supervised and directed the bakers in their duties. Moving forwards, there is a strong possibility that the MOEL will use the criteria applied in its determination of the Paris Baguette case to assess alleged cases of illegal worker dispatch in transaction structures similar to the above case.

In this regard, based on the foregoing, when entering into M&A transactions, buyers will need to confirm whether the target companies are in compliance with the Dispatched Workers Act to avoid being ordered to hire any unexpected additional employees on a permanent basis after closing the transaction.

### VIII TAX LAW

#### i Recent amendments to tax law

The key features of recent amendments to tax laws are as follows.

**Relief from VAT for business transfers**

Under the current law, a comprehensive business transfer is not subject to value added tax (VAT). Where only selected assets or liabilities are transferred, the transaction is classified as an asset transfer and the transferor is required to issue valid VAT invoices and file a VAT return. However, from a practical standpoint, it is actually difficult for taxpayers to determine whether a transaction is a comprehensive business transfer or an asset transfer. There was a risk that input VAT would not be refundable if the transaction was treated by the parties as an asset transfer at the initial stage of the transaction and later determined to be a comprehensive business transfer by tax authorities. Therefore, taxpayers had to obtain a ruling from the tax authorities to gain certainty as to the type of transaction. According to the amended tax laws, which became effective on 1 January 2014, the transferee is allowed to credit the input VAT on a proxy basis when VAT is paid to the relevant tax authorities by the 10th day of the following month after completion of the transaction.

**Employment succession requirements to satisfy tax-free merger and demerger conditions**

Under the former law, a merger or demerger would be treated as tax-free if certain requirements were met, such as business purpose, continuity of interest and continuity
of business. Amendments to the tax law effective from 19 December 2017 imposed the continuity of employment requirement as an additional condition for the tax-free treatment of a merger or demerger. Under the new requirement, 80 per cent or more of the employees of the transferred business must continue to be employed by the surviving entity until the end of the fiscal year during which the merger or demerger is registered.

However, a tax-free merger or demerger may become taxable upon the occurrence of certain trigger events within three years of the end of the fiscal year during which the merger or demerger is registered. The trigger events include discontinuity of interest and discontinuity of business. The revised tax law added discontinuity of employment as a new trigger event. To maintain a tax-free merger, the total number of employees of the surviving entity must be 80 per cent or more of the combined total number of employees of both entities. Similarly, to maintain a tax-free demerger, the total number of the spun-off entity’s employees must be 80 per cent or more of the total number in the pre-demerger spun-off business.

**Relief from tax-free in-kind contribution requirements**

Previously, corporate income tax on capital gains arising from qualified in-kind contributions was deferred if all the following conditions were met:

- **a** the investing company is engaged in the business for five years or more;
- **b** the investing company owns 80 per cent or more of the shares in the invested company, and continues to hold those shares until the end of the year in which the in-kind contribution is made;
- **c** the invested company carries on the transferred business until the year end; and
- **d** a separate and independent business division is transferred to the invested company.

It was not regarded as a transfer of a separate and independent business division if the investing company contributed only certain holding stocks and related assets and liabilities to the invested company.

The tax law as amended on 19 December 2017 abolished the fourth requirement with a view to facilitating corporate restructuring. On or after 1 January 2018, the tax-free in-kind contribution requirements will be met even if the investing company only contributes stocks, if the other three requirements are met.

**Expansion of tax-free merger incentives**

Under the former law, a vertical merger between a parent company and its 100 per cent-owned subsidiary was considered a tax-free merger without having to satisfy any further conditions. According to the tax law as amended on 19 December 2017, in addition, a horizontal merger between brother–sister entities that are 100 per cent held by the same parent company are eligible for tax-free treatment without the need to satisfy any further conditions on or after 1 January 2018.

**Capital gains tax on transfer of SME shares by major shareholders**

Capital gains tax on the transfer of shares in small and medium-sized enterprises (SMEs) was previously imposed at 10 per cent, irrespective of the size of the shareholder’s stake. The tax law as revised on 15 December 2015 increased the capital gains tax rate on the transfer of SME shares owned by major shareholders from 10 per cent to 20 per cent on or after 1 January 2016.
The original 2018 tax reform proposal included an increase in the tax rate from 20 per cent to 25 per cent on the tax base exceeding 300 million won for capital gains earned by a large shareholder, which would be effective for share transfers from 1 January 2018. Under the approved Bill, application of the increased tax rate is postponed for one year for the transfer of shares in SMEs and will be effective from 1 January 2019. This trend of increase in the capital gains tax rate on the transfer of SME shares led to an increase in M&A activity among private companies.

ii Recent court decision

In a case with respect to a share transfer, the Supreme Court decided that cash bonus compensation (M&A bonus) to employees of an acquired company should be an expense borne by the acquired company rather than the buyer of the acquired company. The acquired company paid an M&A bonus to its employees and deducted the M&A bonus in its corporate income tax return. However, the tax authorities denied deductibility of the M&A bonus on the basis of their assertion that it should have been an expense borne by the buyer of the acquired company’s shares as opposed to the acquired company itself.

The Supreme Court held that there was a reasonable basis for the acquired company to pay the M&A bonus considering the fact that it was paid to employees who served the acquired company, that the amount of the M&A bonus was reasonably decided in consideration of the operating income of the year, and that it was not out of the ordinary course of business for the acquired company to pay compensation to its employees to prevent or terminate strikes.

IX COMPETITION LAW

i Overview

According to the KFTC’s 2017 M&A Review, companies notified the KFTC of 688 reportable transactions during 2017, which is a slight increase on the 646 transactions notified in 2016. The KFTC challenged and conditionally approved only four transactions in efforts to protect competition in the industrial sectors, including petrochemicals (Dow/DuPont), industrial equipment for the energy market (Esmeralda/DS-Power), container shipping services (Maersk/HSDG) and cable television services (SK Telecom/CJ Hello-Vision).

ii Recent amendments to competition law

During 2017, there were a couple of notable regulatory changes in the context of merger control: an increase in the jurisdictional thresholds and curtailment of the review period for a transaction that is judged in voluntary prior consultation as one that is unlikely to raise competitive concern. Additionally, the KFTC has indicated that it intends to address competition issues involving big data and digital economy in the context of M&A transactions during 2018.

In October 2017, the KFTC announced increased jurisdictional thresholds for merger notification under the MRFTA. Under the previous merger notification regime, a transaction was required to be reported if a party to the transaction incurred global revenue (or possessed global assets) of at least 200 billion won in the preceding fiscal year and the other party to the transaction had global revenue (or possessed global assets) of at least 20 billion won. These threshold amounts were increased to 300 billion won and 30 billion won respectively and came into force on 19 October 2017. Transactions entered into after 19 October 2017 are subject to the new thresholds. On the other hand, the domestic revenue threshold for
foreign-to-foreign mergers, which refer to mergers and acquisitions involving non-Korean companies, has increased as well. For a foreign-to-foreign merger to be reportable, a foreign company involved in the foreign-to-foreign merger is required to have generated sales in or into Korea of at least 30 billion won in the preceding fiscal year in addition to satisfaction of the global revenue and asset thresholds noted above. Prior to the amendment to the MRFTA, the figure was 20 billion won. According to the KFTC’s 2017 M&A Review, the increased thresholds are likely to reduce the number of merger notifications to the KFTC by 50 cases per year.

The other notable change to merger control law is an extension of the scope of the simplified review procedure. The benefits of the simplified review procedure – a short-form notification and a shorter waiting period (15 calendar days) – have been extended to transactions that are evaluated in voluntary prior consultation as competitively neutral transactions or transactions in which pro-competitive effects outweigh anticompetitive effects. The MRFTA allows the parties contemplating a potentially reportable transaction to request the KFTC’s preliminary or prior review even before signing a preliminary agreement in respect of the transaction. This voluntary prior consultation is often used to prevent unnecessary delay in a merger review after a formal notification has been submitted following execution of a definitive agreement. In practice, if no competitive concern is found in the voluntary prior consultation, the proposed transaction usually passes the formal merger review without difficulty unless substantial changes are made to the deal structure that was notified to the KFTC in the voluntary prior consultation. However, in the past, the notifying party or parties still had to file a full-length notification for the subsequent formal merger review, which is a lengthy form that requires a significant amount of corporate and market data, and were obliged to wait 30 calendar days for receipt of the KFTC’s final approval (although early approval was sometimes granted). Thus, the amendment to the MRFTA has established a consistent procedural approach to transactions that are not likely to raise competitive concerns.

Contemplated changes in competition law

Apart from changes to the jurisdictional thresholds, the KFTC is contemplating an additional notification threshold for ‘unicorn’ deals. The current approach is relatively straightforward but may not cover transactions involving highly valuable start-ups, which at the time of transaction may not have significant revenues or assets meeting the thresholds, but whose deal valuation is relatively high in anticipation of their potential importance in the markets (known as ‘unicorn’ start-ups). The United States, Austria and Germany are a few of the countries that have introduced thresholds based on transaction value. If adopted, the size-of-transaction test would intensify competition law enforcement in the era of the digital economy. However, this proposal is still under consideration and open for further discussion.

In addition, the KFTC appears to be considering the role of big data in merger reviews. On 30 January 2018, the KFTC responded in its testimony to the Congressional Special Committee for the Fourth Industrial Revolution that it will be mindful of likely adverse effects on innovation in connection with its merger review of transactions in the big data-driven market. No indication of drastic changes to the analytical approach to competition issues regarding big data has been observed but the KFTC clearly voiced in its testimony that a company may be found to have dominant market power because of its ownership of and control over valuable data in spite of a low market share. Much has been said about big-data-related theories of harm. The KFTC seems to be concerned that control over big data can
create barriers to entry in particular in a situation where a company holds a unique dataset that cannot be replicated by its competitors without incurring substantial time and cost. Thus, the KFTC is likely to actively monitor the effects of big data on fostering competition in relevant markets.

X OUTLOOK

Considering the projected recovery of the Korean economy (3 per cent gross domestic product (GDP) growth forecast)\textsuperscript{10} and the global economy (3.9 per cent GDP growth forecast),\textsuperscript{11} it is anticipated that the Korean domestic M&A market, as well as inbound and outbound M&A, will show increased activity in 2018. However, continued geopolitical uncertainties, potential global trade wars and increased government regulation may reduce M&A activity.

For the domestic M&A market, it is expected that PEFs will continue active participation in the market, fuelled by plentiful liquidity, and carve-out transactions by companies seeking to strengthen their core business areas will increase. For the inbound and outbound markets, general global recovery is expected to contribute to increased M&A activity, but considering the Korean economy’s global connectedness, the Korean M&A market will be highly exposed to global economic and regulatory risks.

\textsuperscript{10} Bank of Korea forecast, January 2018.

\textsuperscript{11} IMF World Economic Outlook, April 2018.
Chapter 30

LUXEMBOURG

Philippe Hoss and Thierry Kauffman

I OVERVIEW OF M&A ACTIVITY

M&A activity remained relatively strong in Luxembourg in 2017 and 2018, despite a global slowdown due to the remaining uncertainties resulting from Britain’s decision to leave the European Union and key global elections. Some of the reasons for this are Luxembourg’s regulatory and legislative framework, its legal and political stability, and its domestic market, in particular its fund industry and financial sector.

Luxembourg remains the largest investment funds centre in Europe and the second-largest in the world behind the United States. At the close of March 2018, the net assets under management in Luxembourg amounted to €4.149 billion. Hence, the investment funds industry continues to play a major role in stabilising the Luxembourg market. Luxembourg continues to be ideally placed to implement tax-efficient M&A transactions, and hence to be a key platform for M&A and private equity activity. One reason for this is that the relevant legislation continues to be adapted and modernised in order to be as attractive and flexible as possible: this includes new forms of companies, namely the special limited partnership and the simplified stock company, which offer additional solutions for economic actors, including those of the private equity world. Funding instruments and methods created and used by practitioners over past decades, such as the use of tracking shares or the issuance of hybrid instruments, have recently been confirmed by the legislator and codified in the law of 10 August 2016 amending the law of 10 August 1915 on commercial companies (the 1915 Law), hence creating additional legal certainty.

Luxembourg remains one of the leading European hubs for vehicles investing directly or indirectly in European real estate. It is also worth noting that a lot of actions are being undertaken by the government to make Luxembourg a leading hub in the areas of information and communication technology, fintech and space technology.

Chinese banks continue to establish their European headquarters in Luxembourg. In general, Asian deal-makers and investors continue to set their sights on European targets in a bid to reduce reliance on their domestic market. North American investors on the other hand may feel more inclined to stay at home, as there may be new opportunities in a less regulated and lower tax US environment, as promised by the new US President.

With a number of promising drivers and deals in place, we anticipate a relatively active M&A market in 2018. Low costs of funding and the continued desire to expand geographic reach and innovation capabilities speak in favour of an active year. On the other

1 Philippe Hoss and Thierry Kauffman are partners at Elvinger Hoss Prussen.
side, key global elections, heightened regulatory scrutiny, in particular of Chinese investors, and speculations around Brexit may result in a slowdown in M&A activities. Despite strong concurrent bids from other leading European hubs, investors and companies fleeing Brexit seem to find Luxembourg an adequate alternative, and particularly the insurance sector, which has seen the establishment of many newcomers in the Luxembourg market.

II GENERAL INTRODUCTION TO THE LEGAL FRAMEWORK FOR M&A

The Luxembourg Civil Code, notably the provisions governing contracts, and the Luxembourg Commercial Code provide the statutory framework and form the legal basis for the purchase and sale of corporate entities in Luxembourg.

Statutory mergers, including cross-border mergers with EU or non-EU entities, demergers, splits and spin-offs, as well as contributions of branches of activities, or of part or all of the assets and liabilities of Luxembourg undertakings, are mainly governed by the 1915 Law, which implemented the EU Cross-Border Mergers Directive.3

In addition, the law of 5 August 2005 on collateral agreements, which provides legal certainty to lenders, is commonly used in M&A transactions irrespective of the location of the target to secure financing. In that context, it should be noted that Luxembourg continues to offer a legal environment more favourable to lenders than any other European jurisdiction.

In the case of an offer for the acquisition of a target whose shares are admitted to trading on a regulated market in one or more Member States, the law of 19 May 2006 transposing the Takeover Law4 will apply in cases where the target is a Luxembourg company or where its shares are admitted to trading on the regulated market of the Luxembourg Stock Exchange (LSE), or both. If the target is a Luxembourg company and its shares are listed on the regulated market of the LSE, all aspects of the offer will be governed by the Takeover Law (even if the shares are additionally listed on other regulated markets in the EU or the EEA). If the target is a Luxembourg company but its shares are listed only on a regulated market in the EU or the EEA outside Luxembourg, a split jurisdiction regime will apply, with the law of the listing jurisdiction being applicable for the offer and Luxembourg law being applicable for corporate law matters, the legality of measures by the target that could defeat the offer as well as information to be provided to employees of the target. With respect to Luxembourg companies, Luxembourg law will also be competent to determine the ‘central threshold’ from which a mandatory offer will have to be made and exemptions from these obligations as well as sell-out and squeeze-out rules following a successful offer.

If a bidder does not achieve the necessary threshold for a squeeze-out as a result of an offer under the Takeover Law, but reaches that threshold at a later stage, such bidder may be in a position to squeeze-out minority shareholders under the law of 21 July 2012 on mandatory squeeze-out and sell-out of securities of companies currently admitted or previously admitted to dealing on a regulated market in the European Union or having been offered to the public. Conversely, minority shareholders may have the right under that law to cause the majority shareholder to purchase their shares.

3 Directive 2005/56/EC.
4 Directive 2004/25/EC.
Public offerings on the Luxembourg territory and admissions to trading on the Luxembourg regulated market of securities are governed by the Luxembourg prospectus law of 10 July 2005, as amended, implementing the Prospectus Directive (Prospectus Law), and the CSSF is the supervisory and regulatory authority competent to oversee these operations.

For companies whose securities are admitted to trading on the regulated market of the LSE, and whose home Member State will be Luxembourg, a certain number of additional Luxembourg laws (mainly deriving from the implementation of relevant European directives) may apply, in particular the Luxembourg law of 11 January 2008, as amended, implementing the Transparency Directive (Transparency Law) and the Luxembourg law of 26 December 2016 on market abuse, implementing the Market Abuse Directive II. The law of 24 May 2011 on the exercise of certain rights of shareholders in general meetings of listed companies will also apply to Luxembourg companies whose shares are admitted to trading on a regulated market in the EU (Shareholder Rights Law).

The Takeover Law, the Prospectus Law, the Transparency Law and the Shareholder Rights Law are not applicable to Luxembourg or foreign companies whose shares or other securities are admitted to trading on the euro multilateral trading facility (MTF) market of the LSE.

The Market Abuse Regulation and relevant implementing and delegated regulations of the European Commission will apply with respect to companies whose securities are admitted to trading on the regulated market or the euro MTF of the LSE.

Moreover, there may be specific legislation to be considered depending on the sector involved in the transaction (e.g., credit institutions, insurance or reinsurance companies, companies operating in the telecommunication business, MiFID firms) and, in particular, prior regulatory approvals or notifications will then be necessary.

Additional regulations will also apply if a purchase, sale or merger of a Luxembourg undertaking involves the transfer of staff.

III DEVELOPMENTS IN CORPORATE AND TAKEOVER LAW AND THEIR IMPACT

i Modernisation of Luxembourg’s company law


Although the New Company Law brings a lot of significant changes, the contractual freedom of shareholders remains the key feature. The New Company Law mainly aims at integrating some innovations already existing in foreign jurisdictions to offer new legal instruments to investors, to harmonise rules applicable to the different forms of companies and to formally recognise the validity of legal solutions previously developed by Luxembourg practitioners.
The New Company Law contains new opportunities, but also certain additional constraints. As a result, the impact of such legislation should be carefully analysed not only for new entities but also for existing structures.

For any entity incorporated after its entry into force, the New Company Law shall automatically apply in its entirety. For any existing entity, shareholders have 24 months from the entry into force of the New Company Law to adapt the articles of association. During this period (or at least until the articles are amended so as to comply with the New Company Law), the previous legislation remains applicable to all provisions of the articles of association contrary to the New Company Law, while the New Company Law applies to all matters not mentioned in the articles of association.

Below is a summary of some of the key changes resulting from the New Company Law. Some of these may require specific actions, including appropriate provisions to be inserted in the articles of association or shareholders’ agreement:

a Key changes applying to a public company limited by shares, a limited partnership by shares and a private limited liability company are as follows:

- agreements governing voting rights are now formally recognised (with certain limits);
- the New Company Law now contains a list of cases where a decision of shareholders or bondholders may be declared void;
- a shareholder of an SA, an Sàrl or an SCA may validly undertake not to exercise all or part of his, her or its voting rights, either temporarily or permanently;
- management may, if so authorised by the articles of association, suspend the voting rights of a shareholder that is in default of its obligations under the articles of association, a shareholders’ agreement or the relevant shareholder’s undertakings;
- the change of nationality of a Luxembourg company will no longer require a unanimous decision by the shareholders (and bondholders); and
- recognition of provisions where current or future shareholders organise the transfer or acquisition of shares.

b Key changes pertaining only to a private limited liability company:

- the majority requirement applicable to the transfer of shares in an Sàrl to a non-shareholder may be reduced from 75 to 50 per cent of the share capital in the articles of association. If the proposed transfer of shares is not approved, the remaining shareholders may propose alternatives within three months of this refusal to the leaving shareholder allowing it to transfer its shares, and if no solution has been found, the leaving shareholder is authorised to transfer its shares to the third party initially identified;
- the foregoing is without prejudice to the pre-emption and tag-along right agreed among the parties;
- abolishment of the double majority requirement (majority of shareholders representing 75 per cent of the shares) for extraordinary shareholder decisions. A 75 per cent majority of the shares is now sufficient;
- the possibility for managers to pay an interim dividend;
- the possibility to issue redeemable shares; and
- the possibility to provide for an authorised share capital.
Key changes pertaining only to a public company limited by shares and a limited partnership by shares:

- the validity of lock-up clauses in the articles of association is formally recognised, with the consequence that any transfer made in breach of such clauses is expressly null and void;
- prior consent clauses and pre-emption clauses relating to shares provided for in the articles of association are formally declared as being valid as long as such clauses do not prevent the leaving shareholder from transferring its shares for more than 12 months;
- the issuance of non-voting shares is no longer limited to 50 per cent of the share capital, and non-voting shares do not necessarily need to receive a preferred dividend; and
- an auditor’s in-kind report is no longer required for the contribution to a company consisting in a claim against or receivable issued by the same company (under certain conditions).

On 15 December 2017, the Grand-Ducal Regulation (Regulation) coordinating the 1915 Law was published in the Luxembourg Official Gazette (Mémorial A) and applies from 19 December 2017.

This Regulation does not further amend the 1915 Law, but it significantly reorganises the numbering of its articles and sections. From 19 December 2017, all references to the 1915 Law shall take into account the new numbering. The constitutional documents of Luxembourg companies in force before 19 December 2017 do not need to be amended, and reference to an old number will automatically be deemed to refer to the corresponding new number of an article or a section.

iii Parliamentary Bills of Law not yet adopted

Current ongoing legislative activities relevant to M&A activity are quite limited, with the most important being Bill of Law 6539 regarding the preservation of enterprises and aiming to modernise the legal framework for insolvency law and assimilated procedures.

Luxembourg will, however, also need to amend its Law of 24 May 2011 on the exercise of certain rights of shareholders (the 2011 Law), which implements the corresponding European Directive,9 which was amended on 17 May 2017. Luxembourg has until July 2019 to update the 2011 Law, which should reflect changes regarding the identification of shareholders, the increase of the control by the shareholders, as well as the promotion of the exercise of voting rights during shareholders’ meetings.

IV FOREIGN INVOLVEMENT IN M&A TRANSACTIONS

Luxembourg is the second-largest investment fund centre in the world after the United States, the premier captive reinsurance market in the European Union and the premier private banking centre in the eurozone. The financial sector is the largest contributor to the Luxembourg economy.

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9 Directive 2007/36/EC.
Moreover, Brexit has had a positive impact on the Luxembourg insurance sector, with the establishment in Luxembourg of about 10 insurance companies such as AIG, Liberty Mutual, Sompo International and Britannia.

Luxembourg’s success is founded on its social and political stability, and on a modern, efficient, flexible and business-friendly legal and regulatory framework that is continuously updated. Banks, insurance companies, investment fund promoters and specialist service providers from all over the world have been attracted to Luxembourg. M&A transactions are not subject to any particular restrictions.

A large part of M&A activity in Luxembourg consists of the involvement of Luxembourg vehicles in the acquisition of foreign targets or assets. In particular, the number of Luxembourg holding structures through which real estate is held has continued to increase in past years.

Luxembourg’s neighbours, France, Belgium and Germany, are considered to be the main players in the Luxembourg market and they have a noticeable presence in Luxembourg through their financial institutions. While other European countries have a strong presence, the establishment of some of the main international financial institutions and banks from non-European countries, in particular from China, during the past few years, is notable. Indeed, several Chinese banks have incorporated their European headquarters in Luxembourg and Luxembourg has become the leading European jurisdiction for international renminbi business.

Luxembourg is a location that many foreign investors and international groups consider, particularly for the establishment of investment funds, or the structuring of cross-border acquisitions and intragroup structuring, mainly due to Luxembourg’s stability, its pragmatism and flexibility, and its openness to new businesses.

One of the advantages of Luxembourg’s legislation is that when implementing the provisions of the EU Cross-Border Mergers Directive in the 1915 Law, it covers not only national mergers and mergers between Luxembourg companies and EU companies of sociétés anonymes, but also mergers between Luxembourg companies and non-EU companies of any legal form, contrary to the legislation of most other Member States.

It is further possible to express the share capital of a Luxembourg undertaking in a currency other than the euro or to have the legal documentation directly drawn up in English, with the exception that some documents (i.e., notarial deeds) must be followed by a French or German translation.

As further set forth above, the Law of 5 August 2005 on collateral agreements, as amended, is commonly used in M&A transactions involving a Luxembourg entity to secure financing, and continues to offer a legal environment more favourable to lenders than found in other European jurisdictions.

In addition, the migration of companies to Luxembourg with the continuation of their legal personality and without the need for reincorporation has always been recognised, and is a common occurrence.

V SIGNIFICANT TRANSACTIONS, KEY TRENDS AND HOT INDUSTRIES

In April 2017, Standard Industries completed its acquisition of Braas Monier Building Group SA, a Luxembourg company whose shares were at the time listed on the Frankfurt Stock Exchange. This acquisition allows Standard Industries to combine Braas Monier’s operations with its European flat roofing business, Icopal, to form the largest manufacturer
in the European roofing industry. The offer was initially unsolicited, and Braas Monier Building Group SA decided to take defence measures in order to render it significantly more costly for the offeror. After several court actions and discussions between both parties, a business combination agreement was entered into by the parties, following which the board of directors of Braas Monier Building Group SA recommended that its shareholders accept the revised offer, valuing Braas Monier at around US$1.2 billion.

Luxembourg remains heavily involved in major international deals structured through Luxembourg. Hence, assistance on aspects of law was required in, *inter alia*, the following major deals:

- the acquisition via Luxembourg entities of Clarion Events, an event organiser based in London with a portfolio of approximately 150 B2B exhibitions and conferences by Providence Equity Partners for about £210 million;
- the sale of the Helios Group to Kansai Paint by Ring International Holding for €572 million;
- the consortium acquisition of DIF Infrastructure and EDF Invest of Thyssengas for €700 million;
- the acquisition of Athlon Car Lease International by Daimler for €1.1 billion;
- the acquisition of the RFR Holding real estate portfolio by Sigma Prime Selection for €1.5 billion;
- the acquisition of Tumi Holding by Samsonite for US$1.8 billion;
- the acquisition of TNT Express by FedEx for US$4.8 billion;
- the combination of the European wealth management activities of UBS through the cross-border merger of several entities into UBS Europe SE, located in Frankfurt;
- the sale of 58 per cent of the stake of CVC Capital Partners in IDC Salud to Fresenius for €5.75 billion; and
- in February 2018, BGL BNP Paribas and ABN AMRO Bank NV announced an agreement regarding the acquisition by BGL BNP Paribas of all the outstanding shares in ABN AMRO Life SA and ABN AMRO Life SA. This acquisition will strengthen the leading position of the BNP Paribas Group in Luxembourg.

VI FINANCING OF M&A: MAIN SOURCES AND DEVELOPMENTS

In addition to financing by cash resources, Luxembourg law and existing practice in Luxembourg provide for a large range of financing possibilities and instruments. It is possible to gain financing, *inter alia*, through an issue of shares, securities and other financial instruments carrying specific financial or voting rights such as preferred dividend rights, tracking securities, subordinated loans or securities, securities with arrangements ensuring multiple voting rights, convertible instruments, securities or loans with profit-participating elements.

On the equity side, we see contributions to a company’s equity account with or without the issue of shares by the company to be financed. In the latter case, the contribution is made to the freely distributable account (account 115) of the company, which is termed a ‘contribution to equity capital without issue of shares (capital contribution)’ pursuant to the Grand Ducal Decree dated 10 June 2009 on the presentation and content of a standard chart of accounts, this being a sub-account of the share premium account of the company. Alphabet shares, tracking shares and shares with differing par values are also possible, and are now recognised by the New Company Law.
On the debt side, entities are financed through loans that may be interest-bearing, profit-participating, convertible or tracking. However, transfer pricing rules must be complied with, and payments must be at arm’s length.

More complex and hybrid instruments also exist, such as preferred equity certificates (which can be interest-free, tracking, convertible, etc.), notes and bonds that can be issued by an entity in addition to shares and that are governed mainly by their contractual terms.

The New Company Law has introduced a great deal of flexibility or has confirmed the flexibility of previously existing techniques: tracking shares are now formally recognised, the public or private issuance of bonds is now possible for all types of entities vested with legal personality, shares of a société anonyme can be issued below par value under certain conditions and shares can be issued with different nominal values.

Third-party financing usually takes the form of senior or mezzanine loans (whether syndicated or not). That said, alternative lenders are becoming more attractive in the debt financing market given that they often offer more flexibility than traditional bank lenders.

For a number of reasons (including the low minimum share capital, less regulation by the 1915 Law, its closed character), the private limited liability company is the preferred corporate vehicle for Luxembourg-structured acquisitions. For more complex structures, the limited partnership by shares may be interesting in particular for an initiator who wants to retain total control of its management. Some additional company types have become available over the past few years such as the special limited partnership, the simplified private limited liability company and the simplified stock company. The special limited partnership regime is inspired by the UK and US common law concept of a limited partnership. It provides considerable flexibility and offers additional onshore structuring solutions. Investors have demonstrated significant interest in these partnerships, as evidenced by the high number of incorporations of this company form over the past few years. The simplified stock company available in Luxembourg since the New Company Law is a company inspired by French law that has seen great success in France.

VII EMPLOYMENT LAW

Where a merger or an acquisition results in a transfer of an undertaking based on the territory of the Grand-Duchy of Luxembourg defined as a ‘transfer of an economic entity which retains its identity, meaning an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary’, Articles L127-1 et seq of the Luxembourg Labour Code apply.

As a consequence, the rights and obligations of the transferor arising from employment contracts or existing employment relationships on the date of the transfer shall, by virtue of the law, be transferred to the transferee. The transferee is obliged to maintain all the essential elements of the employment contracts of the transferred employees.

The transferor and the transferee shall be jointly and severally liable in respect of obligations that arose before the date of the transfer from an employment contract or an employment relationship existing on the date of the transfer.

The transfer of an undertaking shall not in itself constitute a valid ground for dismissal for the transferor or the transferee. Dismissals on the basis of real and serious grounds linked to an employee’s behaviour or on the basis of economic reasons not linked to the transfer remain possible. However, additional restrictions with respect to the termination of employment contracts following a transfer of undertaking may be foreseen in collective
bargaining agreements, such as the collective bargaining agreements applicable in the banking and insurance sectors. The collective bargaining agreement of the banking sector prohibits terminations based on economic reasons for a period of two years following a transfer unless expressly agreed on by staff representatives. The collective bargaining agreement for the insurance sector does not provide for such exception.

Following a transfer, the transferee is furthermore obliged to maintain the provisions of a collective bargaining agreement that had been applicable to the transferor. The transferred employees will continue to benefit from the provisions of the collective bargaining agreement until its termination or expiry, or until the effective date of its replacement. However, pursuant to recent Luxembourg case law, in cases where a clause of a transferred employment contract refers to the application of a collective bargaining agreement, the provisions of such collective bargaining agreement shall continue to apply to the transferee even after the termination or expiry of the collective bargaining agreement in force the day of the transfer or the entry into force of its replacement. If so, the application of the collective bargaining agreement can be ended either by mutual consent or by a unilateral decision of the employer, provided a specific procedure is followed.

As regards supplementary pension plans, a bill of law reforming the law of 8 June 1999 on supplementary pension schemes as amended was submitted in March 2017 by the government to the Parliament. This bill of law aims to modify the current rules applicable to supplementary pension schemes that also comprise rules applicable in the case of a transfer of undertaking. It is, however, intended that the option given to a transferee not to maintain a transferor's supplementary pension plan will be maintained.

In the context of the transfer of an undertaking, the transferor must inform the transferee in due time about all rights and obligations transferred to the extent that these rights and obligations are known by the transferor at the time of the transfer. The transferor and the transferee shall furthermore inform in due time prior to the effective date of the transfer staff representatives or, in the absence of staff representatives, the employees concerned in the transfer regarding the date and the reasons of the transfer, as well as the legal, economic and social implications for the employees, and any measures envisaged towards the employees. Finally, should the transferor or the transferee envisage taking measures involving the employees due to the transfer, their respective staff delegations must be consulted on those measures in due time with a view to reaching an agreement. The respective staff delegates of the transferor and the transferee shall also be informed and consulted in advance about all decisions that are likely to entail important modifications in the work organisation or in employment contracts, and the respective joint works council (where a joint works council exists) shall be informed about and consulted on any economic or financial decision that may have a substantial impact on the structure of the undertaking or on the level of employment. This applies in particular in the case of a transfer of undertaking. It should be noted that the law of 23 July 2015 on the reform of the social dialogue provides for the abolition of works councils as of the date of the next social elections, foreseen to take place in February or March 2019. As a counterpart, the rights and obligations of staff delegations will be extended to take over the works councils’ current competences if an undertaking employs at least 150 employees over a period of 12 months preceding the first day of the month of the announcement of the elections.
As regards cross-border mergers, the law of 3 June 2016 amending, *inter alia*, Article L426-14 of the Labour Code guarantees to employees that benefited before the merger from a more favourable employee participation system than the one foreseen in Luxembourg the maintenance of their participation in such system.

### VIII TAX LAW

#### i Statutory framework

In general, Luxembourg corporate taxpayers may be subject to corporate income tax (CIT) at a rate of 18 per cent, on which a 7 per cent solidarity surcharge is added, leading to an effective CIT rate of 19.26 per cent, plus municipal business tax (MBT), which varies from one municipality to another.\(^{10}\)

Moreover, corporations are generally subject to an annual net worth tax (NWT), levied at a rate of 0.5 per cent on their unitary value (i.e., taxable assets minus liabilities financing such taxable assets) as at 1 January of each year.\(^{11}\) A reduced tax rate of 0.05 per cent applies to the portion of net wealth exceeding €500 million. Corporations having their registered office or their central administration in Luxembourg, for which the sum of financial assets, transferable securities and bank deposits, receivables held against related parties, or shares or units in tax-transparent entities exceed 90 per cent of their total balance sheet and €350,000, are subject to a minimum NWT of €4,815.

#### ii Participation exemption on dividends, liquidation proceeds and capital gains

Under the Luxembourg participation exemption, dividends, liquidation proceeds and capital gains realised by a fully taxable Luxembourg-resident company from shareholdings in resident or non-resident corporations may be exempt from CIT, MBT and NWT, provided certain minimum holding conditions are met.

#### iii Withholding taxes

The standard withholding tax rate stands at 15 per cent for dividend payments to both resident and non-resident shareholders. Reduced rates or withholding tax exemptions may be available under applicable double tax treaties (DTTs).\(^{12}\) Moreover, a full withholding tax exemption may be available under Luxembourg tax law provided certain conditions are met.\(^{13}\)

No withholding tax is due in Luxembourg on a full or partial liquidation of a fully taxable company, regardless of the tax residence or tax status of the shareholder.

In addition, there is no withholding tax on royalty payments and fixed or floating rate interest payments made to corporate lenders or to non-residents generally.

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\(^{10}\) In Luxembourg City, the municipal business tax is 6.75 per cent and the overall combined rate of corporation taxes in Luxembourg City is 26.01 per cent.

\(^{11}\) For corporations having a financial year corresponding to the calendar year.

\(^{12}\) Luxembourg currently has 81 double tax treaties in force.

\(^{13}\) Cf. Article 147 of the LITA.
Recent developments

IP tax regime

On 17 April 2018, a new intellectual property (IP) tax regime was enacted, which is applicable as from fiscal year 2018.

An 80 per cent tax exemption on eligible net income for qualifying IP rights is available under the new regime. This new IP tax regime is based on the modified nexus approach developed by the OECD in the final BEPS report on Action 5.

Ruling of the Luxembourg Administrative Court No. 39193C of 23 November 2017

The Luxembourg Administrative Court issued an interesting ruling in November 2017 on the tax treatment of share redemptions by a company.

The Court held that the price paid to a shareholder upon the redemption by a company of all or part of his or her shares should qualify as a sale of the shares (rather than a dividend distribution), regardless of whether the shares are cancelled thereafter or not, provided however the sale price corresponds to the net asset value of these shares. As a consequence thereof, no withholding tax should apply on such redemption. If the shares are redeemed at a price exceeding the net asset value, the excessive portion of the price may be considered as a hidden dividend distribution (which may be subject to a 15 per cent withholding tax), unless there are exceptional economic reasons justifying a redemption above net asset value.

Exchange of information


The ECJ ruled in substance that a party has the right to appeal against a request for information, which the aforementioned laws had denied. As a consequence thereof, Luxembourg had to amend its exchange of information procedure as laid down in the 2014 Law. As a result thereof, Bill No. 7223 amending the 2014 Law was submitted to Parliament in December 2017, and is expected to be adopted in the next few months.

Multilateral Instrument

On 7 June 2017, Luxembourg signed the Multilateral Instrument (MLI) as one of the 68 initial signatories. Luxembourg decided that the MLI will be applicable to its 81 DTTs. The MLI will have a direct impact on 59 of those 81 DTTs because of a reciprocity requirement for its applicability (as of May 2018).

The MLI addresses the DTT changes proposed in the base erosion and profit shifting (BEPS) Action Final Reports and in the 2017 OECD Model Tax Convention.

MLI provisions can be classified into three categories: minimum standards that cannot be opted-out of; provisions that apply unless one or both contracting jurisdictions make a full or partial reservation against them; and provisions that have to be expressly opted into by the signing jurisdictions to be applicable.

Most notable choices taken by Luxembourg can be summarised as follows: Luxembourg opted for full reservations with respect to Article 4 (dual resident entities), Article 8 (dividend
transfer transactions), Article 9 (capital gains from the alienation of real estate-rich companies), Article 10 (permanent establishment triangular cases), Article 11 (savings clause), Article 12 (commissionnaire arrangements) and Article 14 (splitting-up of contracts).

With respect to Article 3 (transparent entities), Luxembourg has made a partial reservation, deciding not to apply Article 3(2), Article 3(1) addressing treaty benefits to be granted to income ‘derived by or through an entity or arrangement that is treated as wholly or partly fiscally transparent under the tax law of either Contracting State’.14

With respect to Article 5 (method for the elimination of double taxation), Luxembourg has chosen option A, providing for a switch-over clause under which the residence state must grant a credit, rather than an exemption, for the taxes levied in the other contracting jurisdiction.

With respect to Article 7 (prevention of treaty abuse), Luxembourg chose to apply the principle purpose test (PPT) in contrast to the application of a simplified limitation on benefits (LOB) alongside a PPT, or the fully fledged LOB.

**IX COMPETITION LAW**

If there is a local antitrust impact below the EU thresholds, an assessment is undertaken at the level of the European Commission, which may request assistance from the Luxembourg Competition Council when investigating an M&A transaction involving a Luxembourg entity.

Given that the Luxembourg national market is small, and that most M&A transactions with a Luxembourg connection deploy their competitive effect on a global or EU scale, or mainly in other jurisdictions, most such M&A transactions do not raise any national antitrust issues.

Where the relevant transaction has an EU dimension, EU antitrust rules will apply, as will the law of 23 October 2011 on competition (the Competition Law), which reflects Articles 101 and 102 of the Treaty on the Functioning of the European Union by prohibiting concerted practices, anticompetitive agreements and abuse of dominant market positions.

No pre-merger filings or prior notification requirements to the Luxembourg Competition Council exist under the Competition Law, which only provides for prohibitions of concerted practices and abuses of a dominant position.

However, the above generally held position significantly changed on 17 June 2016, when the Luxembourg Competition Council asserted its competence to scrutinise and sanction M&A transactions that create or strengthen a dominant position. Through this decision, the Luxembourg Competition Council affirmed its authority to exercise *ex post* control of mergers by using, in the absence of a specific merger control regime at the national level, the provisions prohibiting the abuse of a dominant position.


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14 Article 1(2) of the 2017 OECD Model Tax Convention.
On the one hand, the New Competition Law facilitates actions for damages through the introduction of certain specific procedural rules:

a their exercise is simplified by a set of irrebuttable and rebuttable presumptions with respect to the existence of an infringement of competition law and its effects;

b access to evidence, essential for competition law-based claims, is facilitated through certain disclosure rules;

c the joint and several liability of undertakings that have infringed competition law through joint behaviours allows an injured party to require full compensation from any of them until it has been fully compensated; and

d the New Competition Law refers to the Luxemburgish general procedural law principles that provide for a 10-year limitation period for commercial claims.

On the other hand, the New Competition Law encourages consensual dispute resolution. In accordance with the Directive, it provides for the suspension of the limitation period to bring an action for damages for the duration of the consensual dispute resolution process and the suspension of the proceedings relating to the action for damages during a maximum period of two years.

X OUTLOOK

We believe the outlook for M&A activities in Luxembourg is positive, and continues to grow and attract interest from both domestic and foreign investors. The forecast for 2018 regarding domestic M&A is still good, and confirms the global resilience in this field. Moreover, the impact of the legislation of the new US administration is still limited on the global market, and the US market shows a strong performance that will probably have positive consequences on the European and Luxembourg markets. While Brexit has not yet had a negative effect on the Luxembourg M&A market, the terms of the implementation of Brexit remain to be negotiated. It seems clear that some economically significant areas such as merger clearances, cross-board taxation and transfers of employees will be affected. We see industry players and strategic buyers continuing to be active in Luxembourg (and in other countries by using structures through Luxembourg), increasingly expensive financing, fluctuating exchange rates, and a legal and regulatory environment that is getting more and more complex.
I OVERVIEW OF M&A ACTIVITY

In comparison with its size (316 square kilometres and a population of 437,418),\(^2\) M&A activity involving Maltese assets, buyers and sellers is by no means insignificant. Apart from an increasingly healthy M&A market, the trend continues in the listing of shares of Maltese public companies on exchanges both within and outside Malta. Following the launch by the Malta Stock Exchange in 2016 of Prospects, a multilateral trading facility intended to appeal to small and medium-sized enterprises (SMEs) seeking alternative sources for finance, a number of fully subscribed bond and rights issues have been brought to the market successfully through the Prospects platform. The Prospects market targets SMEs incorporated as public companies that employ fewer than 250 persons and have an annual turnover not exceeding €50 million or an annual balance sheet total not exceeding €43 million.

Malta continues to gain momentum as a centre for doing business for persons seeking an efficient entry point into Europe, for holding structures to hold assets globally, and for businesses engaged in activities such as payment processing, electronic money issuance, blockchain and distributed ledger technologies, gaming, gambling, insurance, aviation and yachting. Sensible regulators with in-depth knowledge of the industries they are responsible for and a willingness to engage with the businesses they regulate, sound regulation and a reasonable fiscal environment have significantly contributed to Malta showing remarkable resilience in the face of the global financial crisis. As at the end of June 2017, foreign direct investment in Malta was estimated by the National Statistics Office at €165.5 billion, with 97.1 per cent being attributable to financial and insurance activities. In May 2018, the European Commission (Commission) reported that the trend for growth in Malta’s economy remained robust, bolstered in part by a strong performance in the services sector, particularly in areas such as tourism, remote gaming and professional services.\(^3\) The Commission has also commented that Malta’s economy is ‘among the fastest growing economies in the EU’, observing that a large part of this is due to ‘exceptional investments in the aviation and energy sectors in previous years’ and ‘several projects in the health, technology and telecommunication sectors’. It is in this context that M&A activity has significantly picked up during the past decade, progressing from a situation in which M&A activity was minimal to one that reflects the buoyant state of the Maltese economy, in particular that of the export-driven services sector.

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1 James Scicluna is a co-founding partner, Ramona Azzopardi is a partner and Rachel Vella Baldacchino is an associate at WH Partners.
3 European Commission, Spring 2018 Economic Forecast: Malta.
Most M&A activity goes unreported when it relates to private companies, but an insight into the extent of M&A activity may be gained through the Malta Financial Services Authority’s (MFSA) annual figures, which report that, in 2016, 218 company mergers were carried out, 5,297 new companies were registered and 106 companies transferred their company domicile to Malta.4

The transactions involving Maltese companies, buyers or sellers that receive the highest press coverage relate to the remote gaming and banking industries. The acquisition in 2016 of an 80 per cent stake in Malta-based Tipico Group companies by private equity firm CVC Capital Partners for a valuation of Tipico of €1.3 billion is of particular note, serving as a clear marker of a wave of mega deals in the online gaming and betting industry that remains clearly discernible into mid 2018.

II THE LEGAL FRAMEWORK FOR M&A

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 European Union law, others that are centuries old. Many laws are shaped by traditional civil law principles, 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 European Union law.

The Civil Code5 governs the law of obligations, including rules for the validity of contracts, rules on suspensive and resolutive conditions and joint and several liability, as well as specific contracts such as contracts of sale and deposit. Most rules set out in the Civil Code have their origin in Roman law as developed locally, in France and Italy over the centuries, and are often still very much in line with the Napoleonic Code.

The Companies Act6 is the lex specialis that, inter alia, governs the formation and functioning of companies, their merger, dissolution and winding up, and the taking of security over their shares. This statute, with the subsidiary legislation made under it, is the piece of legislation most frequently referred to by Maltese M&A practitioners. As regards subsidiary legislation made under the Companies Act, the Companies Act (The Prospectus) Regulations7 and the Cross-Border Mergers of Limited Liability Companies Regulations8 are probably most often referred to in a transactional context. The latter transposes Directive 2005/56/EC9 almost word for word.

The Commercial Code10 governs several basic acts of trade, such as agency and brokerage, and is often indispensable when considering the business of the target asset and, at times, deal-specific terms. Most importantly, it also contains rules on the perfection of commercial contracts.

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5 Chapter 16, Laws of Malta.
6 Chapter 386, Laws of Malta.
7 SL 386.11.
8 SL 386.12.
10 Chapter 13, Laws of Malta.
Transactions involving public companies whose shares are traded on the Malta Stock Exchange are subject, apart from the Companies Act (The Prospectus) Regulations, to the Listing Rules published by the MFSA in its capacity as the Maltese listing authority.

Merger control and antitrust regulation operates under the legal framework set out under the Competition Act and the Control of Concentrations Regulations. The national competition authority is the Office for Competition within the Malta Consumer and Competition Affairs Authority, operating pursuant to the Malta Competition and Consumer Affairs Authority Act. Mergers and acquisitions that satisfy the jurisdictional threshold requirements of the European Union Merger Regulation will be subject to review by the European Commission.

Several other pieces of subsidiary legislation made under the Companies Act deal with specific types of companies and, depending on the area being dealt with, may need to be referred to by an M&A practitioner; for example, the Companies Act (SICAV Incorporated Cell Companies) Regulations and the Companies Act (Recognised Incorporated Cell Companies) Regulations contain the rules governing, respectively, the formation of, continuation as or transformation of an investment company with variable share capital (SICAV) or a limited liability company into an incorporated cell company.

M&A activity in particular industries, such as gaming and gambling, and financial services is also largely dependent on regulatory clearance being required under other statutes or regulations. This is the case with the transfer of entities licensed under the Lotteries and Other Games Act, the Investment Services Act, the Banking Act and the Insurance Business Act.

The merger of undertakings for collective investment in transferable securities (UCITS) is harmonised under the EU’s UCITS Directive and transposed into Maltese legislation via the Investment Services Act (UCITS Merger) Regulations, so when dealing with a merger of UCITS, it is these regulations that set out the specific and more cumbersome rules to be followed.

Other statutes and regulations that have a key role in the structuring and progress of a transaction are the Competition Act and the Control of Concentrations Regulations, the Employment and Industrial Relations Act (EIRA), the Transfer of Business (Protection of Employment) Regulations and the Employee Involvement (Cross-Border Mergers of

11 Chapter 379, Laws of Malta.  
12 SL 379.08, Laws of Malta.  
13 Chapter 510, Laws of Malta.  
14 SL 386.14.  
15 SL 386.15.  
16 Chapter 438, Laws of Malta.  
17 Chapter 370, Laws of Malta.  
18 Chapter 371, Laws of Malta.  
19 Chapter 403, Laws of Malta.  
21 SL 370.19.  
22 Chapter 379, Laws of Malta.  
23 SL 379.08.  
24 Chapter 452, Laws of Malta.  
25 SL 452.85.
Limited Liability Companies) Regulations,\textsuperscript{26} the Prevention of Financial Markets Abuse Act\textsuperscript{27} and, last but not least, tax legislation, most notably the Income Tax Act\textsuperscript{28} and the Mergers, Divisions, Transfer of Assets and Exchange of Shares Regulations made under it, as well as the Duty on Documents and Transfers Act.\textsuperscript{29} Some of these are dealt with in more detail below.

Malta’s 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.

III   DEVELOPMENTS IN CORPORATE AND TAKEOVER LAW AND THEIR IMPACT

There have been a number of recent changes to company law that are intended to make Malta more attractive as a financial centre in Europe, some of which are the result of the transposition of EU law. Below we give only a high-level overview of some of the principal changes. Other than the UCITS Merger Regulations, there have been no recent changes to the law governing M&A.

i   UCITS Merger Regulations

There have been no significant changes in the past few years to the law on the merger or amalgamation of companies other than the better transposition of the UCITS Directive. The UCITS Directive was amended by Directive 2014/91/EU,\textsuperscript{30} and amendments to the Investment Services Act (UCITS Merger) Regulations were published in the Government Gazette on 19 September 2014.\textsuperscript{31} These amendments came into force immediately, with a view to the better transposition of the amended UCITS Directive on the coordination of laws, regulations and administrative provisions relating to UCITS in relation to cross-border mergers of UCITS. UCITS involved in a merger are required to adhere to specific standards of disclosure and notification rather than the ‘standard’ procedure provided for under the Companies Act or under the Cross-Border Mergers of Limited Liability Companies Regulations. This is a process that the UCITS Directive has harmonised across the European Union with the intention of facilitating, if not simplifying, the organisation or reorganisation of UCITS in Europe.

ii   Limited liability partnership – with or without shares

An important change to company law was made through the adoption of Legal Notice 478 of 2014 (LN 478/2014) relating to limited liability partnerships (LLPs). The basic provisions regulating LLPs have not changed significantly over the years, but just over a decade ago, specific regulations were adopted allowing the use of this type of partnership for collective investment schemes. As the LLP structure grew in popularity with fund managers, further changes to the law were made, first through Act XX of 2013 and more recently through LN 478/2014. A key feature introduced through this regulation is the ability for an LLP’s capital to be divided into shares, or not. In this type of structure, a general partner is

\textsuperscript{26} SL 452.103.  \
\textsuperscript{27} Chapter 476, Laws of Malta.  \
\textsuperscript{28} Chapter 123, Laws of Malta.  \
\textsuperscript{29} Chapter 364, Laws of Malta.  \
\textsuperscript{31} Gazette No. 19.311 of 19 September 2014, Legal Notice 333 of 2014.
responsible for the management of the LLP, while a limited partner contributes to its capital but is not involved in management. A general partner is jointly and severally unlimitedly liable for the LLP’s debts but a limited partner is liable only to the extent of the unpaid contribution to the LLP.

iii Protected and incorporated cell companies

Malta regulates and offers the possibility to incorporate protected and incorporated cell companies. This type of entity is often used in the insurance business, investment fund and securitisation sector. The first Maltese legislation to provide for such structures was enacted to allow the incorporation of structures created for the purpose of assuming risks and issuing insurance-linked securities as a reinsurance special purpose vehicle. Legal Notice 411 of 2014 extended this concept to allow the incorporation of securitisation cell companies. This type of company allows for multiple series of debt issues to be issued by the same company, but through individual cells constituted through resolutions of the company’s board of directors, while the entire patrimony of each cell within the company remains separate from that of the other cells and of the company itself as a whole.

iv Listing Rules

The Listing Rules were last amended in April 2018, but the changes had no effect on the rules governing takeovers.

IV FOREIGN INVolVEMENT IN M&A AND SIGNIFICANT M&A TRANSACTIONS

The majority of deals by volume and value have some element of foreign involvement, whether on the buy side or sell side. Often the target business has been structured through Maltese entities because of the favourable local business environment. At other times, Maltese structures are used as acquisition special purpose vehicles and, in this sense, several acquisitions have been made by Maltese companies in the past few years. There remains healthy local M&A activity in the area of corporate services and software development, but more often than not these deals are not publicised.

The most significant deal by value during the past year was probably the £4 billion takeover by Isle of Man-based online gaming company GVC Holdings plc of UK bookmaker Ladbrokes Coral, both of which retain ties with the Maltese market through an online presence and a number of gambling licences issued by the Maltese Gaming Authority. The increased interest of private equity firms in the gambling industry is very noticeable, and since Malta is a centre of excellence for remote gambling, it is inevitable that it would see a fair share of private equity deals relating to the gambling industry. The 2016 acquisition by CVC Capital Partners, a private equity firm, of a majority stake in Tipico Group was perhaps but one marker of this heightened interest. Strong online gambling market players continue to line up in the international field for deal-making, and the April 2018 announcement by The Stars Group Inc, a Canada-based online gaming operator, of its C$4.7 billion acquisition
of Sky Betting & Gaming plc, a UK bookmaking heavyweight, evidences the strategic tactic for scale through M&A transactions that frequently call in Maltese elements through the presence of corporate vehicles and Maltese gaming licences.

Further stimuli to M&A activity has concerned Maltese targets, such as the recently completed acquisition of a Malta-licensed online betting operation ComeOn Malta Limited for a total consideration of €280 million based on a multiple figure of the company’s estimated operating profits for 2016.

The dynamism driving the information and communications technology forming the foundations of the online gambling industry has also prompted investment activity in technology-focused companies. Although the financial terms of the deal were not disclosed, Intralot, a Greece-based integrated gaming solutions operator announced late in 2017 the completion of a strategic acquisition deal of Bit8 Ltd, a Malta-grown developer and provider of an intelligent online casino and sportsbook platform. Increasing market demand for acquisitions of companies developing innovative technologies is further evidenced by the acquisition by Norway’s biggest traffic technology supplier, Q-Free ASA, of Malta-based Traffiko, a traffic management solutions company. In this same vein, 2017 brought notable investment activity in Minely Ltd, a Big Data business analytics provider.

Malta’s local economy and high consumer confidence, identified in the Commission’s spring forecast for Malta, is also visible in M&A activity in the consumer retail sector. The strength of the retail market can be traced in the acquisition by Camilleri Holdings Limited, a legacy retail chain operator, of CYKA Limited, an apparel franchise retail operator.

It is probably fair to say that the principal sources of M&A activity are Europe, North America and Asia. Cross-border mega-deals, such as the landmark acquisition announced in April 2018 by The Stars Group Inc (TSG.L.TO), a Toronto listed online gaming operator, of Sky Betting & Gaming from owners CVC Capital Partners and Sky Plc in a deal worth US$4.7 billion, have had an impact locally because of the parties’ respective presence in Malta. The foregoing deal and other mid-sized M&A activity, such as the acquisition by 500.com Limited (NYSE: WBAI) of a 93 per cent stake in The Multi Group, a Malta-headquartered multi-channel online gaming provider, indicate that there is a strong appetite for M&A in Malta originating from major listed entities across the globe.

Some of the more significant recent transactions have been the acquisition by Betsson AB, a Swedish gaming and betting operator having sizeable Maltese operations, of Racebets, a German horse betting operator for a consideration of up to €40 million in 2017, and of the Malta-based Oranje and Kroon businesses through a combined share and assets deal for an initial purchase price of €100 million, of which €40 million was payable in cash. There was also the acquisition of the entire issued share capital of Dumarca Holdings Limited, the Malta-based parent company of the Vera&John group, by Intertain Group Limited (TSX: IT) for an initial payment of €44.5 million in cash and €36.5 million in shares. These are good examples of the trend for the consolidation of the remote gambling business in Europe, a process in which Malta is a major player given the presence on the island of some of the world’s leading remote gambling operators.

Turning to the corporate services and advisory sector, KPMG’s acquisition and de-listing of Maltese company Crimsonwing resulted in the consolidation of KPMG’s Microsoft Dynamics teams in the United Kingdom and the Netherlands. Crimsonwing is to create an overall team of approximately 350 people in Malta, allegedly making KPMG the largest ‘Big 4’ provider of Microsoft Dynamics consulting and implementation services in Europe, and the largest professional services firm in Malta. KPMG’s UK, Netherlands and
Malta partnerships reportedly acquired Crimsonwing for €26 million. Other notable local transactions in the corporate and professional services space were, respectively, the acquisition of Quaestum Corporate Management Limited, an independent corporate management firm, by Zedra, a global independent specialist in trust, corporate and fund services, and the merger of Grant Thornton Malta with EMCS, an independent advisory and tax services firm.

There were at least three notable transactions in the local banking sector. One of these was the acquisition of FCM Bank Limited, a Malta-licensed bank, by the SAB Group, a Czech-based financial services group. The second was the acquisition by FIMBank, a trade finance market player, of Egypt Factors, a factoring business based within one of Egypt’s most important growth industries. Last, 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 of €91 million.

In the insurance industry, Argus Insurance Agencies Limited announced in 2016 the acquisition of the Island Insurance Brokers Limited for an undisclosed sum. The thriving Maltese insurance sector also prompted a sale of business agreement in July 2015, through which MAPFRE Middlesea plc acquired the entire economic activity of Allcare Insurance Ltd.

There was also notable M&A activity in the hotel industry during 2015 with International Hotel Investments plc (IHI), the largest Maltese hotel group, announcing in January 2016 the acquisition of Island Hotels Group Holdings plc (IHGH), which brought with it a number of hotels in Malta, 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, showed that it had 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.

The trend in the corporate services area of global providers of corporate services seeking entry to the Maltese market by acquiring local firms continues. At the same time, increased consolidation is happening locally. The other clearly continuing trend is consolidation in the remote gambling industry, a trend that continues to accelerate, driven by the tightening of regulations in several European jurisdictions and the need for larger resources and compliance capabilities.

V FINANCING OF M&A: MAIN SOURCES AND DEVELOPMENTS

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 activity, and interest rates are not all that favourable. In general, local banks tend to seek to limit their exposure to sectors that they know well, primarily local real estate.

A favoured method of raising liquidity by Maltese businesses, including for M&A transactions, is through debt securities. A notable local corporate bond issue in 2015 was IHI’s €45 million issue, redeemable in 2025 with a coupon of 5.75, which was heavily oversubscribed on opening and closed on the same day. The bond served in large part to redeem an existing €35 million 6.25 per cent bond, with preference given on the new bond to existing bondholders wishing to surrender their bonds for new bonds. The bond issue was announced at the beginning of April 2015, three months after IHI’s announcement of its intended acquisition of IHGH, and opened and closed at the beginning of May with IHI’s
general meeting voting in favour of the completion of the acquisition on 20 May 2015. Bond finance remains a firm favourite within the Maltese market for real estate M&A, and the flurry of oversubscribed retail and non-retail multimillion bond issues within the Maltese debt capital markets augurs well for this source of traditional debt finance.

Non-traditional or alternative sources of finance have played a considerable part in the Commission’s efforts to build a Capital Markets Union and to create a real and meaningful Digital Single Market, and constituted the focal point of its Fintech Action Plan, published in March 2018. Alternative sources of finance have continued to develop over the years, perhaps most notably within the Maltese market for securitisation transactions, an alternative and viable source of M&A financing, which has been earmarked for considerable growth in the near future. This funding mechanism allows businesses to raise funds efficiently through the issue of debt securities on the capital markets by exploiting illiquid but income-producing assets that are pooled and removed from the business balance sheet through a transfer to a specially incorporated independent entity, which will then act as the issuer. Although securitisation issuances have seen a turbulent few years in the aftermath of the financial crisis, the use of securitisation in M&A financing transactions is expected to witness a resurgence following increasing market confidence and high-profile promotion of this structured financing technique by the Commission. Indeed, the new Securitisation Regulation will apply to all securitisation transactions entered into on or after 1 January 2019, subject to certain transitional arrangements. The market has generally welcomed the new regulation, which has been presented with the stated aim of increasing availability of funding opportunities for businesses seeking opportunities for growth through increased certainty and transparency in securitisation transactions.

Malta’s current government has publicly promoted a policy stance that favours the development of a legal and regulatory environment that is beneficial and useful to blockchain technology business, going as far as to promote the description of Malta as a ‘blockchain island’. Blockchain-based currencies and the propensity for decentralisation and increased accessibility of new sources of venture capital through initial coin and cryptocurrency offerings (commonly referred to as ICOs) herald a new era in access to alternative finance for businesses and start-ups. Three Bills that were announced by the Maltese government early in 2018 were published in May 2018; they hold the strong promise of creating a unique regulatory framework to govern blockchain and cryptocurrency businesses and services. Quite possibly the most highly anticipated of the three ‘blockchain Bills’, as the new laws have come to be known, is the Virtual Financial Assets Bill, which enshrines investor protection, market stability and ICO credibility. The proposed laws have been welcomed by the industry and are expected to serve as a significant stimulus to growth finance and venture capital, with the likely consequence that M&A activity will continue to increase down the line in Malta, particularly in the information technology sector.

VI EMPLOYMENT LAW

The basic principle involved in the acquisition of a going concern is embedded in the generic legislation on employment law, the EIRA,34 which regulates conditions of employment.

The EIRA stipulates that when the transferee (the person who takes over the business) acquires ‘a business or other undertaking’ from the transferor (the person who sells the

34 See footnote 24.
business), the former takes on full responsibility for the employees who, at that particular moment, are deemed to be in the employment of the transferor. Broadly speaking, the relevant employees would be those persons who are registered as employees of the transferor with the Employment and Training Corporation (ETC), which is the government agency that oversees the engagement and termination of employment of all persons working in Malta. Thus, it is incumbent on the transferee during the due diligence process to ascertain that the employment list on the books of the transferor is identical to the undertaking’s employment list with the ETC prior to the purchase being concluded.

The transferee is also bound by law to take on all the officially registered employees on the same terms and conditions either ‘agreed in any collective agreement […] until the date of termination or expiry of the collective agreement or the entry into force or application of another collective agreement’ or, in the absence of a collective agreement, with ‘all the rights and obligations which the transferor had towards the employee’.

The EIRA also stipulates that both transferor and transferee shall inform the representatives of the employees affected by the transfer of the date of transfer, the reasons of the transfer, the implications of the transfer for the employees (namely, any legal, economic or social implications) and of any measures that may affect the employees in future.

The above obligations do not apply to any business that is being transferred as a result of bankruptcy or insolvency proceedings, which may be under the supervision of a court-appointed liquidator, or to seamen employed on ships, who are regulated under the Merchant Shipping Act.35

Further details about the transfer of business are found in the Transfer of Business (Protection of Employment) (TUPE) Regulations36 (TUPE Regulations). An important clarification in these Regulations is the definition of ‘service provision change’, which incorporates a function that had first been carried out by the employer and was subsequently outsourced to a contractor. This includes a function transferred from one contractor to another, or from a contractor back to the employer. The function transferred must retain ‘its identity as an organised group of resources’ carrying out the same economic activity. Good examples of such functions are, inter alia, cleaning and security of premises, reception duties and payroll processes.

The TUPE Regulations make reference to the EIRA and open the parameters to include mergers and service-provision changes, in addition to an outright acquisition of a business. The TUPE Regulations also govern transfers of economic activities that are not ‘operating for gain’, thereby including voluntary organisations and non-government organisations. The Regulations are applicable to transfers taking place in Malta.

The TUPE Regulations go into such detail as reimbursement for the balance of vacation leave: the transferor is obliged to pay the transferee any balance of vacation leave that should have been taken by employees prior to the sale or transfer of an undertaking, and vice versa if more leave than the number of days awarded by law had been taken prior to the sale or transfer. This principle also applies to any wages, pro rata bonuses (including government bonuses) and weekly allowances due to employees registered in the company at the time of the transfer or merger.

Furthermore, the Regulations stipulate that the transferee is obliged to re-engage any employees who had been made redundant prior to the official sale or transfer, and whose

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35 Chapter 234, Laws of Malta.
36 SL 452.85.
role becomes available once more within one year of the date of redundancy. In practical terms, this means that making employees redundant prior to the sale (so as not to have those employees on the official ETC list at the time of the transfer or merger) will only oblige the transferee to take on these employees, under the same terms and conditions that they had enjoyed at the time of redundancy, if the company places adverts for these roles within one year of their redundancy.

The TUPE Regulations refer to the obligation of both transferor and transferee stipulated in the EIRA to inform employees’ representatives of the date and reason of transfer, and any implications thereto, at least 15 days before the transfer is carried out. Both transferor and transferee are obliged to send a copy of the written statement given to the employees’ representatives to the Director of Industrial Relations on the day that it is issued. If the transfer includes changes to the conditions of employment of the employees, consultations shall be held between the employees’ representatives, the transferor and the transferee within seven days of the representatives being informed of the intended transfer. This means that consultations, and thus negotiations with the union, if applicable, are required to take place prior to the transfer. Unions having ongoing employee representation are recognised as such after the transfer is effected.

However, this formal information process is restricted to undertakings that have more than 20 employees, irrespective of whether they are full-time or part-time. In the absence of such a headcount, the transferor still has the obligation of giving the employees themselves all the information passed on to the transferee (namely, contract of employment or written statement in terms of the Information to Employees Regulations) by the date of transfer of the business.

The TUPE Regulations explain that the transfer itself, whether of the whole business or of part of the undertaking, shall not constitute ‘sufficient grounds for dismissal’ of existing employees either by the transferor or the transferee. On the other hand, this provision shall not stand in the way of reorganisation of the workforce, although the employer will be regarded as responsible if any such changes will result in termination of employment.

The above obligations are valid even in cases when the transfer is undertaken by an entity controlling the undertaking to be transferred, as long as the undertaking is located in Malta, irrespective of whether the undertaking itself is in control of the transfer.

Contravening the provisions in the TUPE Regulations carries a fine of not less than €1,164.69 per person affected by the transfer.

VII TAX LAW

Malta’s corporate tax regime, which has been in place since 1948, was approved by the Commission when Malta joined the European Union in 2004. Malta also meets international tax standards and is included on the ‘white list’ set out by the OECD. The country operates a full imputation system in terms of which companies are taxed at a rate of 35 per cent. However, the shareholders of companies are entitled to a refund of the tax paid by the company. The tax refund may be five-sevenths, six-sevenths, two-thirds or 100 per cent of the Malta tax paid depending on the source and nature of the income. Malta’s network of double tax treaties further strengthens the country’s position as a key corporate location.
Malta adopted Directive 2005/19/EC in the Mergers, Divisions, Transfer of Assets and Exchange of Shares Regulations. The aim of this Directive is to eliminate obstacles in cross-border mergers between eligible entities situated in different EU Member States.

The Income Tax Act exempts from tax a transfer involving the exchange of shares on the restructuring of holdings through mergers, demergers, divisions, amalgamations and reorganisations. The Duty on Documents and Transfers Act also provides for an exemption from duty on the restructuring of holdings through mergers, demergers, amalgamations and reorganisations within a group of companies as defined.

As from 2013, restructurings that qualify for tax relief in terms of the Income Tax Act and the Duty on Documents and Transfers Act are required to obtain a tax ruling and prior authorisation from the Commissioner for Revenue (Commissioner). Authorisation would generally be granted if the Commissioner is satisfied that the transaction or transactions are to be effected for bona fide reasons and do not form part of a scheme or arrangement in which the main purpose, or one of the main purposes, is the avoidance of liability to duty or tax.

In terms of the Income Tax Act, merging companies may benefit from what is commonly referred to as the ‘step-up clause’. A company resulting from a merger that is registered in Malta as per the Cross-Border Mergers of Limited Liability Regulations, and acquires assets that on the day of the merger are situated outside Malta and owned by a company that is not domiciled or resident in Malta, may opt to have the assets acquired via the merger to be deemed acquired on the day of the merger at a cost that is proved to the satisfaction of the Commissioner to be the market value.

Tax on capital gains is levied on gains generated on the transfer of certain assets, including immovable property situated in Malta, rights over securities, business, goodwill, patents, trademarks, trade names and beneficial interest in trust. Tax on capital gains is also subject to some exemptions, such as an exemption on the transfer of assets between a group of companies or an exemption from capital gains on a transfer of shares if the transferor is a person not resident in Malta.

There are no exit taxes in Malta.

From a VAT perspective, the transfer of a going concern may be exempt from VAT if certain conditions are satisfied on the part of the transferor and the transferee.

VIII COMPETITION LAW

The Control of Concentrations Regulations take an ex ante approach in aiming to avoid excessive market power being gained by undertakings through mergers, acquisitions or joint ventures that would lead to the substantial lessening of competition on any given market. M&A transactions that satisfy the jurisdictional thresholds set out in the Control of Concentrations Regulations are subject to mandatory notification to the Office for Competition in Malta. Generally, concentrations must be notified to the Office for Competition when the revenues

38 SL 123.72.
39 See footnote 28.
40 See footnote 29.
41 SL 379.08.
generated by the concentration from customers located in Malta during the preceding financial year exceeds circa €2.329 million and each of the undertakings concerned in the concentration had a turnover in Malta equivalent to at least 10 per cent of the combined aggregate turnover of the undertakings concerned. The jurisdictional turnover threshold in Malta, although relatively low when compared to thresholds prevailing in other European merger control regimes, was purposely designed to require notification only of transactions that have a real presence and link to the market for Maltese consumers, and reflects the pragmatic approach adopted by the Office for Competition during its review of party submissions. Furthermore, notifiable concentrations might be subject to a European dimension, rendering them subject to review by the Commission under the European Union Merger Regulation or other national competition authorities within the European Union.

Where significant market power is held by an undertaking (enough for it to be considered ‘dominant’) and this is abused, or if anticompetitive agreements are entered into between two or more undertakings, competition rules are in place to provide sanctions for such behaviour once it has taken place (ex post). Although merger control regulation attempts to prohibit mergers that would afford undertakings significant market power (enough to substantially lessen competition), it is not market power itself that is prohibited and sanctioned by competition law but the anticompetitive behaviour of undertakings.

The Maltese Competition Act (the Competition Act) provides the national legislative framework for competition regulation. Articles 5 and 9 of the Competition Act are the substantive provisions that stipulate the competition law prohibitions, and closely mirror Articles 101 and 102 of the Treaty on the Functioning of the European Union under EU competition law. Article 5 prohibits anticompetitive agreements between two or more undertakings, while Article 9 prohibits the abuse of a dominant position by an undertaking.

Any agreement between undertakings, decisions by an association of undertakings or concerted practices between undertakings with the object or effect of hindering competition in line with the prohibition listed in Article 5(1) will be considered null and void in accordance with Article 5(2), unless one of the exceptions under Article 5(3) applies. Block exemption regulations are also in place (these may be referred to, although they are currently expired) that exempt certain types of agreements that are not considered to be anticompetitive. These broadly cover vertical agreements and concerted practices, horizontal agreements, technology transfer agreements, specialisation agreements, and research and development agreements.

Article 9 prohibits the abuse by an undertaking of a dominant position. Dominance is defined in the Competition Act as ‘a position of economic strength held by one or more undertakings which enables it or them the power to prevent effective competition being maintained on the relevant market by affording it or them the power to behave, to an appreciable extent, independently of its or their competitors, suppliers or customers’. Article 9(2) lists examples of the types of behaviour that would be considered an abuse. These may be largely classified into exploitative abuses (in relation to one’s customers) or exclusionary abuses (in relation to one’s competitors).

The Malta Competition and Consumer Affairs Authority Act (the MCCAA Act) provides for the set-up of the Malta Competition Affairs Authority, which includes the Office for Competition, the authority responsible for the regulation of competition law and merger control in Maltese markets. Together with the Competition Act, it also provides the Office with the necessary enforcement powers to investigate and sanction any potential breaches of competition law. The MCCAA Act brought with it major amendments to the Competition

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Act and, most significantly, decriminalised competition law breaches and introduced an administrative fining system based on that used by the Commission for breaches of EU competition law.

Undertakings and consumers who have suffered damages as a result of behaviour by an undertaking in breach of Articles 5 or 9 of the Competition Act may seek to recover such damages. A legal basis for such actions was introduced into the Competition Act by the MCCAA Act in 2011.

The Collective Proceedings Act, which came into force in 2012, helps to create an incentive for consumers and undertakings to seek compensation, particularly where taking on an individual action would have been too burdensome and costly.

Draft leniency regulations were published by the Office for Competition in June 2013, followed by a consultation period. These regulations aim to encourage undertakings involved in anticompetitive agreements to act as whistle-blowers in order for their fine to be reduced, or even waived, thereby allowing such agreements to be uncovered by the Office for Competition.

IX OUTLOOK

It is anticipated that the current level of transactional activity will continue, especially in information technology sectors, and particularly given the effect of forthcoming regulation of the business of cryptocurrencies and distributed ledger technologies. A lot of this activity is driven by the desire to promote and develop an exciting and promising source of alternative finance for business, which has proven to be a significant market development alongside the Commission’s own Fintech Action Plan, launched earlier in 2018. Moreover, considerable M&A activity is visibly motivated by a drive to consolidate and achieve economies of scale and a geographic reach that extends beyond Europe. Another factor is the restructuring of businesses with an increased focus on regulatory and tax efficiency with respect to operations in Europe.

In the next 12 months, we are also likely to see a number of Maltese companies involved in the development of niche software products, and a notable number of established remote gaming market players seeking admission to stock exchanges and multilateral trading facilities overseas, most likely outside the eurozone area.

Finally, proper stimulation of venture capital funding and the ease of access to regulated and reputable sources of alternative finance for distributed ledger technology businesses is very likely to lead to an increased number of businesses, particularly in the technology sector, developing more quickly than was previously possible and potentially becoming the targets of acquisition by larger local and international players in the near future.

42 Chapter 520, Laws of Malta.
Chapter 32

MEXICO

Eduardo González, Jorge Montaño and Humberto Botti

I OVERVIEW OF M&A ACTIVITY

The Mexican M&A market continued to show stable performance throughout 2017 and the first quarter of 2018, even amid countless challenges posed by the uncertainty of the political and trade environment with the Trump administration and the Mexican presidential election to be held in July 2018. In particular, the progress (or lack of) in the North American Free Trade Agreement negotiations has constantly resulted in volatility on the peso-dollar exchange rate. Certain assets have become difficult to price, and therefore some transactions have been temporarily put on hold; however, other participants in the market continue to push forwards with their transactions ahead of the election, in some cases as a defensive measure.

Macroeconomic fundamentals remain strong and, coupled with a weakened peso, continue to provide attractive investment return opportunities in several industries, including financial services, insurance, real estate, consumer products, health, manufacturing and industrial.

According to Transactional Track Record, a reported 75 transactions were completed or announced during the first quarter of 2018, totalling a reported value of around US$6 billion. The number of transactions has increased year-on-year when compared to the first quarter for 2016. The busiest sectors were financial services and insurance, with a reported 17 transactions, followed by real estate, technology and oil and gas with nine, seven and seven reported transactions respectively. The private equity industry continues to be a key driver for M&A activity in Mexico, led by several established international and local firms as well as, most recently, family offices. Recent trends also provide evidence that the venture capital industry is beginning to show signs of growth and development. Another sign of this positive and optimistic trend is the arrival of several M&A advisers, including Lazard, Moelis and Alantra.

On the public exit front, although the initial public offerings market has historically lagged behind other emerging financial markets, there is optimism that increasing exit opportunities through the public offering of securities will be available to investors in the near future as the Mexican Pension Fund investment regimes continue to become more sophisticated and diverse, thus freeing up capital to be allocated to public offerings. Further adding to the mood of optimism is the recent government authorisation of a new stock exchange in Mexico known as BIVA.2

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2 See www.biva.mx.
II GENERAL INTRODUCTION TO THE LEGAL FRAMEWORK FOR M&A

As may be the case for most legal markets, any M&A transaction in Mexico will probably be subject to several statutes depending on the target’s activities and the industry in which the target operates. For example, during the due diligence investigation of the target or during the structuring of the transaction, laws ranging from the broad mercantile, labour and employment, tax, environmental, insurance and anticorruption statutes, to the more industry specific ones such as those regulating, _inter alia_, financial services, telecommunications, oil and gas, transportation and healthcare, will all provide guidelines and parameters within which all M&A transactions have to be structured.

In an effort to increase Mexico’s attractiveness for investors, the federal government has steadily and successfully consummated several changes to statutes that were perceived to be outdated during the past few years. Certain commercial statutes (e.g., the Mexican Commercial Companies Statute and the Mexican Securities Market Statute) have been amended to incentivise M&A activity by allowing parties to, _inter alia_, freely agree on customary governance and liquidity provisions required for investors (particularly of an institutional nature) to attain a higher level of certainty on governance and exit provisions. Another key development has been the liberalisation effort led by President Peña Nieto’s administration, through which the Mexican Foreign Investment Law has been subject to several amendments to decrease (or remove) foreign investment restrictions in, _inter alia_, the telecommunications and oil and gas industries.

The telecommunications industry’s regulatory overhaul not only included the lifting of the foreign investment restriction, but also the creation of the Federal Telecommunications Institute, which is now a much more specialised regulatory governing body with broader authority to regulate the market (particularly from a market competition perspective). It is also the entity in charge of evaluating every transaction within the telecommunications industry subject to antitrust approval (separate from the Mexican Federal Competition Commission). The Federal Telecommunications Institute declared both Televisa and America Móvil preponderant agents, resulting in them being subject to several asymmetric provisions (e.g., mandatory interconnection, maximum interconnection rates, asset divestitures and changes in governance). These asymmetric provisions (particularly with respect to America Móvil in the mobile telephone sector) have resulted in a much more competitive market, and in lower costs and improved services for end users. In an effort to capitalise on these amendments and seek to compete with America Móvil, ATT acquired two of the largest carriers operating in Mexico.

Similarly, in a highly anticipated development in the energy and hydrocarbons sector, the Mexican Constitution was amended to allow private foreign investment in extraction and production (E&P) projects to incentivise and grow Mexico’s refining, natural gas processing, industrial transformation, transportation, distribution, storage and retail of liquid fuels, natural gas and petrochemicals industries, thus ending the historical state monopoly in the oil, gas and petrochemical sectors. Among the regulatory changes, Pemex (Petróleos

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3 Foreign investors can now acquire up to 100 per cent of targets.
4 Defined as any agent that holds more than a 50 per cent national market share, whether measured by users, audience, band capacity or traffic.
5 At the time of writing, there is ongoing litigation in respect of the imposition of asymmetric provisions.
Mexicanos) was transformed into a state productive company\(^6\) to compete efficiently in the oil and gas market by, \textit{inter alia}, enjoying budgetary autonomy (subject to several limitations and congressional oversight) and a specific public procurement and public debt regime. The National Hydrocarbons Commission was restructured to become the decentralised entity of the Ministry of Energy responsible for procurement, bids, subscription and technical administration of awarded oil and gas E&P contracts. According to the Ministry of Energy, these developments are expected to result in investments of more than US$20 billion and have already triggered M&A activity for this sector (and for all ancillary servicing and supply industries).

Although the oil and gas sector reform drew most of the headlines resulting from the energy reform, the electricity sector reform has proven to be just as vital. It allows open competition from private and public entities in the generation and commercialisation of power, including in renewable sectors such as solar, wind and geothermal. Mexico’s Federal Electricity Commission (CFE) (directly or indirectly through its newly created operating subsidiaries) handles the transmission, distribution, construction and maintenance of the grid; however, CFE may outsource these activities to private investors. Given the high amount of capital needed to implement these projects, many sponsors will seek to raise capital, which could result in a spark in the M&A and financing sectors in Mexico and all other cross-border jurisdictions with allocable capital. Just one example of M&A activity in this sector during 2017 was the acquisition by Actis of InterGen Mexico, which is one of the largest combined-cycle gas turbine operators in the country. Furthermore, the renewables sector has begun to see activity in wind and solar projects, with players such as Goldman Sachs Infrastructure Partners, GBM Infraestructura, Thermion Energy, GEMEX, Enel Green Power and CDPQ being involved in several transactions.

III DEVELOPMENTS IN CORPORATE AND TAKEOVER LAW AND THEIR IMPACT

While the statutes relating to corporate and takeover law have remained relatively untouched, changes in respect of certain capital market products are sure to have a significant effect on the M&A landscape in Mexico.

By way of background, the Mexican pension funds (AFORES) are still restricted in the investments that they are allowed to undertake in accordance with their investment regime, which is set forth by law. AFORES are not permitted to invest directly in privately held companies, but they are allowed to invest in publicly listed companies and other publicly listed investment vehicles. This spurred the creation of publicly traded vehicles that are managed by a general partner and that serve as platforms to carry out investments in various sectors (CKDs), including the private equity, infrastructure, renewable energy and real estate sector. The existence of the CKD market in Mexico has caused M&A transactions in various fields and sectors to take off, as pension funds put their cash to work, through fund managers, in acquisitions and similar investments.

There are four similar products that are worth discussing, that complement the CKD market in Mexico. The first is the creation of real estate investment trusts (FIBRAs), a vehicle that invests in or acquires a real estate asset portfolio and is created through the issuance of a

\(^6\) The transformation intends to allow Pemex to operate more as a privately owned enterprise to seek profitability improvements.
public offering and ultimately listed in the Mexican Stock Exchange. The Mexican real estate market has historically been quite active. However, since the creation of FIBRAs, M&A activity in the real estate sector has increased significantly given that the creation of a FIBRA typically entails the bundling or acquisition of real estate assets that will become part of the FIBRA. The sponsors that manage FIBRAs have additional firepower from the amounts raised in the public offering or in follow-on offerings to acquire additional assets for the FIBRA’s portfolio, and FIBRAs present a great take-out opportunity for real estate developers and other stakeholders of real estate properties.

The second product created the equivalent of a master limited partnership, the FIBRA E, which is an investment vehicle for energy and infrastructure projects and is listed on the Mexican Stock Exchange. One key feature is the tax benefits provided to investors in a FIBRA E, as the investment vehicle and the portfolio companies through which investments are held in the infrastructure and energy assets are deemed transparent from a tax perspective. There is a robust pipeline of FIBRA E projects for the future. While a strong impact on M&A activity is not evident yet, given that it is relatively a new product, there is an expectation that transactions in the energy and infrastructure space will continue to increase.

The third product is the special purpose acquisition company, or SPAC, which is an investment vehicle listed on the Mexican Stock Exchange that obtains funds from the public offering through which it is created to invest and acquire a company, which may or may not be identified at the time of the public offering. Essentially, it provides a sponsor with sufficient funds to conduct an M&A transaction within the 24 months following its creation. The first of its kind, Vista Oil and Gas, was successfully launched in August 2017, raising US$650 million in the public offering. This first offering seems to indicate a significant acceptance of these types of investment vehicles in the Mexican market, but only time will tell if that acceptance continues and what effect they will have on the M&A market in Mexico.

The fourth product is the CERPI, which is a derivative of the CKD, but with two key differences: the first is a management and governance structure that more closely resembles a traditional private equity fund, in which limited partners are expected to have a very limited role in management and governance; the second, and the one that has really triggered a spur in the use of this product, is that up to 90 per cent of the proceeds raised in a CERPI may be deployed outside Mexico. This has led many international fund managers to seek to fundraise in Mexico, as they can use it now as a regional platform to invest, not only in Mexico but outside of Mexico as well. This development is certainly expected to raise the level of M&A activity as these funds begin to deploy the funds they raise.

IV FOREIGN INVOLVEMENT IN M&A TRANSACTIONS

As noted in previous sections, the participation of international and global companies in the Mexican market continues to be attractive. The level of cross-border transactions continues to be significant; the country’s economic fundamentals are stable and reflect a solid economy.

It is important to note that the United States continues to be the country that represents the most foreign investment activity in Mexico. Other principal countries carrying out substantial direct foreign investment in Mexico are Spain, Germany and Canada.

Given the manufacturing capabilities that Mexico has developed, the steadily growing middle class and increase in consumerism, certain sectors continue to be ripe for foreign investment, as has been evidenced through recent M&A transactions, and these are expected to continue to experience consolidation or otherwise attract foreign investment.
As can be seen from the examples in Section V and the trends that can be observed, we expect foreign investment to continue to drive a significant portion of the large and complex M&A transactions in Mexico.

V Significant Transactions, Key Trends and Hot Industries

As noted in the Section I, Mexican M&A performed strongly throughout 2016 and 2017. There is a trend of consolidation and a high volume of activity in certain sectors, such as the pharmaceutical industry, real estate, food and beverage, distribution and retail.

M&A activity in the real estate sector is driven in large part by FIBRAs, as discussed in Section III. Transactions mainly involve the acquisition of real estate portfolios, such as the acquisition of the MRP portfolio by Fibra Uno a few years ago, which at the time was one of the largest M&A transactions in the sector in Mexico’s history. The acquisition story driven by FIBRAs has not slowed since then.

The infrastructure (such as toll roads) and ‘soft’ infrastructure (such as government-concessioned hospitals, schools and prisons) space continues to attract international institutional investors, such as the Canadian pension funds.

The pharmaceutical industry remains fragmented and filled with attractive targets.

In the aerospace and automotive sectors, we continue to see significant M&A activity although mostly on the basis of cross-border transactions effected by global players, but in respect of which the Mexican operations will still have a significant role.

The airline industry has also supported developments that have led and may continue to lead to M&A activity. Recent amendments allowing a greater participation (up to 49 per cent) of foreign investment led Delta Airlines to acquire a substantial additional stake in Aeromexico.

Finally, there has also been a trend for a higher volume of small transactions in the venture capital space, which may not represent significant M&A volume at this stage but should have an impact in the medium to long term as these ventures mature and investors need to effect exit transactions from their investments.

VI Financing of M&A: Main Sources and Developments

Mexican corporate law does not impose restrictions on financial assistance and thus a Mexican target company’s ability to secure acquisition financing with its own assets makes financing alternatives relatively more available for M&A and private equity transactions. Mexican banks are actively participating in the market, and it has opened the door to other types of lenders, such as credit opportunities funds created by global institutions (e.g., Credit Suisse).

There is not any particular trend regarding bank and mezzanine debt on Mexican M&A and private equity transactions. As in other markets, a decision about the type of acquisition financing is based upon several factors, including the target company’s sector and its growth plans and needs.

In those M&A and private equity transactions that include bank debt, Mexican banks are normally pressed to incorporate US terms in their loan documents, including material adverse change (MAC) provisions that match the acquirer’s right to withdraw from the potential acquisition and provisions that seek to limit the conditions to the financing as regards the conditions applicable to the closing of the acquisition. Owing to the absence of financial assistance restrictions and a conservative approach to lending, Mexican banks very
rarely accept ‘covenant-lite’ loans, which thus turns the negotiation of the financing terms and conditions and the implementation of the relevant collateral packages into a substantial part of the legal work relating to the closing of a transaction.

When an M&A or private equity transaction involves financing, including a going-private transaction, one of the most controversial sections of loan documents is the one relating to the conditions for a drawdown, and specifically the material adverse effect (MAE) or MAC condition that directly affects the certainty of funds. It is hardly ever the case that the definition of a MAE or MAC in a purchase agreement matches the definition in the loan documents, and therefore the ‘gap’ is generally a risk that the acquirer or investor is asked to assume. In the context of a cross-border deal, the definition of a MAE or MAC becomes even more complex when negotiating political or national risk language within the agreement. Having said that, we see that sponsors in private equity transactions are generally more comfortable with the legal and related risks involved. Increasingly, investors focus more on returns and less on country risk.

With respect to leveraged buyouts (LBOs), the main consideration in structuring such transactions depends on the ability of target companies to pay dividends and make distributions to their shareholders regularly to service acquisition loans. Hence, when structuring LBOs in Mexico, it is paramount to incur the acquisition financing at the level of the operating target companies, or to somehow restructure the debt after the closing so that the operating entities can actually service the debt without having to deal with the tax and other timing restrictions applicable to dividends under Mexican law. In addition, in pricing acquisition financing, investors have to consider both the applicable withholding taxes on interest payments made to foreign lenders (and the potential incremental cost they represent in terms of gross-up provisions) and fraudulent conveyance issues under the Mexican Insolvency Law that are mitigated through due diligence, representations, warranties and, ultimately, indemnities.

VII EMPLOYMENT LAW

Employee subcontracting regimes are common in Mexico and, consequent to relatively recent amendments to tax and employment laws, a thorough diligence is crucial for identifying existing liabilities to avoid or reduce any labour or tax contingencies.

A subcontracting regime exists whenever employees of an entity (i.e., contractor) perform tasks or provide services to another entity (i.e., client). In view of the foregoing, whenever there is a subcontracting regime in place, it is crucial to verify whether it complies with the following conditions set forth by the Mexican Federal Labour Law:

a. it cannot cover all the activities or those activities, similar or alike as a whole, that are performed at the workplace;

b. services to be rendered must be justified because of their specialised nature; and

c. subcontracting may not involve similar or the same activities as those performed by the other employees in the contracting party.

Failure to comply with the specific conditions will not only result in joint and several liability between the contractor and the client, but also in the direct obligation for the client to be liable for the costs of employment and social security obligations, including profit sharing.
VIII TAX LAW

New transfer pricing reporting obligations contained in Mexican law have an impact on tax filings for pre-closing, post-closing and straddle periods, as the buyer and seller will have to agree on the terms and conditions under which these obligations will be complied with on behalf of the target. Compliance with these obligations is particularly sensitive as it provides information related to the organisation and operation of the group worldwide, which, needless to say, the seller will not be willing to share with the buyer; thus, strong confidentiality provisions would have to be negotiated as well.

The imminent approval by Mexico of the OECD’s Multilateral Instrument will limit access to certain tax treaties to which Mexico is a party. This is particularly important in light of the structuring work that needs to be performed prior to any M&A transaction taking place, because any structuring analysis will need to address additional limitations.

There are also new obligations within Mexican legislation related to the issuance of digital invoices, which are now applicable for, inter alia, stock purchases and payments made to non-Mexican residents. Starting in 2014, but increasingly ever since, the tax authorities have enhanced all the regulations pertaining to the issuance of digital invoices, which now apply to certain transactions that were not considered to be affected in the past. Accordingly, stock purchase agreements have to provide some detail in this regard to define which tax documents will be issued by whom at closing, thus avoiding any discussions, as these rules are numerous and detailed.

IX COMPETITION LAW

Enforcement by Mexico’s antitrust agency has been particularly active during the past couple of years. Several ongoing investigations and the imposition of substantial fines in many sectors of the economy indicate the agency’s new more aggressive stance. On the antitrust clearance front, while the outcome of many M&A transactions can be predicted, there are also borderline cases, in which pre-emptive planning for an intelligent approach with the agencies has become more important. Similarly, pre-closing integration efforts now need to be conducted with more sensitivity to antitrust requirements.

X OUTLOOK

Andrés Manuel López Obrador (AMLO), the presidential candidate for the coalition, Juntos Haremos Historia (JHH) – comprising left-leaning parties Morena and Partido del Trabajo and the right-wing Partido Encuentro Social – won by a landslide with 53 per cent of the popular vote shortly before this publication went to press. JHH also won a majority of both the Federal Chamber of Deputies and the Senate, which translates on JHH’s ability to approve new legislation with its majority vote in Congress (including the federal budget), but will not have the percentage of votes to approve constitutional amendments alone.

Although AMLO continuously attacked the Energy Reform enacted by Peña Nieto’s administration during the presidential campaign (see Section II), a closer read of the published campaign documents containing AMLO’s proposals for public policies in the energy sector does not indicate a major shift in the regulatory framework that would affect the existing projects in the oil, gas and power industries. Essentially, the energy policy proposals are aimed at reducing Mexico’s dependency on other countries to satisfy energy needs and achieve self-sufficiency. While implementing the proposals would result in a substantial
policy change by having a more actively engaged federal administration in guiding the oil and power sectors, all of them seem consistent with the legal framework set out in the Energy Reform enacted during 2013 and 2014.

AMLO expressed interest in reviewing Mexico's pension system, which is based on the mandatory contributions system managed by the AFORES (see Section III). AFORES' assets under management represent more than 14 per cent of Mexico's gross domestic product and they are Mexico's principal institutional investor, anchoring initial public offerings, public offerings and local funds. AMLO's National Plan specifically refers to the local capital market as a key source of financing for development and growth of strategic sectors such as oil, gas, power, housing, technology, and small and medium-sized enterprises generally. The importance of AFORES and its position as anchor investor within the Mexican capital markets is likely to continue and potentially increase.

AMLO's plan also includes fostering more competition in the banking sector, where it highlights the concentration of the Mexican banking sector and the stagnation of the Mexican Stock Exchange. To this end, the plan proposes (1) differentiated regulation for small, medium and large banks, (2) more support for new participants, such as niche banks, and (3) to promote the use of new technologies (i.e., fintech).

Since election day, AMLO has met with, and received the support of, most local business and trade organisations, including those that opposed his candidacy during the election process. So far, financial markets have been stable to positive, and given AMLO the benefit of the doubt (since 1 July 2018, the Mexican peso has rallied 3.1578 per cent relative to the US dollar). As this publication goes to press, the North American Free Trade Agreement negotiations seem to be moving towards a good outcome for all three partners. In general, Mexico's regulatory framework and sound macroeconomic outlook has made most economic analysts maintain their view that the Mexican economy continues to be in a period of expansion.

With the election over, and the economic policies announced by AMLO during the transition phase, a good portion of the uncertainty affecting the M&A market during the past 18 months has subsided considerably. The expectation is that with the waning volatility, local valuations and multiples will become more stable, which should translate into a more active M&A market, particularly for international financial sponsors that have largely remained on the sidelines on account of the exchange rate volatility.

Mexico's demographic trends continue to show an economy less dependent on exports, a growing middle class and increased consumerism (with more access to consumer credit), which suggests ample investment opportunities in sectors serving domestic consumption, such as financial services, healthcare, retail, pharma, education, dwellings and agro-industry.
I OVERVIEW OF M&A ACTIVITY

Myanmar’s economic climate has been lifted by recent political developments. The National League for Democracy won nearly 80 per cent of contested seats in the Myanmar Parliament during the general elections on 8 November 2015, and successfully transitioned into civilian-led power with Daw Aung San Suu Kyi as State Counsellor and U Htin Kyaw being sworn in as President in March 2016. In October 2016, former US President Barack Obama issued the Burma-related executive order terminating the national emergency relating to Myanmar. The executive order in effect terminated the US sanctions policy against Myanmar. We are starting to see an increased appetite from US investors in Myanmar, particularly in the oil and gas and energy sectors. However, to date the increase has not been significant. (See Section X for more information.)

After serving only two years of his five-year term, U Htin Kyaw announced his resignation from the office of President of Myanmar on 21 March 2018. The Myanmar Parliament elected U Win Myint as the new President on 28 March 2018.

According to World Bank Statistics, Myanmar is one of the fastest-growing economies in the East Asia and Pacific region and globally, with an expected growth rate in gross domestic product (GDP) of 6.4 per cent for the year 2018 and 6.7 per cent in 2019. Statistics released by the Directorate of Investment and Company Administration (Myanmar’s company regulator) (DICA) show that, during the period between 1 April 2017 and 31 March 2018 (the 2017 financial year), foreign direct investment (FDI) in Myanmar reached US$5.718 billion. Manufacturing industry was the highest-yielding FDI sector in the 2017 financial year, followed closely by the real estate industry, which reached a high of US$1.769 billion. Myanmar’s other high-performing FDI sectors include oil and gas, power, manufacturing, real estate, mining, hotel and tourism, livestock and fisheries, agriculture, industrial estates and construction. The top investor countries into Myanmar include China, Singapore, Thailand, Hong Kong, the United Kingdom, the Republic of Korea, Vietnam, Malaysia, the Netherlands, India, Japan and France.

Myanmar remains very attractive to foreign investors: it is one of the richest countries in Asia for natural resources, with plentiful supplies of oil and gas reserves (both on and offshore), various minerals, jade, precious stones and gems, forest products, and solar and hydropower project potential. While there has been very little exploration of Myanmar’s

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natural resources, because of a lack of developed exploration techniques and availability of equipment, Myanmar’s geographical location is central to key markets. In addition, the cost of local labour remains low, with the minimum wage set at approximately US$56 per month for a standard five-day working week.³

Reforms undertaken in Myanmar’s financial sector further support the country’s growth, as is evident from the kyat-managed floated exchange rate system established in 2012, the creation of a Central Bank licensing mechanism for new foreign banks and the expansion of foreign branch networks. Development of special economic zones⁴ (SEZs), such as the opening of Thilawa SEZ Zone A and approval of developments in Kyaukphyu and Dawei SEZs, similarly point to a promising financial sector. (See Section V.iv for more information.)

Substantial progress has been made in recent years with the passing of relevant laws on investment.⁵ The Financial Institutions Law 2016 (FIL) permits mergers between banks and allows foreign banks to acquire all or part of another bank established in Myanmar. However, this is subject to Central Bank of Myanmar (CBM) approval. Another recently enacted Arbitration Law 2016 gives effect to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and provides a reliable option for dispute resolution concerning M&A deals.

The Yangon Stock Exchange (YSX), which launched on 9 December 2015, made notable progress in Myanmar’s capital markets sector, which began trading in March 2016. First Myanmar Investment Co⁶ was the first company listed on the YSX on 25 March 2016, followed by Myanmar Thilawa SEZ Holdings Public Ltd on 20 May 2016.

M&A activity into the country will continue to be delayed until implementation of the new Myanmar Companies Law 2017 (MCL) on 1 August 2018, under which the government will allow foreign investors to buy shares in local companies, including local companies trading on the YSX. The long-awaited MCL was passed on 6 December 2017 and replaces the century-old Myanmar Company Act 1914 (MCA), which is the most significant progress in Myanmar legislation for 2017. Implementation of the MCL will be postponed until August 2018 at the earliest to allow the DICA to prepare internal policies, online procedures, corresponding by-laws and protocols for implementing the MCL.

i Infrastructure

Poor infrastructure, adverse weather conditions, substantial start-up costs and restrictions on trading pose various challenges to foreign investors doing business in the country. During 2017, 94 per cent of companies experienced power shortages caused by a lack of electrical power. Myanmar currently has less than 4,000MW of installed operating electrical power capacity.⁷

³ A minimum wage was set in August 2015, more than two years after the enactment of the Minimum Wage Labour Law (March 2013). The minimum wage has been set at 3,600 kyats per day calculated at a rate of 450 kyats per hour.
⁴ Special Economic Zones Law (2013).
⁶ Advised by Duane Morris & Selvam LLP.
Although the literacy rate is currently more than 95 per cent, with the state emphasising free and compulsory primary education under the Private School Registration Act (2011), only 88.85 per cent of primary school pupils complete the final grade of primary education. Recent statistics also indicate that the literacy rate for people aged between 15 and 24 is 84.75. Consequently, there is a significant shortage of sufficiently trained human capital.

Nonetheless, improvements are under way in the telecommunications and power sectors. To date, four telecom licences have been awarded to Ooredoo of Qatar, Telenor of Norway, a partnership of MPT with KDDI of Japan and a partnership of MyTel with Viettel of Vietnam.

On 15 January 2018, the Deputy Minister for the Ministry of Electricity and Energy (MOEE), Dr Tun Naing, announced in Parliament that the MOEE has committed to provide an additional 3,600MW in Myanmar within the next four years. The announcement is attributed to an expert ministerial report indicating that the consumption of electricity in Myanmar is expected to increase to 5,774MW by 2022 from the present rate of 3,189MW. Demand for electricity in Myanmar has progressively increased since 2012.

The MOEE has developed an aggressive plan to reach this goal, which includes:
a) upgrading existing power plants;
b) developing 10 new gas and hydro power plants located in Kengtawng, Upper Yeywa, Kyaukphyu, Kanbauk, Ywama, Patolon, Myanaung, Thilawa and Mee Luang Chiang by 2022;
c) developing an additional 500 new transmission lines and substations from power generated by the following power plants to be completed by 2019: the 4MW Yarzagyo hydro power plant, the 40MW Minbu solar power plant, the 118.9MW Thaton gas power plant, the 106MW Thaketa gas power plant and the 225MW Myingyan gas power plant; and

d) purchasing additional power from neighbouring countries – China, Laos and India.

II GENERAL INTRODUCTION TO THE LEGAL FRAMEWORK FOR M&A

Myanmar’s legal framework for M&A comprises company legislation such as the MCA, which will be replaced with the MCL after its implementation, and the Myanmar Special Companies Act 1950 (SCA). These work in conjunction with the Myanmar Investment Law 2016 (MIL) and Myanmar Investment Rules 2017, which repealed and replaced the Foreign Investment Law 2012 and the Myanmar Citizens Investment Law 2013. Investors should pay particular attention to the MCA/MCL and MIL, as these are the most critical pieces of company legislation. These currently form the investment regulatory regime governing foreign and domestic investment in Myanmar.

The Myanmar Investment Commission (MIC) is the government-appointed body responsible for verifying and approving investment proposals, including the issuance of MIC permits (investment permits) to foreign investors. The MIC is basically the caretaker for dealing with most issues under the MIL and regularly issues notifications about sector-specific developments. The MIC is composed of representatives and experts from government ministries, departments, government and non-government bodies.

A foreign investor has many options for structuring a business entity in Myanmar based on the kind of business activity to be carried out. The most common business structure is a

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private company limited by shares (including both 100 per cent foreign-owned companies and joint venture companies), although other legal forms are permitted. Companies limited by shares include companies incorporated in Myanmar but with 100 per cent foreign ownership (shareholders can be both companies and individuals), and joint ventures incorporated in Myanmar between foreign-owned companies or individuals and Myanmar companies or individuals (including state-owned entities). Both 100 per cent foreign-owned companies and joint venture companies are governed by the MCA or the SCA, or by both, depending on whether the state is involved.

Foreign companies can establish their presence in Myanmar as a branch office (typically for oil and gas companies, airlines and foreign banks). A representative office is also permitted (typically for foreign banks not licensed to operate in Myanmar and insurance companies). Other less common options include establishing a not-for-profit organisation, a business association (such as a chamber of commerce), a company limited by guarantee (with or without share capital) or an unlimited company without share capital.

The above legal structures all require registration under the MCA through the DICA, and in some cases with the MIC under the MIL. Registration under the MIL and the obtaining of a project-related MIC permit enables investors to enjoy tax incentives, long-term land lease options and other incentives. There are certain criteria to be met that are often higher in terms of required share capital and percentage of employment of local staff in skilled roles when compared with companies’ registration under the MCA without an MIC permit. Industrial and manufacturing activities require registration under the MIL, while for companies engaged in service-related businesses, it is generally sufficient to register under the MCA only. Special rules apply to joint ventures with government entities, which must be formed under the SCA.

Given the government’s existing policy of prohibiting foreigners from purchasing shares in local companies, an M&A transaction in Myanmar would be typically structured in one of the following way: the foreign investor (1) acquires shares in a foreign-owned Myanmar company held by an existing foreign shareholder; (2) establishes a new joint venture with a Myanmar partner who provides capital contribution as assets that were agreed to be purchased (e.g., land); or (3) establishes a company in Myanmar and purchases the relevant assets from the target.

At this stage, foreigners considering investment in Myanmar should only invest through a foreign-owned Myanmar incorporated company in which they are the shareholders, and have their directors duly registered at the DICA in accordance with the MCA. Foreign Myanmar companies may be acquired by foreign purchasers.

Foreigners entering into nominee structures (holding shares in a Myanmar company in the name of a Myanmar citizen) will have little or no legal recourse in Myanmar. On the face of it, these structures are illegal and unenforceable under Myanmar law. Under the Contract Act 1872, ‘illegality’ may be pleaded and the court will not recognise any foreign ownership rights to the shares. Such a structure will also create asset disposal issues.

At present, this is not an option for foreign investors. However, this position will change after implementation of the MCL. Although nominee structures will still remain illegal and unenforceable in Myanmar, the MCL will allow foreigners to own up to a total
of 35 per cent of the shares in a Myanmar company. Consequently, share transfers in local companies to foreigners may be possible. The MCL will also permit foreigners to buy and sell shares on the YSX.

i MIL

The MIL was enacted in October 2016 and was supplemented in 2017 by subsidiary legislation known as Myanmar Investment Rules and Notifications 10, 11, 13, and 15. A foreign investor may obtain a non-mandatory investment permit (an MIC permit) from the foreign investment regulator, the MIC. An MIC permit allows a foreign investor to benefit from certain investment incentives available under the MIL.

A foreign investor intending to invest on a small scale (having investment capital of less than US$5 million), who desires a long-term lease right for a period exceeding one year, may apply for an endorsement from the MIC. If the investor’s investment capital exceeds US$5 million, he or she must instead apply for an MIC permit, as he or she will be unlikely to be eligible for an endorsement.

Key incentives include the right to enter into a long-term lease, investment protection (which provides assurance that a company will not be nationalised and that the investments will not be terminated), and the right to transfer foreign currencies such as net profit and income abroad. Certain tax incentives, such as tax holidays, are also available. The MIL also sets the regime for share transfers whereby a foreign investor may, with the approval of the MIC, transfer shares to another foreign investor as well as to a Myanmar citizen.

Under the MIL and Notification No. 15/2017, FDI by non-Myanmar residents is restricted as follows:

\[a\] activities only to be carried out by the Union Government of Myanmar;
\[b\] security and defence;
\[c\] arms and ammunition;
\[d\] national postage stamps;
\[e\] air traffic services;
\[f\] pilotage services;
\[g\] natural forest and forest area;
\[h\] radioactive metals;
\[i\] control of electrical power system; and
\[j\] inspection of electrical business.

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9 For the first time, the MCL will allow foreign investors to own, buy and sell up to 35 per cent of the shares in a ‘local’ Myanmar company, and to buy and sell shares in Myanmar companies listed on the YSX. The MCL will also create additional duties for company directors, which will be akin to statutory duties existing under the Australian Corporations Act 2001 (Cth).

10 Income tax holidays are available for a period of three, five or seven years depending on the MIC’s discretion and which zone the project is located in. Zone 1 (less developed areas, excluding Yangon and Nay Pyi Taw), Zone 2 (moderately developed zone, excluding Yangon but including Nay Pyi Taw) or Zone 3 (developed zone, including Yangon and Mandalay). The income tax holiday is inclusive of the year in which the enterprise begins operations.
Foreign investors are prohibited from direct foreign investment in companies carrying out the following businesses:

- publishing and distribution of periodicals in ethnic languages;
- freshwater fisheries;
- establishment of quarantine stations for the export and import of animals;
- pet care services;
- forest products;
- prospecting, exploration and feasibility studies, and production of minerals for small and medium-scale tour guide services;
- mini-markets; and
- convenience stores.

Among others, FDI in the following sectors can only be done through a joint venture with a Myanmar partner (individual, entity or state-owned entity):

- research activities related to fisheries;
- manufacturing and domestic distribution of all kinds of confectionery, including sweets, cocoa and chocolates;
- development, sale and lease of residential apartments and condominiums; and
- local tour services.

Government approval by the relevant ministry is required by foreign investors for FDI in the following sectors:

- publishing of periodical newspapers in foreign languages;
- cable television;
- laboratory services for diagnosis of animal diseases;
- aircraft repair and maintenance;
- wood-based industries;
- private hospital services; and
- urban development projects of 100 acres and above.

### III DEVELOPMENTS IN CORPORATE AND TAKEOVER LAW AND THEIR IMPACT

#### i MCL

The MCA is more than 100 years old and in desperate need of modernisation to bring it in line with international standards. Many parts of the MCA are irrelevant to modern-day business practices, such as the provisions relating to the company registration process, which require investors to file lengthy paper-based application dossiers.

With the joint effort of the DICA, the Ministry of National Planning and Economic Development, the Office of the Attorney General and the Union of Myanmar Federation of Chambers of Commerce and other multilateral agencies, expert legal advisers and the international business community, the MCL was passed on 6 December 2017. The Law modernises Myanmar’s corporate framework and provides new opportunities for local and foreign companies that did not exist under the MCA. Changes under the MCL provide for the improvement of company formation and management procedures, a revised corporate governance structure emphasising directors’ duties, financial reporting and audit requirements, protection for minority shareholders, regulation of related-party transactions and, notably, a
change of in the threshold for foreign ownership in domestic companies. For instance, an application for a permit to trade before incorporation will no longer be required. A public registry for companies is expected to be created that will include information on directors, shareholders, share capital, registered securities and all statutory filings. As part of the reform process, the business community and members of the public were invited to provide submissions. It is expected that the MCL will make it easier for foreign investors to commence start-up operations in Myanmar.

ii  **FIL**

The new FIL, which replaced the Financial Institutions of Myanmar Law 1990, was passed on 25 January 2016, containing more comprehensive regulations on risk management, Basel III compliance, anti-money laundering measures and prudential requirements for banks in Myanmar. It allows the CBM, as an integrated supervisor, to oversee banks, finance companies and companies offering leasing, factoring and credit services.

The minimum capital requirement for local banks has been raised to 20 billion kyats, and to 92 billion kyats for branch offices or subsidiaries of foreign banks. There is currently a total of 13 foreign bank branch licences issued by the CBM allowing foreign banks to offer credit to foreign companies and local banking institutions in Myanmar. Nine foreign bank branches are in operation\(^\text{11}\) and four more have preliminary licences.\(^\text{12}\) All banks must deposit 5 per cent of their customer deposits with the CBM in the form of cash as a reserve that cannot be invested in treasury bonds or any other interest-bearing instruments.

iii  **Securities and Exchange Law**

Enacted on 31 July 2013, the Securities and Exchange Law is supplemented by the Securities and Exchange Rules issued on 27 July 2015. Presently six securities companies are operating pursuant to approval by the Securities and Exchange Commission of Myanmar (SECM). (We expect more to trial in 2018.) This was followed by the YSX’s official launch on 10 December 2015 and subsequent company listings.\(^\text{13}\)

For companies intending to list on the stock exchange, the criteria issued by the YSX on 13 August 2015 cover requirements on corporate existence, level of paid-up capital, shareholder composition and profit levels, as well as on corporate governance and management compliance, including corporate policies on auditing, tax, insider trading and reporting.

The SECM may soon allow foreign investors access to the YSX, and local–foreign joint ventures may potentially be able to list following the expected enactment of the new MCA.\(^\text{14}\)

The benefits of having a dynamic and modern securities exchange for both prospective investors and shareholders in terms of exit strategies, and its overall positive impact on the economy and M&A scene, make this an exciting development.

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\(^{13}\) First Myanmar Investment Co Ltd, Myanmar Thilawa SEZ Holding Public Ltd, Myanmar Citizens Bank Ltd, First Private Bank Ltd and TMH Telecom Public Co Ltd.

\(^{14}\) Ibid.
FOREIGN INVOLVEMENT IN M&A TRANSACTIONS

US sanctions removal
The removal of US sanctions has significantly reduced previous barriers to US foreign investment in Myanmar, particularly in relation to M&A and banking transactions. (See Section X for more information.)

Arbitration Law 2016
Under the Arbitration Law 2016 (AL), which follows the UNCITRAL Model Law, domestic arbitrations are to be decided according to Myanmar law. Parties may further request the Myanmar courts to determine any question of law arising out of arbitral proceedings. On the other hand, international arbitrations are to be decided according to the law agreed upon by the parties involved or as determined by the arbitral tribunal.

AL provisions encourage parties to first seek interim measures from an arbitral tribunal. Any subsequent court intervention in arbitral proceedings will be restricted to matters set out in the AL. While domestic awards may be set aside on grounds similar to Article 34 of the Model Law or appealed on a point of law, the procedure with regard to an international arbitration award made in Myanmar remains uncertain.

With the AL in force, greater legal security and stability is expected, which will be of benefit to investors. Foreign investors are also likely to have recourse to protection under bilateral investment treaties or free trade agreements. Despite the passage of the AL, however, additional steps still need to be taken for the smooth enforcement of international arbitration awards, such as the Myanmar courts updating or introducing new rules and procedures, and training judges about the process of enforcing such awards.

SIGNIFICANT TRANSACTIONS, KEY TRENDS AND HOT INDUSTRIES

According to the International Monetary Fund’s most recent World Economic Outlook, Myanmar is currently one of the world’s fast-growing economies, with an expected growth projection of 6.7 per cent in 2018.15

Manufacturing sector
The European Union’s reinstatement of preferential access for Myanmar’s exports and the United States’ suspension of its ban on imports from Myanmar, coupled with the country’s appeal to investors as a low-cost manufacturing base given its low operating overheads and wage rates, point towards promising growth in Myanmar’s manufacturing industry.

Garment manufacturing has been the largest recipient of FDI in Myanmar in previous years. Other recent projects include Nissan transferring production of the Sunny compact sedan to a new plant in the Bago region. This is expected to employ about 300 people and have an annual output capacity of 10,000 cars.16

15 See footnote 2.
ii Infrastructure sector

There have been several high-profile deals in the energy sector. Singapore-based Sembcorp Utilities\(^{17}\) signed a power purchase agreement for a US$300 million gas-based plant project with the Myanmar Electric Power Enterprise (MEPE). This will involve the construction of a 230MW gas-fired power plant in Mawlamyaing and a 225MW gas-fired power plant in Myingyan.\(^{18}\) In addition, China Three Gorges Corporation and MEPE will be developing a wind farm in Chaungtha, in the Ayeyarwady region.\(^{19}\) These projects should provide some much-needed supply to address Myanmar’s power deficiency, and improved grid reliability should facilitate the development of industrial zones.

iii Hospitality sector

In 2015, the travel and tourism sector in Myanmar saw a 6.8 per cent growth in direct contributions to the country’s GDP, and the sector is expected to grow at about 8.4 per cent per annum in its direct contribution to GDP between 2015 and 2025.\(^{20}\) In anticipation of the continued surge in visitor numbers, developers have moved to take advantage of the opportunity to address the scarcity of hotel accommodation in the country. Starwood Hotels and Resorts Worldwide Inc has signed up to build the Sheraton Yangon Hotel in the Tamwe Township. Future Group Co Ltd and Pyay Phyo Tun International Co Ltd have plans to develop a US$150 million sea-view condominium and hotel in Myeik, Tanintharyi. In January 2016, Yoma Strategic Holdings Ltd announced the Landmark development project in the heart of the downtown Yangon business district, which will convert the former headquarters of the Myanmar Railway Company into the Yangon Peninsula Hotel, complemented by luxury residences, hotel and commercial developments. This has been a complete success, with construction still under way.

The increased demand in this sector is likely to see M&A investment opportunities with local developers and management contracts involving a range of hospitality projects, including heritage redevelopments in the city centre, serviced apartments to cater to a growing influx of expatriates and business hotels in the country’s growth hubs.

iv Special economic zones

The Special Economic Zone Law (SEZL), enacted on 23 January 2014 for the development of private sector-led SEZs in Myanmar, offers tax incentives and other benefits, such as leases of up to 75 years, to promote the entry of export-oriented enterprises in, \textit{inter alia}, the manufacturing sector. Under the decentralised governing system, applications for investment

\(^{17}\) Advised by Duane Morris & Selvam LLP.


permits within each SEZ will be approved by respective management committees that are
separately overseen by a central working body. Foreign insurance companies and joint venture
insurance companies are allowed to operate within the SEZs.

Thilawa SEZ, which is located 25 kilometres south of Yangon along the Yangon River,
was the first SEZ in Myanmar, and was established in October 2013 by Myanmar-Japan
Thilawa Development Ltd with Zone A being opened on 23 September 2015. One hundred
companies are expected to set up businesses in this area in the new few years.

In August 2015, Italian-Thai Development and Rojana Industrial Park signed an
agreement with the government to resume the initial phase of the Dawei SEZ project. This
will be in the Tanintharyi region, about 614 kilometres south of Yangon, and will involve
building a port, power plants, a road to Thailand, an LNG terminal, a township, a telecom
landline and an industrial estate. The Japanese government has also participated in developing
the Dawei SEZ and a Chinese state-affiliated company has plans to build an oil refinery near
the zone.

The Kyaukphyu SEZ was approved in December 2015 by the Myanmar Parliament
and is situated about 400 kilometres north-west of Yangon in the Rakhine region. CITIC
will hold an 85 per cent stake in it. CITIC’s development projects will include building a
deep-sea port, an industrial park and residential estates worth an estimated US$10 billion.
This has been perceived as one of the largest foreign investment projects in Myanmar to date
(Kyaukphyu Project).

However, the Kyaukphyu Project has experienced long delays since its inception. There
may also potentially be issues associated with financing. Before the project can move forward,
significant financing will be required. There are concerns about whether the government has
the capacity to finance the project itself or will need to obtain Chinese or multilateral loans.

To date, the Thilawa SEZ is the only SEZ to attract large-scale foreign investment.

VI FINANCING OF M&A: MAIN SOURCES AND DEVELOPMENTS

As a cash-based society, Myanmar’s finance sector has been largely underdeveloped because of
its exclusion from the global banking system, coupled with its continuing struggle to recover
from the 2003 banking crisis and subsequent heavy-handed regulation. Taking security as
a foreign investor over immovable property (in the form of land and buildings) involving
a mortgage over land as well as ‘land use rights’ (as a large majority of land ownership is
in the form of leasehold rights) is challenging. The basic rule is that foreign ownership of
‘immovable property’ (defined under the Transfer of Immovable Property Restriction Act

21 Mitsubishi, Marubeni, Sumitomo, Japan International Cooperation Agency (49 per cent), government of
Myanmar (10 per cent), local enterprises (41 per cent).
22 Including companies such as Acecook, Pokka Sapporo and Asahi Group Holdings.
23 Matzui, M (11 April 2016). ‘Chinese Company to Build Oil Refinery near Dawei SEZ in
Myanmar’, Nikkei Asian Review – see https://asia.nikkei.com/Busines Chinese-company-to-build-
24 Gaung, J S (30 December 2015). ‘Myanmar gives go-ahead to Kyaukphyu SEZ, China’s CITIC to hold
85% stake’, Deal Street Asia – see www.dealstreetasia.com/stories/kyaukphyu-sez-to-be-handled-by-
25 Sun, Yin (7 November 2017). ‘China’s latest Myanmar megaproject courts controversy’, Nikkei Asian
(1987) to include ‘land, benefits from the land, buildings and things constructed or situated on that land and things installed on those buildings’) is significantly restricted. Accordingly, M&A financing is typically sourced offshore, as tight domestic and international restrictions limit sources of financing for the private sector.

i Central Bank Law 2013

The government initiated a reform of the financial sector on 11 July 2013, when a new Central Bank Law (CBL) came into force. This has given the CBM greater autonomy, and it is now an institution that acts as the licensing authority and regulator of all banks in Myanmar. The CBM can independently adjust interest rates as well as conduct currency and exchange operations. It also has statutory responsibility for developing Myanmar’s capital markets sector.

Since 2013, the CBM has issued 13 foreign bank licences for operations in Myanmar’s commercial banking sector. However, the scope of permitted operations is limited to banking for foreign corporations and foreign exchange services, including providing loans to foreign entities in both foreign and local currency. Foreign licensed banks are not allowed to participate in retail banking but can partner with local banks to engage in trade finance and lend to local banks directly.

The CBM has alluded to the fact that current official interest rates for loans and deposits would not apply to loans by foreign banks to foreign entities, and that syndicated loans could take place between foreign banks and Myanmar entities in the future.

The Financial Institutions Law (passed on 25 January 2016) is the current legislative authority in Myanmar governing the entire banking and finance sector; this replaced the Financial Institutions of Myanmar Law (1990). To date, there have been no new implementing rules or regulations.

ii Capital market

Raising finance through Myanmar’s capital market is now a viable reality for Myanmar companies and citizens with the opening of the YSX in December 2015. Regulated by the SECM, the YSX currently only allows Myanmar citizens or companies to invest in companies listed on the YSX, although this is expected to change upon the future enactment of the MCL. A key issue from a liquidity standpoint is expected to be a change in the MCL allowing foreign investors to invest in Myanmar companies; until then, this remains a barrier to foreign investment in the Myanmar market. With the current regulations only allowing for local retail investors who largely lack capital and sufficient know-how of the operations of the capital market, the participation of institutional and foreign investors will be crucial to increasing liquidity and the continued success of the YSX. Training and capacity building will be needed for intermediary stakeholders, as there is currently a limited talent pool of skilled finance professionals in Myanmar. Over-the-counter markets will also be established by securities companies for public companies that may not be ready to list on the YSX.

iii Offshore and cross-border financing

While most developed and developing jurisdictions have in place well-defined mechanisms and legal procedures regarding the provision of financing with the corresponding onshore security of the borrower (in the form of land mortgages, charges on assets or the taking of other types of collateral), this process remains very much in its infancy in Myanmar. That said, several non-recourse offshore finance projects occurred in 2015 in Myanmar, primarily within the telecom sector and involving foreign-owned telecom tower companies that are
working with telecom licence-holders Ooredoo and Telenor. Structuring these financing deals involved complex challenges, given the absence of defined procedures in permitting offshore private and multilateral financiers in not only taking onshore security from Myanmar borrowers but also perfecting said security. Whether financial closure was obtained remains to be seen, as we believe, in most cases, conditions precedent were either waived or shifted to conditions subsequent in order to permit a partial drawdown of the loan facilities by the Myanmar borrowers.

To this end, these deals have highlighted the current issues surrounding project financing in Myanmar, essentially pushing the issue into the spotlight, with the international business community requesting both policy and legal reform, such as the enactment of a Secured Transactions Law to address the issue of security over the assets and property of a Myanmar borrower, as well as the perfection and registration of security in the name of the lender or lenders.

VII EMPLOYMENT LAW

Myanmar labour laws do not specifically deal with transfers of employment in an M&A situation. If employees are to be transferred to a new entity, this can be done via a contractual arrangement, and investors should take measures to ensure that any formalities or requirements in the contract are observed and complied with. If an employee does not consent to a change in employer, or to enter into any transfer arrangement, the employee’s existing employment will have to be terminated and termination severance will be payable. Termination standard practice calculations are based on the employment period as follows:

- completion of six months but less than one year, a severance payment in an amount of half of one month’s salary;
- completion of one year but less than two years, severance payment in an amount of one month’s salary;
- completion of two years but less than three years, severance payment in an amount of one-and-a-half month’s salary;
- completion of three years but less than four years, severance payment in an amount of three months’ salary;
- completion of four years but less than six years, severance payment in an amount of four months’ salary;
- completion of six years but less than eight years, severance payment in an amount of five months’ salary;
- completion of eight years but less than 10 years, severance payment in an amount of six months’ salary; and
- completion of 10 years but less than 20 years, severance payment in an amount of eight months’ salary.

Under the MIL, foreign investors are required to submit vocational training plans annually and commit to training their local employees to upgrade their skills. These employment provisions within the MIL affirm the government’s support for local workers and recognise the importance of upgrading the Myanmar workforce to achieve sustainable economic growth.

Navigating the employment law framework is highly complicated for employers in Myanmar. Labour laws are still in a state of flux, and there is no single uniform piece of employment legislation; instead, a plethora of different laws regulate issues such as work
hours, holidays, leaves of absence, maternity, wages, overtime and severance pay.\textsuperscript{26} The Ministry of Labour also issues regulations and guidelines on the legal rights and duties of employers and employees, model employment contracts and fair labour practices, with a view to establishing and maintaining industrial harmony.

\textbf{VIII  TAX LAW}

The taxable period of a company (income year) in Myanmar coincides with its financial year, from 1 April to 31 March. Income tax returns must be filed within three months of the end of the income year. Capital gains tax returns must be filed and the corresponding payment made within one month of the date of disposal of the capital assets, defined as the date of the execution of the deed of disposal or the date of delivery of the capital assets, whichever is earlier.

Under the Income Tax Law (ITL), double tax agreements\textsuperscript{27} entered into by the government with any foreign state on income tax will be followed notwithstanding any terms contrary in the ITL. However, this first requires approval of the Director General of the Internal Revenue Department in Nay Pyi Taw.

\textbf{i  Corporate income tax}

Corporate income tax is levied at a rate of 25 per cent on total income, not including capital gains (except the transfer of shares in an oil and gas company, where rates ranging from 40 to 50 per cent will apply on gains). It is applicable to both resident and non-resident companies in Myanmar. A resident company is defined as one formed under the MCA or any other existing law of Myanmar, including companies under the MIL. Resident companies are taxed on a worldwide basis; hence, income deriving from sources outside Myanmar is also taxable. Non-resident companies are those that are not formed under the MCA or any other existing Myanmar law. Taxable income includes trade or business income and rental income from movable or immovable property.

\textbf{ii  Capital gains tax}

Capital gains tax of 10 per cent, applicable to both resident and non-resident companies, is payable on any gains realised from the sale, exchange or transfer of one or more capital assets, including shares in a company. Higher rates of between 40 and 50 per cent apply on gains from the transfer of shares in oil and gas companies.

\textbf{iv  Commercial tax}

Commercial tax is generally a 5 per cent turnover tax on goods and services produced or rendered within Myanmar, based on sales proceeds, and is dependent on the nature of goods and services. All services are subject to 5 per cent commercial tax, except 26 types of services

\textsuperscript{26} Social Security Law 2012; Minimum Wage Labour Law (March 2013); Immigration Act 1947; Employment and Skill Development Law 2013; Employment and Training Act (1950); Factories Act 1951; Foreign Investment Law 2012; Payment of Wages Act 1936; Shops and Establishments Act 2016; Leave and Holidays Act 1951; and Workman’s Compensation Act 1923.

\textsuperscript{27} Double tax agreements have been concluded with India, Indonesia, Malaysia, Singapore, the Republic of Korea, Thailand, the United Kingdom, Vietnam, Laos and Bangladesh.
that are specifically exempted from commercial tax (e.g., home rental, life insurance, banking services). It is only applicable to specific commercial transactions listed in the Commercial Tax Law, including imported goods based on the landed cost, which is the sum of the cost, insurance, freight value and customs duties.

v Special goods tax
The Union Tax Law 2016 took effect on 1 April 2016, with key developments including the reintroduction of the Special Goods Tax Law. This imposes tax rates ranging from 5 per cent to 120 per cent on listed special goods, including cigarettes, tobacco leaves, cheroots, cigars, pipe tobacco, alcoholic beverages, gemstones, teak, petroleum, jet fuel and natural gas.

IX COMPETITION LAW
Myanmar’s Competition Law (CL), which was enacted on 24 February 2015, came into force on 24 February 2017 under Notification 69/2015 issued by the President’s office on 12 December 2015. The CL is far-reaching and provides for the creation of a Competition Commission with investigative and adjudicative powers. It classifies violations into four categories to regulate competition, market monopolies, anticompetitive acts and merger control. Civil and criminal penalties will be imposed and include the conviction of senior managers. The CL is likely to have a significant impact and businesses would be well advised to seek necessary assistance.

X SANCTIONS
The US government pledged a commitment to remove all the remaining financial and trade sanctions against Myanmar, representing a milestone in the country’s journey to further integrate into the global economy. This announcement was made by former US President Barack Obama on 14 September 2016 after a meeting with Myanmar State Counsellor Daw Aung San Suu Kyi, the de facto leader of Myanmar.

The US sanctions were imposed by the International Emergency Economic Powers Act, which authorised President Obama to declare a ‘national emergency’ and to impose economic and trade sanctions in response to the ‘unusual and extraordinary’ threat to, *inter alia*, US security, its economy and foreign policy. As a part of enforcement efforts, the US Department of the Treasury’s Office of Foreign Assets Control (OFAC) published a list of individuals, groups and companies owned by or controlled by Myanmar citizens that US citizens were prohibited to deal with – the Specially Designated Nationals List (SDN List). The US sanctions against Myanmar were put in place by OFAC from 1997 but largely eased in 2012. This initial easing was followed by relief, effective in early 2016, which removed several state-owned enterprises and banks from the SDN List.

As a result of removal of all sanctions, the prohibition to trade or deal with the Myanmar individuals and entities on the SDN List no longer exists; however, sanctions against them under other programmes, such as that regarding North Korea and counternarcotics, will remain on the List. This landmark move will effectively facilitate US investment to enter one of the last frontier markets in Asia.
On 7 October 2016, President Barack Obama issued an executive order terminating the national emergency relating to Myanmar (the Burma-related executive orders). This has had the effect that:

- **a** all individuals and entities on the SDN List for Myanmar-related reasons have been removed from the List;
- **b** the requirement for US citizens and companies to report annually to the US State Department outlining information regarding policies and procedures with respect to human rights, workers’ rights, environmental stewardship, land acquisitions, arrangements with security service providers and payments to Myanmar government entities has been suspended;
- **c** all OFAC-administered restrictions relating to banking and financial transactions within Myanmar have been removed;
- **d** the Responsible Investment Reporting Requirements have been removed (that is, US citizens will no longer need to report any agreement with the Myanmar Oil and Gas Enterprise or any investment that exceeds US$5 million); and
- **e** the ban on the importation into the United States of Myanmar-originated jadeite and rubies has been revoked.

The suspension is contingent on Myanmar’s progress in addressing money laundering, corruption and narcotics-related activities. The US Financial Crimes Enforcement Network will remove the prohibition entirely when Myanmar has made sufficient progress on this front.

In reality, the lifting of US sanctions has not overwhelmingly increased US foreign investment in Myanmar. However, we are seeing more US investor interest and remain optimistic. It is still early days.

**XI OUTLOOK**

As Myanmar’s reform process gains momentum after more than a year of transition to a civilian-led government and the removal of US sanctions, many changes are taking place. In 2016, Daw Aung San Suu Kyi announced a crackdown on unpaid taxes, and revisited Myanmar’s Anti-Corruption law with a set of guidelines lowering limits on gifts accepted by civil servants. The Anti-Corruption Law (AC Law), passed by Parliament in August 2013, seeks to ‘eradicate bribery as a national cause’. Several former Myanmar officials have been charged already under the AC Law and are awaiting trial.

The AC Law sets out a framework for a presidential commission to investigate cases of bribery and to consider the assets of public officials on its own initiative. While primarily targeted at bribe-taking by those in the public sector, the net can be cast to catch those in the private sector. There is a ban on the receipt of gifts from organisations or individuals seeking gains, whether of a business or other nature, from civil servants. Gifts subject to the new limit include ‘money, gold, silver, air tickets, hotel stays, free meals, golf club membership fees’. The new guidelines state that they aim to distinguish ‘gifts offered as a means of social courtesy […] from ones given with the intention of bribery’. The guidelines offer specificity to many aspects outlined in the AC Law and will be a development welcomed by those seeking to invest and do business in Myanmar.

In a new move to streamline government activity, a reorganisation of the union ministries was commenced in March 2016, reducing the overall number of ministries from 36 to 21. In a further development, on 24 March 2016, the Union Parliament approved the
appointment of 18 key ministers to form the new government. Some of these ministers have oversight of more than one major ministry. It is likely that the existing ministries will be further restructured, subject to the discretion of President U Win Myint.

The merger of the Ministry of Finance and the Ministry of National Planning has created synergies to facilitate investment. The integration of the ministries related to transportation and communications also benefits major projects, a number of which are still in progress. Finally, the merger of the Ministry of Electric Power and the Ministry of Energy has helped to streamline the process for the development of new power projects. Consolidating the ministries has promoted an easing of administrative processes concerning foreign investment and will hopefully continue to be a significant benefit to current and future projects. We remain optimistic.

Lawyers and investors alike are still eagerly awaiting the passing of key new legislation (which was meant to be enacted in late 2015). These include the MCL and implementing Rules, the Condominium Law (Rules) and the Mining Law Amendment Act (Rules). Myanmar is still in desperate need of a Secured Transactions Law and an improved Intellectual Property Law to help stimulate foreign investment.

Myanmar is moving towards a more open economy and democratic society, although these transitions will neither be seamless nor occur overnight. As the country readies itself for increased foreign investment, it will remain a challenging frontier market for investors. Nevertheless, from multinational corporations to private equity firms, companies still seem to be drawn to one of the world’s last economic frontiers. If prospective investors are able to identify and mitigate risks through focused risk assessments, comprehensive due diligence and appropriate compliance measures, there are opportunities available.
Chapter 34

NETHERLANDS

Meltem Koning-Gungormez and Hanne van ‘t Klooster

I  OVERVIEW OF M&A ACTIVITY

Although 2017 started slowly with many takeover bids that were not successful at the time, it has been a strong year for M&A activity in the Netherlands. The number of mergers and acquisitions was the highest in 10 years, and the 588 mergers is an increase of 12.5 per cent compared to 2016.²

There were no billion-euro deals in 2017 and the beginning of the year in particular, in terms of deal value, was not as high as in 2016. This could be explained by the delayed effects of the Brexit referendum in the United Kingdom and the US presidential election, which added slightly to uncertainty within the Netherlands. The second half of the year was better and the fact that the Dutch market is becoming more and more seller-friendly has restored shareholder activity in the corporate landscape. In two important deals in 2017, AkzoNobel and Qualcomm, US-based hedge fund Elliott played an important lead role.

Most M&A transactions in 2017 were within the service industries and manufacturing³ but the number of specific (information) technology transactions continues to increase. A new development in 2017 was the multiple initial coin offerings that followed the cryptocurrency mania and created an interesting new form of financing.

II  GENERAL INTRODUCTION TO THE LEGAL FRAMEWORK FOR M&A

Dutch transactions are generally structured by the transfer of shares or (specific) assets of the company or by way of a legal merger. The main principles governing the legal framework of these transactions are laid down in the Dutch Civil Code.

Of particular importance is that parties are free to enter into contracts and to negotiate the terms of contracts. Based on case law dating back to 1981, not only the wording of the agreement should be considered for interpretation thereof, but also the intentions of the parties and what they can reasonably expect from each other.⁴

Over time and because of foreign involvement, contracts have become more extensive and more Anglo-American, for example as regards the use of the entire agreement clause.

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1 Meltem Koning-Gungormez is a partner and Hanne van ‘t Klooster is an associate at Kennedy Van der Laan NV.
3 Id.
4 Supreme Court, 13 March 1981 (Haviltex).
However, recent case law indicates that the use of an entire agreement clause does not have the result that no meaning should be given to the parties’ statements or behaviour prior to conclusion of the agreement.5

Under Dutch law, the stakeholder model is used most often, whereby the board of a company has a duty to act in the best interests of the company and all the stakeholders involved, thereby focusing on creating long-term value. The Enterprise Chamber, a specialised entity within the Amsterdam Court of Appeal, is the court of first instance in disputes involving mismanagement and similar corporate issues, and the appellate court in certain corporate litigation disputes. The Enterprise Chamber is often addressed by foreign stakeholders to challenge the parameters of the Dutch stakeholder model, for instance in a recent case in which shareholders Elliott wanted to intervene in the strategy of AkzoNobel in order to enter into negotiations with PPG Industries for the acquisition of AkzoNobel.

i  Negotiations and pre-contractual good faith
In the pre-contractual phase, parties are obligated to behave in accordance with the requirements of reasonableness and fairness and, in doing so, they must also have their behaviour determined by the legitimate interests of the other parties. Although in theory all parties are free to break off negotiations, it can be unacceptable to do so because one party may have the expectation that an agreement has been or will be concluded. In that event, that party could be entitled to compensation, or could request an injunction requiring the other party to continue negotiations. What the parties could reasonably have expected in a particular set of circumstances should be taken into account to determine whether or not such a situation has arisen.

ii  Anti-takeover structures
In the event that a shareholder requests an agenda item that may lead to a change in the company’s strategy (such as a takeover), the management board can invoke, pursuant to the Corporate Governance Code, a response time of a maximum of 180 days for further deliberation and constructive consultation. Furthermore, it is possible to place preference shares at a different entity, such as a foundation that is serving the interests of the company and its stakeholders. By giving this entity a call option that can be exercised during an imminent takeover, the equity interest that a hostile party accrues will dilute and the other entity can make sure the company focuses on creating long-term value. It is also possible to issue priority shares with specific (voting) rights or depositary receipts instead of shares, in which event the votes on the shares will stay with a foundation that is friendly to the board of the company.

iii  Notifications
Before concluding an M&A transaction in the Netherlands, it may be required that the works councils of the parties involved are notified and consulted (pursuant to the Works Council Act) and that a notification is sent to the SER Merger Code Committee and the trade unions in question (pursuant to the SER Merger Code 2015). Obtaining clearance

5  Supreme Court 5 April 2013 (Lundiform/Mexx).
from the Netherlands Authority for Consumers and Markets and the European Committee regarding possible competition concerns may also be required. Furthermore, sector specific notifications may be necessary, such as to the Dutch Central Bank.

III DEVELOPMENTS IN CORPORATE AND TAKEOVER LAW AND THEIR IMPACT

i Ultimate Beneficial Ownership Register

EU Member States were required to be compliant by 26 June 2017 with the Fourth Anti-Money Laundering Directive (EU) 2015/849 (AMLD IV), which seeks to prevent the use of financial systems for money laundering or terrorist financing by means of, among other things, introducing an Ultimate Beneficial Ownership Register (UBO Register). The Netherlands has not met this deadline. The draft proposal act introducing the UBO Register in the Netherlands was published for consultation on 31 March 2017. It was intended to send the draft proposal act to the House of Representatives in the first half of 2018. However, on 19 April 2018, the European Parliament approved the Fifth Anti-Money Laundering Directive (AMLD V), amending AMLD IV and giving Member States another 18 months to implement the UBO Register in national law after adoption by the European Council. For this reason and because of the fact that AMLD V has consequences for the contents of the draft proposal act (e.g., it is required that the UBO Register will be publicly accessible), the Dutch Minister of Finance has put the national legislative process on hold. The amended concept proposal act introducing the UBO Register will now be presented to the House of Representatives early in 2019.

ii Act on management and supervision of legal entities

A legislative proposal for the management and supervision of legal entities was submitted to the House of Representatives on 13 June 2016. The proposal aims to clarify the legal framework that is applicable to the association, the cooperative association, the mutual insurance association and the foundation. The most important change is that provisions applicable to the public limited company and the private limited company on certain items are now applicable to all legal entities.

The proposal stipulates that directors and supervisors of all legal entities must put the interests of the legal entity first. It is also a requirement for all legal entities that directors and supervisors with a conflicting interest may not participate in the deliberation and decision-making and that directors and supervisors who perform their duties improperly may be liable for the resulting damage. Furthermore, the grounds for dismissal of poorly functioning directors and supervisors are extended and now also apply to members of the supervisory body.

Finally, the proposal entails a legal basis for all kinds of entities to establish a supervisory board. It will now also be possible for all legal entities to opt for a board with both executive and non-executive directors and within which the non-executive directors fulfil the supervisory role.

iii Corporate Governance Code 2016

The Corporate Governance Code 2016 entered into effect on 1 January 2017, replacing the first Corporate Governance Code of 2008. The Code of 2016 is applicable to Dutch listed companies whereby the ‘comply or explain’ principle is leading and directors must
report on this in the annual accounts. Non-listed companies can opt to follow the Code. The most important difference from the Code of 2008 is that long-term value creation is now central. In this respect, the board has to formulate a strategy relating to the creation of long-term value and thereby has to weigh the interests of all stakeholders. In line with this, the concept of ‘culture’ is introduced as a component of effective corporate governance. Management board members and supervisory board members are required to create a culture within the organisation that is focused on long-term value creation. In that context, values that fit into the views of the company and a code of conduct have to be formulated. As with the Code of 2008, the Corporate Governance Monitoring Committee will report annually on compliance with the Code.

iv Proposed regulation on hostile bids and takeover activities

The Dutch M&A market has shown an increase in hostile takeover activity, recent examples being the bids for AkzoNobel and Unilever. This has led to a public debate on the use of response measures in the Netherlands. Following this, the Minister of Economic Affairs stated that he is in favour of additional legislation that would give directors more time and opportunity to assess the effects of public takeovers on all stakeholders. In June 2017, the House of Parliament discussed the effectiveness of the measures that management and supervisory boards of Dutch listed companies have at their disposal to respond to bids and takeover activities. Following this the government stated that it values an open attitude towards takeovers given their importance to the Dutch business and investment climate. However, the government also recognises that takeovers may pose risks to the economy, in particular if they are hostile. A legislative proposal is now being prepared on a preventive test in respect of takeovers of companies that belong to vital infrastructure sectors that are of major importance for national security, the economy or employment.

v EU Directive on long-term and transparent engagement by shareholders

Directive (EU) 2017/828 (amending Directive 2007/36/EC), regarding the encouragement of long-term and transparent engagement by shareholders of listed companies, must be converted into national law by the Member States by 9 June 2019. The Directive contains requirements relating to the remuneration of directors, the identification of shareholders, the facilitation of shareholders’ rights, the transmission of information, transparency for institutional investors, asset managers and proxy advisers and related party transactions. The draft proposal act implementing the Directive in the Netherlands was published for consultation on 27 February 2018. The Joint Committee Company Law of the Dutch Bar Association and the Royal Dutch Notarial Association advised the Ministry of Justice and Security not to extend the provisions of the Directive with additional national rules when there is no specific ground for it. According to those entities, the focus should be on ways to strengthen the business climate in the Netherlands and to guarantee the flexibility of Dutch companies.

IV FOREIGN INVOLVEMENT IN M&A TRANSACTIONS

Despite the financial crisis, foreign involvement has been present in the Dutch M&A market for a long time. Although not an immediate success, there were numerous efforts by foreign companies to take over Dutch businesses during the first months of 2017. Striking examples are the Belgian postal service Bpost wanting to acquire PostNL and PPG Industries’ potential hostile takeover of AkzoNobel. Also Warren Buffett’s Berkshire Hathaway, Kraft Heinz and
3G’s attempt to make a deal with Unilever did not yield any result but nevertheless shows that the Dutch market is still very interesting for foreign investors. The majority of the M&A deals in 2017 were in-bound investment by foreign private equity investors or corporates.

However, in some cases, the buyer dropped out, as in the sale of Attero, a Dutch waste treatment company. About three years ago, Dutch private equity investor Waterland bought Attero, which at the time was in the hands of six provinces and 116 municipalities in the south, east and north of the Netherlands, for a purchase price of €170 million. It appears to have been a good deal as, only a year later, Waterland received a €183 million dividend and, in 2017, allegedly another €50 million was added to that amount. In spite of the large cash-outs, Chinese parties seemed willing to pay sums of up to €1 billion for the company last year. In the end, there was no deal because, allegedly, the Chinese government suddenly set stricter requirements for acquisitions abroad.

In the first quarter of 2018, Attero was finally sold to UK-based investor 3i and the German asset management company DWS, which is a branch of Deutsche Bank.

Also in that first quarter, the chemical branch of AkzoNobel was finally sold for €10.1 billion to the American investment company Carlyle and the Singaporean investment company GIC. This combination won the bidding battle against three other parties, including the Dutch HAL Investments.

Another public bid that has been stirring up feelings since 2016 is the one by Qualcomm Inc for the Dutch chip manufacturer NXP Semiconductors NV. Although in October 2016, the parties agreed on a price of US$110 per share (thereby setting a total value for NXP of €43 billion), Qualcomm fell prey to Singapore-based company Broadcom soon afterwards. Fearing that Qualcomm would pay too much for NXP, Broadcom got involved in the negotiations between Qualcomm and NXP. President Trump settled this in part by announcing that the acquisition of Qualcomm by a foreign party was off the table. In March 2018, Qualcomm announced it was extending the period of its cash tender offer pursuant to the purchase agreement of October 2016. However, the acquisition of all shares in NXP might still a long way off as US hedge fund Elliott, which holds around 7 per cent of the shares, has apparently stated that it wants at least US$135 per share.

V SIGNIFICANT TRANSACTIONS, KEY TRENDS AND HOT INDUSTRIES

The number of high-profile potential public takeover bids in 2017 has been matched by an increase in shareholder activity. One of the most striking examples was the Dutch paint and coatings company AkzoNobel rejecting three unsolicited buyout offers by its US competitor, PPG Industries. Second, shareholder Elliott tried to dismiss the supervisory board member who, in their opinion, was responsible for AkzoNobel not engaging in talks with PPG. According to the board and the supervisory board, the offers by PPG undervalued the AkzoNobel business, contained significant risks and uncertainties, made no substantive commitments to stakeholders and demonstrated a lack of cultural understanding. Although AkzoNobel managed to keep its assailant at a distance, this made shareholder Elliott angry. When the board did not consent to the shareholder request to put the dismissal on the agenda of the next shareholders’ meeting, a judicial investigation and immediate measures at the Dutch Enterprise Chamber were requested. However, the Enterprise Chamber rejected the request because, in its view, the dismissal was only intended to make sure that negotiations with PPG would start and, under Dutch law, there is no obligation for (supervisory) board
members to do so because in the Netherlands a company’s strategy is set by the management board (under the supervision of the supervisory board) and there is no obligation to discuss this with the shareholders beforehand.

Other M&A trends can be found in the tech sector, in which Dutch companies continue to attract the interest of international companies. For the most part, larger corporates acquire tech start-ups to speed up technological development and keep up with market demands. A notable transaction was the acquisition in July 2017 of Dutch company Liteq by Kulicke and Soffa, the Singaporean market leader in the field of semiconductor packaging, to make use of the technology used by Liteq to create cheaper and more sophisticated packaging.

A striking difference between 2016 and 2017 is that in 2016, Dutch companies were mostly buying foreign companies, whereas in 2017 Dutch companies were mostly being bought. The only real example of a Dutch acquisition in 2017 by a Dutch company was the acquisition of Autonomos by TomTom.

VI  FINANCING OF M&A: MAIN SOURCES AND DEVELOPMENTS
Cash has remained the preferred means of funding M&A deals. Private equity and venture capital funding are runners-up as sources of funding for most transactions. Bank loans are also attractive in view of the low interest rates. A relatively new form of funding is initial coin offerings whereby start-ups using blockchain technology are raising capital through coin offerings. The Dutch regulatory authorities are watching these developments closely as it may trigger money laundering and fraud.

VII  EMPLOYMENT LAW

i  The Work and Security Act
With the introduction of the Work and Security Act in July 2015, employment law has been amended substantially. The Act regulates most aspects, such as entering into an employment agreement, employment conditions, payment of salary during illness, and termination of employment agreements.

Under the Act, an employer can only terminate an employment contract on a limited number of grounds. In the event of the long-term illness of an employee or if an employer can demonstrate sufficient economical reasons, the Employee Insurance Agency will grant permission for an employer to terminate a contract. If the grounds are more personal (such as inadequate performance or a damaged working relationship), permission to terminate an employment agreement must be obtained from the courts. In all cases (except for a serious imputable act by the employee and summary dismissal), an employee who has been in post for more than 24 months is entitled to a statutory severance payment (‘transition fee’).

The sequence system for successive fixed-term employment contracts has been amended under the Work and Security Act. The number of successive fixed-term contracts has been limited to three, and the total period may not exceed two years. In the event of a fourth consecutive contract or if the total duration of employment exceeds two years, the employment contract will be deemed permanent.

ii  The Balanced Labour Market Bill
Elections for the Dutch Lower House of Parliament were held in March 2017; it took the resulting coalition until October 2017 to come to an agreement. The parties in the government
proposed important measures for the labour market, which were detailed in the Balanced Labour Market Bill. On 9 April 2018, the Bill was presented for internet consultation. The projected date of entry into force is 1 January 2020.

Some of the most important changes with regard to the Work and Security Act are as follows:

\( a \) A new ground for dismissal is proposed, in addition to the existing limited grounds for dismissal: the ‘cumulation ground’. This ground offers employers the option to combine several incomplete grounds for dismissal into one successful ground. Currently that combination of grounds is not possible. An employer who requests termination of an employment agreement must choose between all limited grounds. In the case of cumulation of grounds, the court may award an employee an extra fee on top of the transition fee (and fair compensation, if any).

\( b \) Employees will be entitled to a transition fee from the first day of their employment agreement (including the probationary period), not only after they have been employed for more than 24 months.

\( c \) The current sequence system of a maximum of three contracts in two years will be extended to a maximum of three contracts in three years. The current rule that the sequence is interrupted after a period of more than six months will remain unchanged.

### iii Pre-pack and transfer of undertaking

In 2017, preliminary questions of the Subdistrict Court of Almere were answered by the European Court of Justice (ECJ). The ECJ has ruled that a pre-pack (short for pre-packaged insolvency) is not excluded from European Directive 2001/23 on the transfer of undertakings (the Directive).

Based on the Directive – and the implementation thereof in the Dutch Civil Code – the employees of a transferring undertaking remain entitled to their employment and all rights and obligations from that employment. In this event, the acquiring undertaking must also take over these employees.

If an undertaking is declared bankrupt, its employees are not protected by the Directive or the Civil Code. For this reason, the pre-pack was created as a means of preventing (additional) loss of value as in a regular bankruptcy and to increase the chance of relaunching the company. A pre-pack is a transfer of the assets prepared before the declaration of bankruptcy with the consent of a prospective insolvency administrator, appointed by the court, and is put into effect by that administrator immediately after the declaration of bankruptcy.

The ECJ has ruled that the Dutch pre-pack procedure does not qualify as ‘bankruptcy proceedings’ within the meaning of the Directive because its purpose is for the continuation of the company, not its liquidation. Therefore it is not justified that employees lose the protection of the Directive. The consequence is a basic rule whereby all employees will automatically transfer to the acquiring company, while retaining the employment conditions from the bankrupt company.

### iv Self-employed workers

The new coalition government has concluded that the intended (and postponed) introduction of the Assessment of Employment Relationships Deregulation Act (the DBA Law) should be cancelled. Instead, the coalition agreement contains alternatives for the position of self-employed workers. It is often the subject of dispute whether a self-employed person is in fact employed by a contracting party.
In the Balanced Labour Market Bill, the coalition proposes an alternative to the model agreements the Dutch Tax Authority is currently approving. The use of these approved models reduces the risk of meeting the requirements of an employment relationship with all its obligations (such as taxes, but also protection under Dutch dismissal law). The proposed alternative contains, for example, a minimum rate for independent contractors and the introduction of a declaration of commissioning. Those elements contribute to security and clarity for independent contractors about their position.

v Legislative proposal aiming to increase awareness of equal pay for women

A legislative proposal aiming to increase the awareness of equal pay for women and strengthening the control thereof was submitted to the House of Representatives on 14 April 2014. The proposal aims to ensure that:

a the right of consent of the Works Council on the policy regarding equal pay for women is made explicit;

b at least once a year, all companies must provide information to the Works Council on the remuneration ratio between men and women within the same function group; and

c companies that are required by the Dutch Civil Code to publish an annual report are obliged to include figures on the remuneration ratio between men and women, an explanation for the possible difference in pay between men and women and of the policy they are pursuing to promote equal pay.

Although the proposal was received positively, it is unclear whether it will be adopted in this form as, during the first plenary session at the House of Representatives, there was criticism about it. The proposed legislation is still being debated in the House of Representatives.

VIII TAX LAW

i The OECD’s Base Erosion Profit Shifting

The public debate on corporate tax planning has continued and, on 7 June 2017, the Multilateral Instrument (MLI) that was proposed following the OECD’s Base Erosion Profit Shifting (BEPS) Action 15 was signed by more than 70 countries, including the Netherlands. Pursuant to the MLI, BEPS Actions — such as agreed minimum standards to counter treaty abuse — can be implemented in bilateral tax treaties without countries having to renegotiate and amend all such treaties. One of the measures of the MLI is the introduction of a ‘principle purpose test’ (PPT), pursuant to which a treaty benefit may be denied if obtaining that treaty benefit was one of the principal purposes of any arrangement or transaction that resulted directly or indirectly in that benefit, unless it is established that granting the benefit in the relevant circumstances would be in accordance with the object and purpose of the relevant treaty. Considering that the PPT is an agreed minimum standard against ‘treaty shopping’, and that all countries that signed the MLI have opted for at least the implementation of the PPT, it is likely that this anti-abuse rule will be implemented in many of the Netherlands’ bilateral tax treaties. In abusive situations, it will then become much easier for the Netherlands to deny treaty benefits to foreign recipients of Dutch source income.
ii Dividend tax
A recent change in tax regulation has had an immediate effect on the structure of M&A transactions. The Act regarding the dividend withholding tax obligation for holding cooperatives and the expansion of the dividend withholding tax exemption came into effect on 1 January 2018. Under previous Dutch law, a cooperative was not subject to dividend withholding tax, unlike a private limited liability company (BV) and a public limited liability company (NV). In the light of the increasing importance of cooperatives in international structures (as a possible means for international tax evasion) and the state aid risk, a dividend withholding tax obligation for qualifying membership rights in holding cooperatives was introduced. A holding cooperative is defined as a cooperative whose actual activity in the year preceding the distribution consisted primarily (i.e., for 70 per cent or more) of the holding of participations or the direct or indirect financing of affiliated entities or natural persons. A qualifying membership right of a holding cooperative is defined as a right that entitles the holder to at least 5 per cent of the annual profit or at least 5 per cent of what is paid out on liquidation. Furthermore, under the new Act, the dividend withholding tax exemption is extended from distributions made to qualifying BV and NV shareholders within the European Union and EEA to distributions made to qualifying BV and NV shareholders and qualifying holding cooperative members located in the European Union, the EEA or in a country with which the Netherlands has concluded a treaty that contains a tax provision for the prevention of double taxation. The exemption is subject to an anti-abuse rule. Although the dividend withholding tax will be abolished altogether in 2020, the government expressly chose to introduce the Act because of the state aid risk and the fact that it can serve as a basis for new legislation.

iii Withholding tax on interest
Under current law, the Netherlands does not levy a withholding tax on interest. However, the government recently announced plans to introduce a withholding tax on interest in abusive situations as from 1 January 2021, to avoid the Netherlands being used for payments to low tax jurisdictions through Dutch conduit entities. No details of this new withholding tax are yet known. In principle, a Dutch company engaged in financing activities will be taxed on the difference between the interest income and expenses (spread). For intra-group financing companies there are minimum equity and minimum substance requirements that should be reviewed and discussed in more detail.

IX COMPETITION LAW
On 26 October 2017, the General Court of the European Union annulled the European Commission’s decision dated 10 October 2014 whereby it approved the merger between the Dutch cable companies UPC and Ziggo (following the acquisition of Ziggo by Liberty Global, the US parent company of UPC). The companies’ Dutch competitor, KPN, disagreed with the decision and brought an appeal at the General Court. According to the Court, the Commission had failed to explain why the merger would not have raised vertical competition concerns in relation to premium pay TV sports channels and thus annulled its decision. It is unclear what the exact consequences of the annulment will be. In accordance with the
EU Merger Regulation, the concentration\(^6\) will have to be re-examined by the Commission or the Commission can appeal to the ECJ. A complicating factor is that the merged UPC/Ziggo entity has already been combined with the Dutch business of UK telecom company Vodafone into a 50/50 joint venture, which was approved by the Commission.

Furthermore, on 18 January 2018, after an in-depth review, the European Commission approved under the EU Merger Regulation the proposed acquisition of the Dutch company NXP by the US company Qualcomm. Since the Commission had several concerns about competition (the firms are both important players in the semiconductor industry), the approval is conditional on full compliance with the commitments offered by Qualcomm (remedies regarding licences and interoperability). The public bid had been made in 2016, but it took some time to fulfil the conditions precedent, most notably the approval of the regulatory authorities in several countries. At the moment, this precedent is still only partly fulfilled. Furthermore, not all shareholders have agreed with the price that was offered. At the request of the Ministry of Commerce in China, Qualcomm and NXP have withdrawn and refiled the notice of acquisition to obtain approval of the Chinese government. In that light, the end date for the purchase agreement was extended (for the last time) from 25 April 2018 to 25 July 2018.

**X OUTLOOK**

The year 2018 started strongly, with the highest level of M&A activity in the past 10 years, especially in the mid-market. We expect technology will continue to be a key driver in M&A transactions for the rest of the year, as it is in the rest of the world. With a positive outlook for the world economy, a stable oil price, strong company balance sheets and piles of dry powder, we expect 2018 to be a booming year for M&A in the Netherlands in terms of the number of transactions.

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\(^6\) The term ‘concentration’ used in the EU Merger Regulation covers various types of transactions, such as mergers, acquisitions, takeovers and certain types of joint ventures.

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Chapter 35

NIGERIA

Lawrence Fubara Anga and Maranatha Abraham

I OVERVIEW OF M&A ACTIVITY

Nigeria has been on the path to full recovery from the recession that crippled the economy between 2016 and 2017. Following the end of the recession in September 2017, a few notable M&A transactions took place after the lull of the previous year.

The technology, media and telecommunications (TMT) sector was very active, with several significant transactions, including the acquisition of 9mobile (formerly Etisalat) by Teleology Holdings Limited after paying a US$50 million deposit to the trustee of the company’s lenders. Another significant deal in this sector was the acquisition by Transsion Holdings (producers of Tecno) of Microstation, a Nigeria-based mobile phone retail chain store. In another deal, GreyCroft Partners, a US-based venture capital firm, made a US$10 million investment in Flutterwave, a fast-growing fintech start-up. Another notable transaction was the acquisition of Konga by Zinox Group, a leading ICT solutions provider.

In the financial sector, FCMB Group recently announced the acquisition of a 60 per cent stake in Legacy Pension Managers, increasing its stake in the company to about 88 per cent.

Other significant transactions include Century Petroleum’s landmark reverse merger with Ibeto Cement, in which Ibeto Cement acquired a 70 per cent stake in Century Petroleum Corporation, a publicly traded US petroleum company.

II GENERAL INTRODUCTION TO THE LEGAL FRAMEWORK FOR M&A

The laws that regulate M&A activity in Nigeria are the Investments and Securities Act (ISA), the Companies and Allied Matters Act and the Rules and Regulations of the Securities and Exchange Commission (the SEC Rules and Regulations) made pursuant to the ISA. Amendments were made to the SEC Rules and Regulations in 2013. The Listing Requirements of the Nigerian Stock Exchange also contain provisions that affect M&A transactions.

The role of the Security and Exchange Commission (SEC) is to review proposed M&A to ascertain whether a proposed transaction would result in substantial restraint of trade and to give its approval. The ISA provides that it is not necessary for the SEC to be notified prior to the implementation of a small merger (i.e., between entities whose combined turnover or assets are below 1 billion naira), although the SEC must be informed after such mergers are
completed. The acquisition of controlling equity in a private or unquoted public company is also only subject to the prior approval of the SEC if the consideration for the shares acquired is at least 500 million naira.

Additionally, there are sector-specific laws that regulate M&A transactions in certain sectors. For example, the Banks and Other Financial Institutions Act and the Central Bank of Nigeria’s Guidelines and Incentives on Consolidation in the Banking Industry are relevant to M&A in the banking sector; the Nigerian Communications Act regulates the telecommunications sector; the Electric Power Sector Reform Act regulates the electricity sector; and the National Insurance Commission Act regulates the insurance industry. These sector-specific laws operate in addition to the provisions of the ISA and the SEC Rules and Regulations.

The Companies Income Tax Act also requires the consent of the Federal Inland Revenue Service (FIRS) for a proposed merger or acquisition in relation to the capital gains tax payable. Common law applies to the extent that there is no relevant provision in the statutes.

### III DEVELOPMENTS IN CORPORATE AND TAKEOVER LAW AND THEIR IMPACT

The main authority in the regulation of M&A transactions is the SEC.

Following plans to introduce a robust competition and consumer protection regime, the Federal Competition and Consumer Protection Bill 2017 was passed by the National Assembly in December 2017 and is currently awaiting presidential assent. When passed, the law will bring about a much-needed competition regime and have a significant effect on merger regulation. In addition to other provisions, the Bill establishes a Federal Competition and Consumer Protection Commission with powers to regulate competition, which will, in effect, assume the merger control powers of the SEC.

There are also plans to amend the Investments and Securities Act, which is the primary legislation governing M&A transactions. The aim of the amendments is to improve investor protection in Nigeria and, hopefully, encourage foreign investment in Nigerian businesses.

The Corporate Affairs Commission, which is the main regulatory body for corporate organisations generally, has introduced various measures to make the companies’ registry more efficient, one being the creation of the Companies Registration Portal to facilitate online registration of companies.

### IV FOREIGN INVOLVEMENT IN M&A TRANSACTIONS

M&A activity in the past was fuelled by investors’ desire to participate in Nigeria’s rapidly developing economy. However, foreign exchange challenges coupled with the economic downturn have caused significant discouragement among investors. More recently, interest in investment in Nigeria has been revived. This is partly connected to the devaluation of the naira, which enabled foreign concerns to acquire Nigerian interests at a much cheaper rate.

### V SIGNIFICANT TRANSACTIONS, KEY TRENDS AND HOT INDUSTRIES

Arguably the biggest deal for the period under review was Ibeto’s acquisition of Century Petroleum Corp in a historic reverse merger deal, making Ibeto Cement the first Nigerian company to be listed on the US Stock Exchange.
Other significant deals include the acquisition of Konga by the Zinox Group and Greycroft’s investment in Flutterwave; the latter deal in particular is significant because the fintech space in Nigeria is still in its early stages.

In the financial services sector, Allianz Group, a leading insurer and asset manager, acquired an 8 per cent stake in African Reinsurance in a deal worth about US$81 million.

VI  FINANCING OF M&A: MAIN SOURCES AND DEVELOPMENTS

The cost of locally sourced debt funding for acquisitions is very high, with interest rates typically above 20 per cent. As a result, the vast majority of acquisitions in Nigeria are funded using equity or foreign-sourced debt. However, a reduction in the number of deals funded by foreign capital is expected until concerns surrounding the volatility of the exchange rate and illiquidity in the currency markets have been addressed by the government.

VII  EMPLOYMENT LAW

There have been no recent changes to employment law that are relevant to M&A. The statutes governing this are the Labour Act, the Pension Reform Act and the Personal Income Tax Act.

The Labour Act provides that the transfer of any contract from one employer to another shall be subject to the consent of the worker and the endorsement of the transfer of the contract by an authorised labour officer.

The National Industrial Court (NIC) has been active in resolving labour disputes. Recently, the controversy surrounding the appellate jurisdiction of the NIC was laid to rest by a Supreme Court decision affirming the jurisdiction of the Court of Appeal to hear appeals arising from decisions made by the NIC.

VIII  TAX LAW

There have been no recent changes to the tax law that are relevant to M&A. In an M&A context, stamp duty is the relevant tax. When new share capital is issued, a stamp tax of 0.75 per cent of the value of the newly issued capital is payable to the Stamp Duties Office.

The tax considerations will depend on the manner in which the combination is structured. If the transaction involves an asset acquisition, the company disposing of the asset would be liable to pay capital gains tax of 10 per cent on the gains realised on the disposal. If the combination is effected by an acquisition of shares, no capital gains tax will be payable because the Capital Gains Tax Act exempts gains accruing on the disposal of stocks and shares from tax. For tax purposes, the value of an asset transferred between connected companies is deemed to be the amount equal to the residue of the qualifying expenditure.

No merger, takeover or any form of acquisition should be undertaken by a company without obtaining prior direction as to the manner of assessment of its taxable income. Directions are obtained from the FIRS. Clearance should also be obtained from the FIRS with respect to any capital gains tax that may be due and payable as a result of the business combination.
IX COMPETITION LAW

No new competition legislation relevant to M&A has been introduced in the past year. Nigeria does not have a competition law, but industry regulatory authorities are generally given the power to refuse to grant consent to mergers if they are satisfied that competition in the sector will be significantly reduced as a result. Thus, the SEC will not approve a merger if it is satisfied that the merger will substantially lessen competition in the relevant sector. Other industry-specific regulators also have this power; for example, under its Competition Practices Regulations 2007, the Nigerian Communication Commission will review proposed mergers if it determines, based on the preliminary information provided by a licensee in its initial transaction notification, that the transaction may result in a substantial lessening of competition in one or more communication markets, or may result in a licensee or any successor company having a dominant position in one or more communication markets.

However, as outlined in Section III, there are plans to enact competition and consumer protection law, which would bring about a much-needed competition regime in Nigeria and have a significant effect on the way mergers are regulated. The law, when passed, will provide a check on unhealthy competition and will assuage the fears of foreign investors who are reluctant to do business in Nigeria because of the lack of competition law.

X OUTLOOK

In view of the contraction of the Nigerian economy and continuing exchange rate uncertainty regarding foreign currency supplies, the general outlook for inbound foreign direct investment appears to be challenging. We do, however, expect to see more M&A deals in sectors with a high potential for growth, such as the TMT sector, and others where favourable asset valuations may make acquisitions attractive, such as oil and gas. Specifically, we expect to see considerable activity in TMT, especially in the financial technology sub-sector, which appears to be a fast-developing area. The e-commerce space also shows a lot of potential for M&A activity in the wake of Konga’s acquisition by Zinox Group and the acquisition of Jumia House (the housing division of Jumia) by ToLet.com.ng. We also expect to see new deals in the telecommunications sector as a result of the uncertainty surrounding 9mobile’s recent acquisition by Teleology.

The National Association of Securities Dealers (NASD) provides a platform for trade in the securities of unlisted public companies, thereby allowing companies to raise capital without being listed on the Nigerian Stock Exchange. The platform provided by the NASD is instrumental in improving liquidity and facilitating private equity exits.

The Central Bank of Nigeria has made moves to mitigate the effects of persistent foreign exchange challenges. The most recent of these moves is the introduction of the investors’ and exporters’ FX window in a bid to improve liquidity. Transactions under this window are to be determined on a ‘willing buyer, willing seller’ basis. Experts believe this policy will encourage foreign investment in the equity and bond markets and, on this basis, we anticipate new deals across several sectors.
I OVERVIEW OF M&A ACTIVITY

In 2017, the Norwegian M&A market improved significantly both in value and number of deals. In terms of the number of transactions, 2017 ended approximately 23 per cent up as compared with 2016.

There were 55 M&A transactions in Norway in Q1 2018, which is a 16.67 per cent decline in volume compared with Q1 2017. The retracting deal volume seems partly to be a result of a more volatile stock market because of increasing interest rates and the risk of geopolitical tension at the beginning of 2018. The total reported deal value for Q1 2018 ended at €1,050 million, which is also significantly down from the total reported deal value for Q1 2017 of €5,677 million. However, 2017 was an exceptionally good year for deal-making in Norway, with record levels in both the number and value of M&A deals.

The deal pipeline continues to be quite strong, with an increasing number of respondents planning divesting parts of their business operations in the next couple of years. We also continue to see strong deal drivers, such as technological innovations and digital disruption both in Norway and the global markets in general. There were a few notable transactions during Q1, in particular Blackstone Group LP’s €805 million acquisition of an undisclosed stake in Mime Petroleum, a Norwegian hydrocarbon development and production company.

Seven of the 10 largest disclosed Norwegian M&A deals in 2017 had industrial or strategic investors on the buy side. The private equity transaction volume for 2017 was significantly up (a 54.7 per cent increase compared with 2016’s figures) and was to a large extent driven by new investments and add-ons. We also continued to witness a substantial increase in the number of exits.

Transaction data from Mergermarket for the first four months of 2018 reveal that the volume of Norwegian transactions continues to decline, with a 32 per cent decrease compared with the same period in 2017. As at the end of April 2018, 68 transactions with a total value of €1.23 billion had been reported, whereas for the same period in 2017 there were 100 transactions with a total reported value of €7.3 billion reported. During April 2018, the Norwegian market also witnessed a few additional notable M&A deals, of which Aviva Plc’s acquisition of Crystal Rig III Limited and Brockloch Rig Windfarm Limited, the Norway-based wind farms, from Fred Olsen Renewables ASA for €133 million is among the most notable. MacGregor Group’s acquisition of TTS Group ASA’s marine and offshore business for €87 million and China Everbright Limited’s acquisition of Boreal Buss AS are also worth mentioning.

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During the past few years, a large part of Norwegian deal volume has come from inbound cross-border deals, and during the first four months of 2018, inbound cross-border deals comprised 47 per cent of the total number of transactions. This is a slight increase in percentage compared with inbound cross-border transactions in the first four months of 2017, which accounted for 42 per cent of the total deal volume. However, foreign players continue to be prevalent, particularly in parts of the M&A market. This shows that many Norwegian businesses possess technology and knowledge that foreign investors consider attractive, in particular from a bolt-on acquisition perspective.

There has not been much change in the market for M&A deals. Nevertheless, large auction processes continue to be slightly less common than they were 36 months ago. In the past two to three years, we have observed an increase in the use of more tailored sales processes, particularly within the oil and gas segment, involving one or a very limited number of participants rather than full auction processes.

II GENERAL INTRODUCTION TO THE LEGAL FRAMEWORK FOR M&A

The Limited Liability Companies Act (1997), the Public Limited Liability Companies Act (1997) and the Partnership Act provide the fundamental statutory framework and, with the Contract Act (1918) (which applies to almost any kind of contract) and the Norwegian Sales of Goods Act (1988), form the legal basis for the purchase and sale of corporate entities.

Public companies whose securities are listed on the Oslo Stock Exchange (OSE) or another regulated market in Norway are additionally regulated under the Securities Trading Act (2007) (STA) and the Securities Trading Regulation (STR). These rules regulate prospectus and information requirements, establish a regime to prevent market abuse and insider dealing, and set out more detailed regulations with respect to tender offers involving listed shares under Norwegian law. These statutes are supplemented by, inter alia, guidelines and recommendations issued by the OSE, and the rules and regulations of the OSE. Mergers and takeovers of private companies and unlisted public companies have no equivalent regulations. Anyone familiar with M&A transactions in most other parts of Europe will find the Norwegian landscape relatively familiar, in particular with respect to public takeovers. Norway is part of the European Economic Area (EEA) and has therefore implemented the EU regulations of relevance to companies with publicly traded securities, including the Prospectus Directive, the Takeover Directive, the Transparency Directive, the Market in Financial Instruments Directive (MiFID) and the Market Abuse Directive.

The Competition Act (2004) gives the Norwegian Competition Authority (NCA) the power to intervene against anticompetitive concentrations. Companies that are active in the Norwegian market (generally in larger transactions) must also abide by the merger control provisions set out in the EEA agreement; however, the ‘one-stop-shop’ principle prevents duplication of the competence of the European Commission, the European Free Trade Association (EFTA) Surveillance Authority and the NCA.

The remainder of this section describes the key rules applicable to public takeovers and certain particular issues arising under Norwegian law.

i Stakebuilding in public traded companies – disclosure obligations

No limits exist regarding the speed at which a stake can be built. Norwegian law contains a limited set of provisions governing stakebuilding, but insider dealing rules, disclosure requirements and mandatory bid rules must also be observed.
Any persons owning shares in a company whose securities are listed on a Norwegian regulated market (OSE or Oslo Axess) must immediately notify the company and the OSE if their proportion of shares or rights to shares in the company reaches, exceeds or falls below any of the following thresholds: 5, 10, 15, 20 or 25 per cent, one-third, 50 per cent, two-thirds or 90 per cent of the share capital, or a corresponding proportion of the votes, as a result of acquisitions, disposal or other circumstances. Specific rules apply with regard to the calculation of voting rights and share capital. Breaches of these disclosure rules will frequently result in fines, which are increasing in severity.

Certain types of convertible securities, such as subscription rights and options, are counted when calculating whether a threshold requiring disclosure has been reached; however, see Section III.i with regard to certain proposed changes in this regard. It is possible, and to some extent customary, to seek irrevocable undertakings or pre-acceptances from major shareholders as well as from key or management shareholders during a stakebuilding process, prior to announcing a mandatory or voluntary bid. Such irrevocable undertakings are typically either drafted as ‘soft irrevocables’ or ‘hard irrevocables’. The latter are irrevocable undertakings to sell the shares regardless of whether a subsequent competing higher bid is put forward. ‘Soft irrevocables’ will normally be limited to a commitment to accept the offer provided that no higher competing bids are made. There are no particular disclosure requirements for such undertakings, other than the general disclosure obligations and the disclosure obligations regarding options and similar instruments as part of stakebuilding, which, however, may imply early disclosure of the undertakings owing to the low thresholds set out by law. In Norwegian legal theory, it has so far been assumed that the disclosure requirements will not be triggered by properly drafted soft irrevocable undertakings.

Notification must be given as soon as an agreement regarding acquisition or disposal has been entered into. Crossing one of these statutory thresholds requires disclosure even if it is ‘passive’ (i.e., caused by changes in the share capital of the issuer where the person crossing the relevant threshold does not acquire any shares or rights to shares or to dispose of any shares). In such cases, notification must be given as soon as the shareholder becomes aware of the circumstances causing the shareholder’s holdings in the company to reach, exceed or fall below the relevant thresholds. Consolidation rules apply, and require the consolidation of shares held by certain affiliates and closely related parties. Hence, the combined holdings of the acquirer or the disposer, or of both, and of a party’s close associates, are relevant when deciding whether any disclosure obligations have been triggered.

**ii Mandatory offers**

If a stake of one-third or more of the votes is acquired (directly or indirectly, or through consolidation of ownership) in a Norwegian target company whose shares are listed on a Norwegian regulated market, but also in, *inter alia*, foreign companies listed in Norway but not in their home country, a mandatory offer to buy the remaining shares must be made. Certain exceptions do apply, the most practical of which is when the shares are acquired as consideration in mergers and demergers. In practice, a mandatory offer usually follows a voluntary offer, triggered by the voluntary offer reaching the mandatory offer threshold. The offeror is further obliged to make subsequent mandatory offers when, as a result of an acquisition, the offeror passes a threshold of 40 or 50 per cent of the voting shares of the company.

Regarding consolidation rules, note that certain derivative arrangements, such as total return swaps, may be considered as controlling votes for the purpose of the mandatory offer.
rules. A voluntary offer will also be subject to certain provisions of the mandatory offer requirements if the offer – if accepted – may take the offeror above the thresholds for a mandatory offer. This means that a voluntary offer document for all the shares in a listed company must, \textit{inter alia}, be approved by the OSE before the offer is made public.

After entering into an acquisition agreement that will trigger a mandatory offer, the acquirer shall immediately notify the target company and the OSE about whether it will make an offer or sell the shares. It is possible to avoid the obligation to make an offer if the acquirer sells the shares that exceed the relevant threshold within four weeks. After announcing that an offer will be made, the announcement may not thereafter be changed to an announcement of sale.

The offeror must then prepare an offer document to be approved by the OSE before it is issued. In practice, the approval procedure takes one or two weeks, or longer if there are difficult issues to deal with or if the OSE finds errors within the offer document. In a mandatory offer document, the offeror must give a time limit of between four and six weeks for acceptance by the shareholders.

The share price offered in a mandatory offer must be equal to the highest price paid by the offeror (or agreed to be paid by the offeror) for shares (or, under the relevant circumstances, rights to shares) in the target company during the previous six months. According to the STA, the takeover authority may invoke that the offer must be based on market price if it is clear that the market price at the time the offer obligation was triggered was higher than the highest share price the bidder paid or agreed to pay. However, a 2010 EFTA court ruling found that this rule did not comply with the EU takeover rules, as it does not provide sufficient guidance on the method concerning how the market price is to be calculated. It has been assumed that the Norwegian legislator is most likely to seek to revise the relevant provision of the STA to meet the requirements of the EU takeover rules. However, this provision has not yet been amended.

A mandatory offer must be unconditional and apply to all issued shares in the target company, and the consideration needs to be in cash; however, it is possible to offer alternative forms of consideration under a mandatory offer (e.g., shares in the offeror) provided that an option to receive the total offer price in cash is also made, and this option is at least as favourable as the alternative consideration. The consideration offered must be unconditionally guaranteed by either a bank or an insurance undertaking authorised to conduct business in Norway.

If the offeror acquires more than 90 per cent of the shares and the capital of the target company, squeeze-out rights will be available.

\textbf{iii \hspace{1em} Voluntary offers}

In a voluntary tender offer (VTO) or exchange offer for a listed company, there is in general no limitation under Norwegian law as to which conditions the offer may contain. A VTO may be launched at the offeror’s discretion. The offeror may also choose to make the offer to only some shareholders. Conditions such as a certain level of acceptance from existing shareholders (90 per cent or two-thirds of the shares and votes), regulatory or competition approvals, completion of satisfactory due diligence and a ‘no material adverse change’ clause are regularly included in Norwegian VTO documents. To complete the transaction quickly or to avoid competing bids, in some cases the offeror may decide to include very few conditions. In other cases, an offeror may decide to include more extensive conditions. In a VTO, the offeror can offer consideration in shares or other non-cash forms, or a combination, also
with cash as an element. In principle, it is also possible to make a voluntary offer conditional upon financing, but the offer document must include information on how the acquisition is to be financed.

There are no provisions regarding minimum consideration in a VTO under Norwegian law, but in general a shareholder may expect to achieve a premium of 20 to 40 per cent compared with the current share price. In recent years, there has been considerable variation in the level of premiums offered in VTOs, with some examples of premiums of around 60 per cent compared with the average in the preceding 30 days.

If a VTO is accepted and brings the offeror control over voting rights so that it triggers an obligation to issue a subsequent mandatory offer, several of the obligations relating to mandatory offers will also apply, including an obligation of equal treatment of shareholders. Under these circumstances, the VTO document must first be approved by the OSE, but the offeror is still free to decide which conditions the voluntary offer may contain. The mandatory offer requirements will not apply if the offeror has reserved the right to refuse or reduce acceptance if the offer gives the offeror at least one-third of the voting rights, or if the offer is addressed specifically to certain shareholders without it being made simultaneously or in conjunction and with the same content.

The offer period for a VTO is between two and 10 weeks, and four weeks frequently used as the initial offer period.

iv **Standstill**
The target company is allowed to take a more or less cooperative approach in a takeover situation. However, there are restrictions on the board of the target company taking action that might frustrate the willingness or otherwise of an offeror to make an offer or complete an offer that has already been made. These restrictions apply after the target has been informed that a mandatory or voluntary offer will be made. During this period, the target company may, as a main rule, not issue new shares or other financial instruments, merge, or sell or purchase material assets or shares in the company. These restrictions do not apply to disposals that are part of the target’s normal business operations or when a shareholders’ meeting authorises the board or the manager to take such action with takeover situations in mind. As a result of this, a considerable number of Norwegian-listed companies have adopted defensive measures aimed at preventing a successful hostile bid.

The Norwegian Competition Act provides that all transactions fulfilling certain thresholds must be notified to the NCA, and that completion is suspended until clearance.

v **Squeeze-out**
It is rare that an offeror can expect to acquire 100 per cent of the shares and votes in the target company through a voluntary or mandatory offer process; however, if the offeror is able to acquire more than 90 per cent of the shares and voting rights, it has the right to acquire (squeeze out) the remaining shares even if the minority shareholders refuse.

The Limited Liability Companies Act and the Public Limited Liability Companies Act provide that if a parent company, either solely or jointly with a subsidiary, owns or controls more than 90 per cent of another company’s shares and voting rights, the board of directors of the parent company may, by resolution, decide to squeeze out the remaining minority shareholders by a forced purchase at a redemption price. Minority shareholders have a corresponding right to demand the acquisition of their shares by a shareholder with a stake of more than 90 per cent of the company’s shares.
The resolution shall be notified to the minority shareholders in writing and made public through electronic notification from the Norwegian Register of Business Enterprises (the Register). A deadline may be fixed, which must be at least two months after the date of electronic notification from the Register, within which the individual minority shareholders may make objections to or reject the offered price. The acquirer becomes the owner of (and assumes legal title to) the remaining shares immediately, following a notice to the minority shareholders of the squeeze-out and the price offered, and the depositing of the aggregate consideration in a separate account with an appropriate financial institution.

If any minority shareholders do not accept the redemption price per share offered, they are protected by appraisal rights that allow shareholders who do not consent to seek judicially determined consideration for their shares at the company’s expense. The courts decide the actual value of the shares. In determining the actual value, the starting point for the court will be to establish the underlying value of the company divided equally between all shares. However, if the squeeze-out takes place within three months of the expiry of the public tender offer period for a listed company, then the price is fixed on the basis of the price offered in the tender offer unless special grounds call for another price.

Provided that the conditions for a squeeze-out are met, it is a straightforward process to have the target company delisted from the OSE or Oslo Axess. However, if these conditions are not met, it could be substantially more challenging to delist the target company even when the offeror has managed to acquire more than 80 per cent of the votes.

### vi Statutory mergers

Subject to the approval of the majority of two-thirds of the votes and the share capital represented at a general meeting of shareholders, Norwegian limited liability companies (LLCs) may merge, creating a company (the surviving company) that takes over all assets, rights and obligations of one or more assigning companies (the surrendering company or companies). The articles of association of a company may provide for a higher majority threshold, but may not set a lower one. Under a statutory merger, the shareholders of the surrendering company have to be compensated by way of shares in the surviving company, or by a combination of shares and cash, provided that the amount of cash does not exceed 20 per cent of the aggregate compensation. If the surviving company is part of a group, and if one or more of the group companies hold more than 90 per cent of the shares and the votes of the surviving company, compensation to the shareholders of the surrendering company may consist of shares in the parent company or in another member of the surviving company’s group. It is further possible to effect a merger by combining two or more companies into a new company established for the purpose of the merger. After completion of a statutory merger, any surrendering companies are dissolved.

Under Norwegian law, a statutory merger will be considered as a continuation of the companies involved in the merger, implying that the transaction does not represent an assignment of the original companies’ rights and obligations.

Certain formalities need to be observed to complete a merger under Norwegian law. A joint merger plan describing the general terms of the merger has to be prepared and negotiated between the surviving and surrendering companies. The joint merger plan must be signed by the board of directors prior to the general meeting of shareholders resolving to approve the merger plan. The board of directors, after signing the joint merger plan, have to issue a report to the shareholders explaining the reasoning behind the merger, and how, *inter alia*, this may affect the company’s employees. If a public LLC (ASA) is involved in a legal merger there are
more detailed requirements for the content of the report. In addition, each of the participating entities’ boards shall ensure that a written statement containing a detailed review of the merger consideration payable to the shareholders of the participating companies is issued, including an opinion of the fairness of the consideration. This statement is to be prepared and issued by an independent expert (such as an auditor) when the participating entity is an ASA. When the participating entity is a private limited company (AS), the statement may be issued by the board and confirmed by the company’s auditor. The resolution to merge the companies must be reported to the Register within certain time limits to avoid the resolutions being deemed void. The shares used as consideration to the shareholders in the surrendering company are issued according to the rules applicable to a capital increase.

Since Norway implemented Directive 2005/56/EC, it is further possible to conduct a statutory merger of a Norwegian company cross-border within the European Union and the EEA; however, public tender offers and other offer structures are often used instead of a statutory merger, which cannot be used by foreign companies (outside the European Union or the EEA), allows only 20 per cent of the consideration to be given in cash, requires more formalities and documentation, and normally takes longer to complete than a public offer. Still, a statutory merger may be suitable when an exchange offer mechanism would not procure complete control under one corporate umbrella, and if there is not enough cash available to effect a mandatory offer and squeeze out the minority shareholders.

Statutory mergers are generally not regulated by the STA’s public takeover rules; however, transactions that are similar in form to mergers (share-for-share exchanges) but whose structures do not meet the formal requirements for a merger under Norwegian legislation, may be subject to the STA’s takeover rules if the target company’s shares are listed on the OSE.

vii Employee board representation
In both ASAs and ASs, employees are entitled to be represented on the board of directors, provided that the number of full-time employees in a company exceeds 30. Under these circumstances, employees will be entitled to elect between one and up to one-third of the members of the board from among the employees. The exact number of employee representatives on a board varies according to the number of employees in the company. Employee representatives will have the same voting rights as the other board members. Employee board representation is not mandatory under Norwegian law, but cannot be rejected if requested by employees when the conditions for representation are fulfilled.

A bidder should note that the employees of a Norwegian subsidiary may also demand to be treated as employees at the Norwegian parent or sub-parent level, thus obtaining representation on the board of directors of the Norwegian parent or sub parent.

viii Requirements of residency
The chief executive officer and at least 50 per cent of the members of the board of directors must be residents of Norway, unless the Ministry of Trade, Industry and Fisheries grants an exemption in an individual case. These residence requirements do not apply to citizens of an EEA Member State, provided the board members are residents of an EEA Member State.

ix Gender requirements
For public LLCs, Norwegian law imposes a requirement that both genders shall be represented on a board of directors. As a main rule, each gender must be represented by at
least 40 per cent on the boards of directors of public companies. Consequently, on a board of five directors there cannot be fewer than two members of each gender. Exceptions apply to the directors elected from among employees. The obligation to have both genders represented on the board does not apply to Norwegian private LLCs.

III DEVELOPMENTS IN CORPORATE AND TAKEOVER LAW AND THEIR IMPACT

i EU initiatives

Several new EU directives, regulations and clarification statements regarding the capital markets are proposed or have been implemented in recent years. Norway will have to adopt and implement some of these to comply with its obligations under the EEA agreement. These EU initiatives are likely to have a direct or indirect impact on the regulatory framework for public M&A transactions in Norway. As a result of these initiatives, several amendments to the STA are expected to take place during the next 12 to 24 months.

The government appointed an expert committee to evaluate and propose relevant amendments to existing Norwegian legislation resulting from amendments to the Transparency Directive, MiFID I and the Market Abuse Directive. The committee was mandated to prepare three separate reports to the government. All three reports have now been delivered. The first report, *inter alia*, proposes implementing certain amendments to the STA with regard to disclosure requirements for derivatives with shares as underlying instruments. According to the proposal, the materiality thresholds and disclosure requirements that apply for acquisition of shares in listed companies shall now also apply for derivatives with shares as underlying instrument, irrespective of such equity derivatives being cash-settled or settled by physical delivery of the underlying securities.

The committee further proposes that both borrowing and lending of shares shall become subject to the same notification regime for both the lender and the borrower. Soft, irrevocable undertakings will remain exempt from the disclosure obligations. The existing disclosure obligations under the STA also include an obligation to disclose information in relation to ‘rights to shares’, regardless of whether the shares already have been issued or not. This is a stricter disclosure and filing obligation than what follows from the minimum requirements set out in the Transparency Directive, and the committee has proposed the obligation be abolished. If adopted by Parliament, Norwegian law will no longer have mandatory disclosure obligations for warrants and convertible bonds not linked to any issued (existing) shares.

The second report, published in January 2017, proposes further amendments to the STA to implement MiFID II and MiFIR into Norwegian law. In April 2018, the Ministry of Finance issued a white paper to Parliament based on the committee’s second report. Then in June 2018, Parliament resolved to implement these proposals into Norwegian law, but the changes do not contain amendments that are directly relevant for the bidder or target in an M&A process.

The third report deals with implementation of the Market Abuse Regulation and includes proposals by which the STA rules governing market abuse are expanded. These include a proposal for new rules concerning ‘market sounding’ that occurs in preparation for a potential transaction, among others. It is also proposed that primary insiders will be personally obligated to publish information about their trading activities in listed financial instruments.
ii  New takeover rules expected
The committee is also working on a report concerning the rules governing voluntary and mandatory offers, with particular focus on the current STA limited regulation of the pre-offer phase. This initiative does not arise out of changes to EU rules but rather the need to review and update Norwegian takeover rules on the basis of past experience and market developments. The committee was originally expected to publish its report in Q2 2018; however, this has been postponed to Q4 2018.

iii  Expected amendments to the prospectus regime
In June 2017, the European Union adopted a new Prospectus Regulation\(^2\) to improve the existing prospectus regime. The regulation replaces the Prospectus Directive.\(^3\) Both the Prospectus Directive and the existing Prospectus Regulation\(^4\) are implemented in Norwegian law, and these rules are set out in the STA and the STR. The requirement of a prospectus or equivalent document will no longer apply to securities offered in connection with a takeover by means of an exchange offer, merger or a division, provided a document is made available that contains information describing the transaction and its impact on the issuer. On 19 June 2018, the government-appointed expert committee delivered a new report in which it proposes amending the prospectus rules in the STA and in the STR by implementing the new Prospectus Regulation into Norwegian law. However, we believe it is unlikely that Norway will be able to finally implement the new Prospectus Regulation into Norwegian law until mid 2019 at the earliest.

iv  New National Security Act
In 2017, the Ministry of Defence issued a proposed Bill and draft resolution to Parliament for implementing the new National Security Act. This proposal grants the government powers to intervene and stop acquisitions of shares in a company holding investments in sectors considered vital from a Norwegian national security perspective. In March 2018, Parliament adopted the proposed Bill but the Act has not yet entered into force. This is expected during Q3 or Q4 2018 and, from that time, Norway will implement a national security review of acquisitions that is similar to the type of review conducted by the US Committee of Foreign Investments.

v  Proposed amendments to the Norwegian financial assistance prohibition
In February 2016, the Ministry of Industry, Trade and Fisheries issued a consultation paper proposing the further easing of the Norwegian financial assistance prohibition rule. The Ministry proposed abolishing the requirement that a buyer (borrower) must deposit ‘adequate security’ towards the target company if the buyer receives financial assistance from the target in the form of security for the buyer’s acquisition financing. If adopted in its current proposed form, Norway will finally have a type of ‘whitewash’ procedure that could work also for leveraged buyout (LBO) transactions. In the past, it has been rather impractical to

obtain such assistance from a target company in typical LBO transactions (see Section VI.ii).
However, a proposal has not yet been put forward to Parliament, and it is too early to say whether this proposal will be forwarded to Parliament in its current form, if at all.

IV FOREIGN INVOLVEMENT IN M&A TRANSACTIONS

Foreign nationals were relatively active in the Norwegian financial markets until a noticeable retreat in 2015, largely as a result of a collapse in oil prices. However, in both 2016 and 2017, foreign bidders returned and, so far in 2018, foreign appetite for Norwegian assets continues to be relatively high.

In the first half of 2017, 176 Norwegian M&A transactions were announced with a deal value of more than €5 million, of which 38.6 per cent involved foreign buyers. Overall, in 2017, the total number of M&A transactions with a deal value of more than €5 million was a record high of 332, of which 42.5 per cent involved foreign buyers. Five of the 10 largest inbound M&A deals during 2017 involved foreign buyers, while seven of the 10 largest inbound private equity transactions involved foreign funds investing in a Norwegian target company.

See Section V for examples of inbound cross-border M&A deals during 2017.

Foreign investors’ appetite for Norwegian assets in the first four months of 2018 has decreased compared with the same period in 2017, at least in terms of number of deals, even though the relative percentage of the total deal count for this period was higher. Six of the 10 largest M&A transactions involved a foreign buyer, three more than in the first four months of 2017, while for the same period in 2016 five of the 10 largest M&A transactions involved foreign buyers. For the same period, 68 Norwegian M&A transactions were announced with a deal value of more than €5 million, of which 47 per cent involved foreign buyers. This is an increase in terms of the percentage of the total deal volume compared with 2017, in which 42 per cent involved foreign buyers. However, in terms of the number of deals, there was a decrease of 23.8 per cent in volume compared with 2017. Examples of inbound cross-border transactions so far in 2018 include Blackstone Group LP’s €805 million acquisition of a stake in Mime Petroleum AS, MacGregor Group’s €87 million acquisition of TTS Group ASA’s marine and offshore operations, and Aviva Plc’s acquisition of Crystal Rig III Limited and Brockloch Rig Windfarm Limited, the Norway-based wind farms, from Fred Olsen Renewables ASA for €133 million.

The foreign ownership rate of shares listed on the OSE at the end of 2017, calculated by market value, was 38.36 per cent, an increase compared with 36.6 per cent in 2016, but still below the record of 40.8 per cent from 2007.

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5 Source: Mergermarket (based on announced deals above €5 million where the target is Norwegian. Excludes lapsed or withdrawn bids).
6 Source: Mergermarket.
7 Ibid.
8 See footnote 5.
9 Ibid.
V SIGNIFICANT TRANSACTIONS, KEY TRENDS AND HOT INDUSTRIES

i Industrials and manufacturing

In 2017, the industrial and manufacturing sector was largest in terms of acquisitions in Norway, accounting for 17.8 per cent of the total deal count for the year. This represented a 1.1 per cent decrease in the total deal volume compared with 2016. However, there was still a 15.7 per cent increase in terms of the number of deals in this segment compared with 2016. The strength of M&A activity during 2017 continued to be driven by this sector benefiting from a weakening Norwegian krone. However, most of the transactions were small. One exception was Hydro ASA’s acquisition of Orkla ASA’s 50 per cent stake in Sapa for €1.41 billion, announced in July 2017. This was the eighth largest M&A transaction concluded last year. Another notable transaction was Triton Partner’s acquisition of a 75.16 per cent stake in Glamox AS for €269 million, announced in September 2017.

The momentum within the industrial and manufacturing sector has continued entering 2018, with 11 deals announced in the first four months, representing 16.2 per cent of the total deal count for the period. The most notable of these deals were MacGregor Group’s acquisition of TTS Group ASA’s marine and offshore businesses for €87 million in deal value and FSN Capital Partners’ acquisition of Morenot Offshore AS, a Norway-based company engaged in providing industrial equipment and machinery to customers in fisheries, aquaculture and marine seismic sector.

ii Technology, media and telecommunications

The strong momentum within the technology, media and telecommunications (TMT) sector continued throughout 2017, accounting for 16.9 per cent of the total volume of deals. TMT was the second most active sector in 2017, with a 0.9 per cent decrease compared with 2016 of total deal volume. In actual number of deals, there was a 16.7 per cent increase compared with 2016. There has also been a substantial increase in the average deal value within the TMT sector. The most notable transaction in 2017 was HgCapital LLP, Intermediate Capital Group PLC, Montagu Private Equity LLP and GIC Pte Ltd and Visma AS’ management’s €4.7 billion acquisition of a 40.74 per cent stake in Visma AS, an Oslo-based software publisher, from Cinven Partners LLP and KKR & Co LP, in a privately negotiated transaction. Other significant deals were InvestCorp’s €190 million acquisition of Abax AS, from Norvestor in an LBO, and Hansen Technologies Limited’s acquisition of Enoro Holding AS, a Norway-based software publisher, from Herkules Private Equity Fund III, for around €65 million.

As in previous years, the majority of deals in this sector were rather small, since several target companies originate from venture capital investments reaching a stage in their development where investors are seeking an exit. Since the post-crisis cooldown, there has been relatively moderate interest in venture capital investments in the Norwegian market, which to a great extent has resulted in the venture capital market lagging behind when compared to more mature companies. However, the trend for more people being attracted to innovative tech investments has continued.

To date in 2018, the volume of deals within the TMT sector accounted for 13.2 per cent of the total deal volume during the first four months. However, with the exception of Melin Medical AS’ €15 million acquisition of CrediCare AS, the transactions have been small.
Based on current market sentiment, there are likely to be relatively high numbers of TMT deals throughout the remainder of 2018, thanks largely to a ‘domino effect’, whereby corporates that were inactive in 2015, 2016 and 2017 continue to replicate peer deal success and related advantages. However, there are some concerns, including that the pricing of companies within this sector has been on the rise for some time, and some commentators feel that there could be a lack of robustness for development.

iii Services
This was another busy sector in 2017, accounting for approximately 11.1 per cent of the total deal count. Although this is less than the 11.5 per cent of the total deal count for 2016, this was one of the most active sectors, with a total of 37 transactions, six more than in 2016. Many corporates in the business services sector continue to experience margin pressure. Technology-led disruptive innovations have the potential to transform the way business service providers operate with the potential for becoming more global. With opportunities for global growth, M&A delivery scale, improved geographical footprint and capability, these are considered an attractive way for creating revenue and cost synergies.

The most notable transaction within the services sector in 2017 was announced in November 2017, when Lowell Group, the UK-based company engaged in receivables management and software segments, announced that it had agreed to acquire the carve-out business of Lindorff Group AB and Intrum Justitia AB for €730 million. The deal included the seller’s businesses in Denmark, Estonia, Finland, Sweden and Norway.

In Q1 2018, eight deals were related to the services sector. The most notable was the acquisition by Everbridge, Inc, the listed US-based software company, for €27.55 million of Unified Messaging Systems ASA (UMS), the listed Norway-based provider of alert solutions that allow public and private entities to communicate with customers and citizens through various channels.

iv Consumer
The consumer and retail sector accounted for 11.7 per cent of the total transaction volume in 2017, a slight increase compared with 2016 (11.5 per cent). In terms of number of transactions, the sector showed a 25.8 per cent increase compared with 2016. In January 2017, Guy Hands (Private investor) announced that he had acquired McDonald’s Corporation (Nordic Operation), a US-based fast-food chain for a total consideration of €421 million.

Other major deals were DCC Plc’s acquisition of Esso Norge AS (142 retail petrol stations), for €275 million, and FSN Capital Partner’s acquisition of Active Brands AS, a Norway-based sportswear and sports equipment supplier from Holta Invest AS, for more than €122 million.

In Q1 2018, six of a total of 55 deals were related to the consumer and retail sector, two fewer than in Q1 2017.

v Energy (including oil and gas)
Throughout 2017, there was a clear improvement in oil and gas prices, and oil investments started to slowly improve. Overall, 10.5 per cent of all deals in 2017 were related to energy, oil services and the offshore sector, of which the oil and gas segment accounted for 6.9 per cent. The oil and gas industry has continued to reconfigure its business model to sustain and grow in a lower oil price environment. Reduced oil prices in 2016 led to many sponsors taking an interest in exploration and production (E&P) assets at favourable prices, which continued
into 2017, resulting in increased interest in such assets in general. The most noteworthy transaction was announced in August 2017 – the €6.325 billion acquisition of Maersk Oil & Gas by Total SA, the French oil and gas exploration and production company.

Notable transactions within the E&P segment included Neptune Oil and Gas Limited’s acquisition of a 70 per cent stake in ENGIE E&P International SA’s oil fields in France, the Netherlands and Norway at a deal value of €4.61 billion, Aker PB acquiring Hess Norge AS for €1.63 billion, and Statoil ASA acquiring a 51 per cent stake in the Martin Linge field for €1.2 billion.

The offshore supply vessel sector has seen some major distressed transactions, the most notable being an agreement signed by senior lenders, bondholders and F-Shiplease AS to acquire a 98.7 per cent stake in Farstad Shipping ASA via a debt/equity swap. In March 2017, it was announced that Solship Sub AS of Norway had agreed to acquire the entire share capital (291,330 million ordinary shares) of Deep Sea Supply Plc, a Limassol-based provider of deep sea freight transportation services, for €0.146 per share. Solstad Offshore ASA also agreed to acquire the entire share capital of Farstad Shipping ASA.

Within the electric power supply market, it was announced in April 2017 that Citi of Oslo had acquired a 46.27 per cent stake in Hafslund ASA from Fortum Oyj AB, a listed Finland-based energy group engaged in producing power from nuclear and wind sources, for €969 million. In September 2017, it was announced that the energy group Fredrikstad Energi AS had agreed to acquire Gauldal Nett AS from Gauldal Energi AS, a hydroelectric power company, for an undisclosed consideration.

In Q1 2018, five transactions were related to the oil and gas sector, which is two more than in Q1 2017. Two were in the E&P segment and the other three in the oil services and equipment market. However, within the latter segment, potential sellers continue to be reluctant to initiate sales processes, preferring to use bilateral sales processes rather than auctions. We expect that this segment will continue to improve in 2018, depending on changes in oil prices.

Private equity
The number of transactions involving private equity (PE) sponsors either on the buy side or sell side increased by 54.7 per cent in 2017. Regarding buyout investments by volume, Sweden saw the highest volume with 34 per cent, followed by Denmark with 27 per cent and then Finland and Norway with 20 per cent each.

Norway’s PE industry is largely driven by new investments and add-ons, but there was also a significant increase in the number of exits. Of all the transactions during 2017, half were new investments and add-ons, 14.6 per cent were secondary and 35.4 per cent were exits. However, of the deals involving PE sponsors, the average reported deal size improved significantly from €368 million in 2016 to €567 million in 2017. Of the 10 largest disclosed transactions, nine had a deal value exceeding €100 million (there were seven in 2016), and three of the 10 largest announced and completed transactions involved PE.

Among the most notable PE deals in 2017 were (1) an investor group, comprised of HgCapital LLP, Intermediate Capital Group PLC, Montagu Private Equity LLP and GIC Pte Ltd and Visma AS’ management, acquiring a 40.74 per cent stake in Visma AS for €4.7 billion, (2) InvestCorps’ €190 million acquisition of Abax AS and (3) Triton Partners’ €269 million investment in Glamox AS. In May 2017, it was announced that Neptune
Energy Group, a company controlled by CVC Capital and Carlyle, had agreed to acquire ENGIE E&P International SA for €3.6 billion. This was the second-largest private equity deal in the Norwegian market in 2017.

The PE market has experienced a clear uptick at the beginning of 2018, with a 62.5 per cent increase in announced deals compared with Q1 2017, but with a significant decrease in average deal sizes. This reflects the fact that Norway’s economic activity is expected to firm up gradually, thanks to higher private consumption and a rebound in non-oil investment, helped by better global prospects and a weaker currency. A majority of PE professionals expect a rising number of M&A transactions with PE involvement in 2018, at least at a global level, even if they are less confident than in the past two years.

FSN Capital AS agreed to acquire Mørenot Offshore AS for an undisclosed consideration at the beginning of 2018. Norwestor Equity’s acquisition of Sperre Insustri AS, a producer of compressors and air reserves, for an undisclosed consideration, was announced in February.

Many PE funds continue their plans to exit some of their existing portfolio companies. Some of these processes were put on hold when the market was hit by declining oil prices, but are expected to be reinitiated as soon as sellers feel they have more clarity in the short to medium term. We also expect an increase in the number of PE and venture capital-related exits, add-ons and secondary transactions, in particular within the TMT sector, consumer goods and retail sectors in the next 12 to 24 months. The number and size of deals involving PE sponsors will depend on market developments and volatility. Some large distressed assets within the oil and gas segment may also tempt some funds into opportunistic investments.

VI FINANCING OF M&A: MAIN SOURCES AND DEVELOPMENTS

The high-yield bond market has recovered from a period in the doldrums and is now quite buoyant. Higher and more stable oil and gas prices, particularly during the second half of 2016 and throughout 2017, combined with capital continuing to be inexpensive and plentiful, has contributed to a significant strengthening of the credit markets. Bidders are again considering high-yield bonds as a means of financing new acquisitions.

While some Norwegian banks continue to be selective even at the beginning of 2018, in particular for projects exposed to the oil and gas industry, the presence of alternative lenders and institutional investors in the form of collateralised loan obligations funds (CLOs) flooding the international financing markets with an ever-more borrower-friendly documentation, combined with an improved bond market, have created a very borrower-friendly environment. The trend of unitranche or term loan B-style (TLB) loans spreading globally continues and funds offering these types of loan products are marketing their products particularly towards PE sponsors.

i M&A financing

Traditionally, third-party financing of acquisitions is provided by way of bank loans. In large transactions, the senior loan will be governed either by Norwegian or English law, with one bank acting as agent for the syndicate of lenders. In syndicated transactions, the senior loan agreements used will normally be influenced by the forms used internationally, in particular the standard forms developed by the Loan Market Association. Acquisition financing (in particular for private equity transactions) tends to be provided by way of two or sometimes
three layers of debt, with subsequent seniority. In recent years, generally we have witnessed a greater variety of combinations of debt layers and lenders involved, especially in larger LBO transactions.

Increasing competition from the high-yield bond market, unitranche funds (see below) and mezzanine providers, which ask for high interest rates, has made mezzanine financing less competitive than other options. It is rarely seen for new deals, although some traditional mezzanine funds are starting to adapt to the new market situation by offering products similar to unitranche loans. There is an increasing use of second lien facilities instead.

Using debt securities such as high-yield (junk) bonds for acquisitions has not been common in Norway, mainly because, compared with financing an acquisition with a credit facility, financing through a high-yield bond debt involves coordinating the closing of a transaction with what is, in fact, public financing. In most cases, the acquisition will be subject to various conditions, typically including various forms of regulatory approval. Funding an acquisition through a traditional credit facility is generally more feasible than a high-yield bond. Historically, larger listed corporations have dominated acquisition financing obtained through the Norwegian bond market. Such corporations have frequently been willing to take a practical approach by issuing bonds and uploading debts on their balance sheet to have dry powder easily available for future acquisitions without necessarily having to take into consideration how to coordinate a drawdown with the conditions precedent under a pending sale and purchase agreement. Such instruments would generally be documented under New York or English law, or Norwegian law for issue in the local market. However, from 2012 to September 2014, acquisition financing raised in the Norwegian debt capital market was increasingly popular. During this period, it also became fairly common among sponsors to attempt to refinance acquisition debt post-completion by using the Norwegian bond market. Bonds governed by Norwegian law are usually issued pursuant to the standard terms of Nordic Trustee ASA, which acts as the trustee for the majority of bonds issued by Norwegian companies.

Between May 2016 and the first half of 2018, the bond market has been improving significantly. Bidders are again raising financing in the high-yield bond market in connection with Norwegian leveraged acquisitions. We have also observed an increasing number of sponsors refinancing acquisition debt post-completion at favourable coupon rates by using the bond market. We expect that the high-yield bond market’s popularity for raising acquisition financing will continue (depending on how the debt capital markets develop).

In the past year, there has been increased activity from non-bank (alternative) lenders and funds that are offering to replace or supplement traditional senior secured bank loans to finance M&A transactions. The products these lenders are offering typically include TLB facilities and unitranche loans.

Vendors may occasionally also be willing to bridge the valuation gap by offering a bidder to finance parts of the purchase price to achieve the price the vendors are asking. If structured as vendor loan notes, these will sometimes (but not always) be subordinated to the other elements of the acquisition financing. Vendor loan notes will then normally be on similar terms (or senior) to the subordinated loan or preferred equity capital provided by the private equity sponsor, but are usually priced to give a lower rate of return. The split between debt finance and true and quasi-equity will be determined on a transaction-by-transaction basis, and particularly by reference to the underlying business and its funding requirements.

Other forms of debt financing that may be used in acquisitions, such as securitisations, are relatively rare in Norwegian business combinations.
Financial assistance and debt pushdown

A buyer may also want to borrow funds from a target company (or its subsidiaries, following completion of a transaction). While as a general rule there are no major obstacles in this regard, in an asset deal where the business assets are bought by the entity financing the deal, a ‘debt pushdown’ is substantially more difficult in a share transaction. Public and private LLCs have been prohibited from providing upstream financial assistance in connection with the acquisition of shares in a target company (or its parent company).

Since 1 July 2013, the former prohibition on financial assistance has been eased by the introduction of a type of whitewash procedure. Under this rule, both private (AS) and public (ASA) limited liability target companies can, subject to certain conditions, provide financial assistance to a potential buyer of shares in the target company itself. This must be granted based on normal commercial terms and policies, and the buyer must deposit adequate security for his or her obligation to repay any financial assistance received from a target company.

Financial assistance must also be approved by the target’s general assembly by a special resolution. This requires the same support from the target’s shareholders as would be needed to amend the target’s articles of association (i.e., unless otherwise required by the articles themselves, at least two-thirds of the votes cast and the share capital represented at the general meeting). In addition, the target’s board has to prepare a special report that contains information about:

- the proposal for financial assistance;
- whether financial assistance will be to the target’s corporate benefit;
- conditions that relate to the completion of the transaction;
- an assessment of the effect of the assistance on the target’s liquidity and solvency; and
- the price payable by the buyer for any shares in the target company or any rights to any such shares.

This report has to be attached to the notice of the general meeting sent to shareholders.

The target company’s board will also be under an obligation to obtain a credit rating report on the party that is to receive such financial assistance.

The requirement to deposit ‘adequate security’ for the borrower’s obligation to repay any upstream financial assistance provided by a target will, however, mean that it becomes impractical to obtain direct financial assistance from the target company in most LBO transactions due to the senior financing banks’ collateral requirements in connection with such deals. Banks normally request extensive collateral packages, so in practice there will be no ‘adequate security’ left, or available, from the buying company (or its parent company) for securing any financial assistance from the target group, at least for the purchase of the shares. The extent to which the offered security is ‘adequate’ may mean that the target has difficulty providing upstream assistance unless the new owners, or the vendors, are able to come up with some additional collateral. Consequently, in practice, the new rules have so far had little impact on how LBO financing is structured under Norwegian law, at least in private equity transactions. In most cases, the parties continue to pursue debt pushdowns by refinancing the target company’s existing debt, as had previously been the case. It was proposed in 2016 that the requirement that a buyer (borrower) must deposit ‘adequate security’ towards the target company be abolished. However, it still unclear when and if this proposal will be
implemented. If it is adopted by Parliament, it will be possible in LBO transactions for a buyer to receive financial assistance from the target company in the form of security for the buyer’s acquisition financing. (See also Section III.v.)

**iii Corporate benefit**

The power of an entity to grant security or guarantees is limited by the doctrine of corporate benefit in some situations. Under Norwegian law, a board of directors has a general duty to act in the best interests of the company and all its shareholders. There is currently limited case law to determine the boundaries of the corporate benefit requirements, but it has been assumed that boards enjoy fairly wide discretion to consider the corporate benefit. If a board, following due consideration, concludes that a transaction is in a company’s interests, it will be difficult to challenge a well-documented resolution to this effect.

However, under Norwegian law it is uncertain to what extent a group benefit is sufficient when there is no benefit to the individual group company, for example, in connection with granting a guarantee or providing a security. In principle it is assumed that a Norwegian company is able to provide upstream and cross-stream guarantees and security provided that:

- this will not jeopardise its continuing existence;
- its corporate objects are not transgressed by such transactions;
- it can be argued that cross guarantees benefiting the company exist or that the relevant group company receives any type of guarantee fees; and
- guarantees and securities are not in breach of the financial assistance propitiation (see Section VI.ii).

The Public Limited Liability Companies Act and the Private Limited Liability Companies Act now both contain a provision in Section 8-7(3) No. 3 stating that a loan or security to the benefit of another legal entity within the group is not included in the prohibition on loans or security to a company’s shareholders, provided that the loan or security will economically benefit the group. This provision indicates that a group benefit may be sufficient when issuing intra-group guarantees, even if there is no direct benefit to the individual group company that is issuing the guarantees.

The validity of a legal act entered into by a legal entity can be set aside if, as a result, its objects are transgressed and the counterparty was or ought to have been aware of the transgression. Lenders will typically require the submission of corporate resolutions in which the borrower’s board of directors confirms that the transactions contemplated by the finance documents to be entered into by the Norwegian company are beneficial to the interests of the company. On this basis, lenders can argue that they did not know or could not have known that the corporate objects had been transgressed.

**iv Need for shareholder approval**

Both the Public Limited Liability Companies Act and the Private Limited Liability Companies Act require that agreements between a company and a shareholder, the shareholder’s parent company, a director or the general manager, a shareholder’s related party, or someone who acts according to an agreement or understanding with any of the aforementioned parties, must be approved by the company’s general meeting if the consideration to be paid by the company has an actual value exceeding 10 per cent (AS) or 5 per cent (ASA) of the company’s share capital at the time of the transaction. It has been assumed that the rules in principle also apply to loans and guarantees, provided the interests and fees paid exceed these thresholds.
If the rules apply, the board of directors must issue a report to the shareholders, including a statement that there is a reasonable correlation between the value of the consideration to be paid by the company and the value of the consideration received by it. In addition, an independent expert (ASA) or the company’s auditor (AS) must issue a statement confirming that the board’s statement is correct.

Certain exemptions apply, such as agreements entered into following the rules governing the incorporation or share capital increase against a contribution in kind, certain management remuneration arrangements, transfers made according to publicly quoted prices, and what are referred to as ‘agreements entered into as part of the company’s normal business and that contain price and other terms that are customary for such agreements’. An exemption rule now exists for intra-group agreements entered into between a parent company and a subsidiary provided that the parent owns all shares in the relevant subsidiary and the loan or security is to the benefit of the group, or the parties have adopted the new whitewash procedures relating to financial assistance.

As long as a parent company controls all shares in the relevant subsidiary issuing the intra-group loans and guarantees used, it can now be argued that there will no longer be a need for banks to request that loans and guarantees have to be approved by the shareholders. Approval may still be necessary in cases as referred to in Section VI.ii or where the parent does not control all shares in the relevant group companies issuing the loans or securities. Intra-group loans may trigger a need for shareholder approval from the receiving subsidiaries’ shareholders, unless they are entered into as part of the relevant subsidiaries’ ordinary business activity and contain prices and other terms that are normal for such agreements. In legal theory, it has been argued that intra-group loan agreements entered into in connection with M&A transactions very often must be considered as falling outside the normal business activity of the respective company receiving the financing and, therefore, under all circumstances need to be approved by the company’s shareholders.

v Pricing of credit

At the time of writing, the pricing of credit in the Norwegian leveraged finance market seems to be relatively similar to the situation in 2017. To be competitive, Nordic banks are now offering TLB for 375 to 400 basis points over the Norwegian interbank offered rate (NIBOR). There has been a move away from the traditional senior A/B tranches (with even amortisation on the A tranche and bullet repayment on the B tranche) to an all-TLB structure with minimal front-end amortisation. Typically, the margin on the A tranche will be 50 basis points lower than for the B tranche. On some smaller deals where the banks’ acquisition financing department has not been involved, margins have been more favourable. A tranches throughout 2017 and into 2018 have been less frequent than in previous years. When banks insist on an A/B tranche structure, they can seldom expect to achieve more than a 20/80 split, compared to a 40/60 split, or sometimes 50/50 split, as was the norm in the years immediately following the credit crunch.

Leverage multiples have continued to increase since 2015, all depending on each individual investment case. During 2017, we observed everything from 2.5 to 6.7 times EBITDA (all senior) and combinations of senior and high-yield bonds around 7 times EBITDA, even if most banks would hold back on accepting an increase in leverage multiples above 5.5 times EBITDA. For some large Norwegian targets with attractive cash flow, there were indications that some international banks were willing to support 7 times leverage
Norway

(potentially 7.5 times if cash flows or valuation were supportive), while most Nordic banks would, subject to credit committee approval, be willing to accept a debt structure of 6.5 times EBITDA with senior debt leverage between 5 to 5.5 times EBITDA.

Throughout 2016 and 2017 and the beginning of 2018, most Nordic banks seem to be attempting to resist equity contributions below 35 per cent. There has been a clear increase in acquisition multiples and banks prefer that a borrower finances parts of the increase itself by contributing more equity to the structure. Sponsors may still attempt to circulate draft term sheets to the banks with ‘financing ideas’ with only a 20 to 30 per cent equity contribution from the sponsor; there were deals of this kind in both 2016 and 2017.

In general, in our view the arrangement fee in bilateral transactions in May 2018 was between 225 and 275 basis points. In syndicated deals, the arrangement fee now seems to be standard at 250 basis points for medium-sized transactions. If a syndicate consisted of two or three banks, of which one is a foreign bank, this very often increased the arrangement fee by 50 to 75 basis points compared with a bilateral transaction. Agency fees have also increased. The banks blame this, *inter alia*, on more cumbersome obligations to comply with ‘know your customers’ guidelines.

For larger deals, unitranche structures combining senior and subordinated debt into one debt instrument at a blended price seem to have replaced traditional mezzanine. Throughout 2017, we observed some international banks willing to propose term B, C, D, E and F-style loan facilities for financing Norwegian assets at very favourable rates.

Up to May 2018, three PE sponsor-backed M&A deals were refinanced by issuing high-yield bonds in the debt capital market, one less than during the same period in 2017. These were achieved through interest rates from 550 to 700 basis points over NIBOR.

### vi Financial covenants, mandatory prepayments and excess cash sweep

A full suite of financial covenants more or less used to be the norm in the leveraged debt market, usually comprising leverage, interest cover, cash-flow cover and restrictions on capital expenditure, and such covenants would be tested frequently. Borrowers would seek to amend the interest cover covenants to provide additional headroom.

However, there has been an explosive development in financing provided by high-yield bonds issued in the debt capital market. Bond financing may still retain incurrence-based financial covenants (i.e., compliance with a fixed-charge covenant test or leverage test measured at the time debt is incurred, investments are made or dividends are issued). Nowadays, most Norwegian banks are willing to grant acquisition financing only based on leverage and cash flow cover covenants.

Throughout 2017 and into 2018, in larger deals with an international banking syndicate, it has become the norm to use cove lite-like terms for LBO transactions, but banks will normally seek to resist such terms on small to medium-sized transactions. To meet increased competition on smaller deals, banks continue to ease back on some of their terms and there has been a move towards more relaxed terms (covenant-loose) for senior debt in the leveraged market for mid-market deals. Typically, interest cover and capital expenditure covenants are not seen very frequently in leveraged finance transactions.

Equity cure rights (the right to cure breaches of financial covenants by injecting additional equity) are generally accepted among banks. However, permitted amounts, their

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10 In a syndicated loan agreement, one bank will act as an agent on behalf of the other banks in the syndicate according to a clause in the agreement. For this, the borrower will have to pay an annual agency fee.
use in consecutive financial quarters and the application of equity cure proceeds to repay debt are subject to negotiation. Banks will generally tend to restrict equity cures and will try to ensure that as much as possible of the equity cure amount is being applied to prepayments. By mid 2018, there seemed to be a general consensus among the larger banks that they would be prepared to accept equity cure rights of up to four times the terms of the facilities, even though it was known that, for occasional deals, banks had been willing to move to up to five times. This is more or less the same as for 2017. We have now also started to see increased pressure on banks to accept EBITDA cures, and there have now been deals in Norway conducted with this type of cure.

The scope of agreed carve-outs and de minimis thresholds for mandatory prepayment in cases of disposal proceeds, acquisition proceeds, insurance proceeds and excess cash flow continue to be the subject of hard negotiations, and will vary according to the deal. However, since 2013, the sweep percentage has steadily gone down, and the downwards ratchet leverage levels at which a cash sweep ceases to apply have started to increase. Entering 2018, it is not uncommon for a cash sweep provision to cease to apply when the leverage levels have been reduced by 25 per cent compared with the situation per drawdown.

Provided that the current sentiment in the debt market continues, we expect banks’ terms and conditions in the leveraged finance sector may be forced to return to very close to those of the pre-crisis era. Obviously, banks will seek to hold back this development as long as possible. How far sponsors are able to drive the banks in this respect remains to be seen.

VII EMPLOYMENT LAW

Under Norwegian law, employees are afforded protection through legislation, mainly the Workers’ Protection Act (the Act), which implements the Acquired Rights Directive and collective bargaining agreements. The Act further includes protection against, inter alia, unlawful dismissals and mass layoffs.

Private acquisitions of or public offers for shares in a target company will not generally affect the terms of an individual’s contract of employment with the target company. A transaction will not itself trigger any duties towards the target company’s employees for the new shareholder. However, the target company is duty-bound to inform the employees.

When a business (asset) is acquired, according to the Act, employees as a main rule have the right to have their employment contracts transferred to the purchaser, and the purchaser will therefore assume all rights and obligations of the transferor, provided that the unit being transferred is an independent economic unit that keeps its identity subsequent to the transfer. Certain exceptions apply to pension regimes. An employee may refuse the transfer of his or her employment to the new employer. The former and the new employer shall, as early as possible, provide information concerning the transfer, discuss it with the employees’ elected representatives and then inform each employee. Similar provisions are often provided for in collective bargaining agreements, and the provisions in these agreements may therefore also apply to share transactions.

Employees are protected against termination based on a transfer of business, but terminations resulting from rationalisation measures may take place. The rules for asset transfers also apply in cases where the identity of the employer changes after a merger.

The Act sets out detailed rules that must be observed with respect to, *inter alia*, workforce reductions, dismissals and redundancy notices, and transferring and relocating employees, in particular in a business combination that takes place as an asset deal. These rules are supplemented by notification and discussion obligations in connection with a business combination set out in collective bargaining agreements (if applicable) with some of the labour unions.

Furthermore, the Norwegian Reorganisation Act of 2008 must be observed prior to plant closures and mass lay-offs. This Act sets out detailed rules and imposes an obligation on the owner of a business if it is considering a workforce reduction that involves more than 90 per cent of the company's workforce or if it is considering closing the business activity.

In March 2015, the Conservative government surprisingly reintroduced a Bill proposal implying changes to the rules relating to restrictive covenants in employment relationships. The Ministry of Labour under the previous government had introduced the basis for the proposed amendments in 2010. The Bill proposal was never put forward. However, the proposed changes have now been reintroduced and, in spite of objections from several employer and business organisations, Parliament has resolved to adopt the proposal.

From 1 January 2016, non-recruitment clauses between an employer and other businesses will be invalid except when such undertakings are agreed in connection with takeover situations. Since 1 January 2016, however, in takeover situations, a non-recruitment clause can only be agreed for a maximum of six months from the date on which the parties resolved to terminate negotiations if negotiations fail. Non-recruitment clauses can further be agreed for a maximum six-month period from the date of transfer of a business provided the employer has informed all affected employees in writing.

It is not obvious if the ‘letter of the new law’ also prohibits a seller and a buyer in a share purchase transaction from agreeing non-recruitment clauses for longer periods, provided the target company itself (as the employer of the relevant employees) is not a direct party to the agreement. It can be argued that a non-recruitment clause in a share purchase agreement does not violate the new legislation as long as the non-recruitment clause only refers to the target company's employees, and the target company itself is not a party to the agreement. There is a risk that non-recruitment clauses agreed for longer periods in share sale and purchase transactions may still be invalid. The basis for this is that even if the target company is not a direct party to the sale and purchase agreement, the effects of the clauses in share purchase agreements may still turn out to be the same as if a target company had become a party to the agreement. Consequently, it can be argued that non-recruitment clauses agreed for longer durations in share purchase agreements at least violate the spirit of the new legislation, and thus must also be considered prohibited.

**VIII  TAX LAW**

### i  Acquisition of shares

Norwegian shareholders, as LLCs and certain similar entities (corporate shareholders), are generally exempt from tax on dividends received from, and capital gains upon the realisation of, shares in domestic or foreign companies domiciled within EU and EEA Member States. Losses related to such realisation are not tax-deductible. Consequently, corporate shareholders may sell shares in such companies without being taxed on capital gains derived from the sale. Costs incurred in connection with the sale of shares are not tax-deductible. Certain restrictions exist regarding foreign companies not located in EU or EEA Member...
States, or located in low-income tax states within EU and EEA Member States, that are not conducting businesses out of such countries (controlled foreign companies (CFC) rules). On 1 January 2012, Norway abolished the former 3 per cent clawback rule on capital gains so that capital gains earned by corporate shareholders has become subject to zero tax. This applies regardless of whether the exempted capital gain is derived from a Norwegian or a qualifying non-Norwegian company. Dividends received by a Norwegian company on business-related shares in group subsidiaries within the EEA, held directly or indirectly with more than 90 per cent inside the EEA, are also exempt from Norwegian corporate tax in the hands of the receiving corporate shareholders. The 3 per cent clawback rule will, however, apply to dividends received by corporate shareholders owning less than 90 per cent of the shares, and for foreign corporate shareholders with a permanent establishment in Norway that receive dividends from Norwegian companies, subject to such foreign corporate shareholders participating in or carrying out business in Norway to which such shareholdings are allocated. Under these circumstances, 3 per cent of dividends are subject to taxation as ordinary income at a rate of 23 per cent (reduced from 24 per cent with effect from 1 January 2018) (giving an effective tax rate of 0.69 per cent).

Dividends received or capital gains derived from realisations of shares by shareholders who are Norwegian private individuals (personal shareholders) are taxable as ordinary income. With effect from 1 January 2018, the government increased the tax rate on dividends received from or capital gains derived from the realisation of shares held by Norwegian private individuals. According to the new rules, the amount derived from, inter alia, such distributions or capital gains must be multiplied by 1.33 (an increase from 1.24 in 2017), and this grossed-up amount is thereafter to be taxed as ordinary income for private individuals at a rate of 23 per cent. In effect, this increases the effective tax rate on distributions and gains from the 29.76 per cent rate under the former tax regime to 30.59 per cent. Any losses are tax-deductible against a personal shareholder’s ordinary income.

Capital gains from the realisation of shares in Norwegian LLCs by a foreign shareholder are not subject to tax in Norway unless certain special conditions apply. The extent of the tax liability of foreign shareholders in their country of residence will depend on the tax rules applicable in that jurisdiction.

Normally, an acquisition of shares in a Norwegian target company will not affect the target’s tax position, including losses carried forward, and such attributes normally remain with the target unless the tax authorities can demonstrate that the transfer of shares is primarily tax-motivated.

ii Acquisitions of assets

Capital gains derived from the disposal of business assets or a business as a whole are subject to 23 per cent tax and losses are deductible. A Norwegian seller can defer taxation by gradually entering the gains as income according to a declining balance method. For most assets, the yearly rate is a minimum of 20 per cent, including goodwill (however, see Section VIII.x).

The acquirer will have to allocate the purchase price among the assets acquired for the purposes of future depreciation allowances. The acquirer will be allowed a stepped-up tax basis of the target’s asset acquired. The part of the purchase price that exceeds the market value of the purchased assets will be regarded as goodwill. However, the tax authorities may dispute the allocation to goodwill instead of other intangible assets with a considerably longer lifetime.
As gains from the disposal of shares in LLCs are generally exempt from tax for corporate shareholders, this will, in many instances, make the sellers favour a share transaction over an asset transaction. This will not, however, be the case in transactions involving a loss for the seller, as a loss will still be admitted for the sale of assets.

iii Mergers

Under Norwegian law, an enterprise can be acquired through a tax-free statutory merger in return for the shareholders in the transferor company receiving shares as consideration. Such a transaction will be tax-exempt for both the shareholders and the merging companies. To qualify as a tax-exempt merger, all companies involved need to be domiciled in Norway; however, according to amendments made to the tax regulations in 2011, cross-border mergers and demergers between Norwegian companies and a company domiciled within the European Union or the EEA (subject to certain conditions being fulfilled) can also be carried out as tax-free mergers or demergers under Norwegian law.

To qualify as a tax-free merger, all tax positions will have to be carried over without any changes, both at the company level and at the shareholder level.

A cash element may be applied as consideration in addition to shares in the transferee company, but may not exceed 20 per cent of the total merger consideration. Cash payments will be considered as dividends or as capital gains, both of which will be taxable if the receiver is a personal shareholder. If cash compensation shall be considered as dividends, it must be divided between the shareholders in accordance with their ownership in the transferor company. Dividends or gain will be tax-exempt if the shareholder is a corporate shareholder, except for the tax on 3 per cent of their dividend income derived from shares in the merging companies, which is taxed at a tax rate of 23 per cent if the shareholder owns less than 90 per cent of the shares in the merging companies.

iv Distribution of dividends and interests

No withholding tax is imposed on dividends or liquidation dividends paid by a Norwegian LLC to an EEA-resident corporate shareholder provided that the shareholder is genuinely established and conducts a real business activity in the relevant jurisdiction. Furthermore, an EEA-resident corporate shareholder must be comparable to a Norwegian LLC. In this context, an assessment would need to be performed to determine whether the company is genuinely established pursuant to a business motive and that the establishment is not purely tax-motivated. The assessment will differ according to the nature of the company in question, and it must be assumed that assessments of a trading company and a holding company will not be the same. If the required criteria are not met, the withholding tax rate in the applicable double taxation treaty for the involved jurisdictions will apply. If a foreign holding company is considered an agent or nominee for another real shareholder (not a legal and economic owner of the dividends) or a pure conduit company without any autonomy to decide what to do with its income, the tax authorities may apply the default 25 per cent withholding tax rate (i.e., not accept treaty protection). Foreign buyers of Norwegian assets should thus be cautious when setting up acquisition structures and include tax reviews of any prior holding structures when conducting due diligence.

Interest payments are not subject to withholding tax, even if payments are made outside the EEA; however, the government has proposed a new tax reform, which includes a rule allowing the government to introduce withholding tax on interest and royalty payments (see Section VIII.x). Regarding excessive interest and reclassified loans, see Section VIII.vi.
Deducting losses on receivables between related companies

A company may finance its subsidiaries either by loans or by equity. If using a relatively high amount of loan financing, the parent company could deduct the losses on receivables (bad debt) in the case of an unsuccessful investment while realising a tax-exempt gain on shares where an investment is successful. As of 6 October 2011, a parent company’s right to deduct losses on receivables on related entities where the creditor has ownership of more than 90 per cent has been restricted. However, the limitation will not apply to losses on customer debt, losses on debts that represent previously taxed income by the creditor, or losses on receivables arising from mergers and demergers.

Thin capitalisation and transfer pricing

Under Norwegian law, significant restrictions on the deduction of interest paid to ‘related parties’ were implemented with effect from 1 January 2014. Additional restrictions were implemented with effect from 1 January 2016. The term ‘related parties’ covers both direct and indirect ownership or control, and the minimum ownership or control requirement is 50 per cent. Where a related party to the borrowing company has issued security for loans raised from an external lender (typically a bank), the interest paid to the external lender shall be considered ‘internal’ interest that will be subject to limitations for deduction for tax purposes. Nevertheless, a loan from an unrelated party secured by a guarantee from another group company shall not be considered an intra-group loan provided that 50 per cent or more of shares in the group company issuing the security are owned or controlled by the borrowing company. The limitation rule will also not apply to third-party loans in situations where a related party provides a pledge over that party’s shares in the borrowing company, or provides a pledge or charge over the related party’s outstanding claims towards the borrowing company. Further, negative pledges provided by a related party in favour of a third-party lender will not be deemed as security within the scope of the interest limitation rule. Notwithstanding the above, the interest limitation rule will still apply if the loan from an unrelated party can be considered as a de facto back-to-back loan from a related party.

According to the interest limitation rules, interest expenses will, in general, still be fully deductible against interest income. However, interest expense excluding interest income (net interest expense) will only be fully deductible if the total amount of interest expenses does not exceed 5 million kroner (a threshold value, not a basic tax-free allowance) during a fiscal year or if the interest expense is paid to a non-related party. Outside these situations, from 1 January 2016 the rules hold that net interest expenses paid to a related party can only be deducted to the extent that external and internal interest expenses combined do not exceed 25 per cent (previously 30 per cent) of the taxable profit after adding back net internal and external interest expenses and tax depreciation. This is a type of taxable approach to a company's EBITDA. If a company has paid interest on intra-group loans exceeding 25 per cent of the calculation basis, any excess amount shall be added back to its taxable income.

For the purpose of calculating the net interest paid, which may be subject to limitations, the term ‘interest’ includes any payment considered as interest for Norwegian tax purposes, including certain premiums and discounts. The same applies to gains and losses on receivables issued at a higher or lower price than the strike price. However, gains and losses are not regarded as interest income or interest expenses for the person who has acquired the debt in the secondary market. Currency gains or losses are not considered as interest; nor are gains or losses on currency and interest derivatives.
Further, the limitation of interest deductions shall be calculated on a per-legal-entity basis, and any related-party interest payments that are not deductible due to such limitation may be carried forward for a maximum period of 10 years. Interest received shall be classified as taxable income for the creditor company, even if the debtor company is denied deductions due to the proposed limitation. Group contributions and losses carried forward may not be used to reduce income resulting from interest limitation. Interest limitation will thus result in payable tax.

At the end of the 2016, the EFTA Surveillance Authority (ESA) issued a reasoned opinion stating that the Norwegian interest limitation rules of 2015 in their current form violate the freedom of establishment, and thereby Article 31 in the EEA agreement. In a response dated 31 January 2017, the Ministry of Finance argued that the Norwegian interest limitation rules are compatible with Norway’s EEA obligations; however, the Ministry also described certain proposed changes to the rules that should be implemented. The next step is for the ESA to decide whether it will take Norway to the EFTA Court for infringing its EEA obligations.

However, in May 2017, the Ministry of Finance issued a consultation paper in which it proposes 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 not forming part of any tax evasion scheme are still tax-deductible. The rules will only apply if the group’s equity-to-asset ratio is comparable to (within two percentage points) or lower than either the equity to asset ratio of the Norwegian corporation in question, or the combined equity-to-asset ratio of all Norwegian corporations within the consolidated group. These escape rules exempt wholly Norwegian groups from the proposed limitation, meaning that the new rules will only apply to Norwegian group companies belonging to foreign parent companies or that have subsidiaries abroad.

It is further proposed that the existing interest deduction limitation rules shall continue to co-exist 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 the consolidated group (typically where the related lender is an individual). For enterprises within the petroleum sector, the Ministry has stated that it may consider introducing separate interest deduction limitation rules.

The government was expected to follow up on this proposal in the 2018 Fiscal Budget. However, the Ministry has stated that it needs more time, and a final revised proposal is now expected to be issued during 2018, with the aim of having the new rules implemented with effect from 1 January 2019.

vii Taxation of ‘carried interests’
Under current tax law, there is no explicit rule for taxation where managers of investment funds receive ‘profit interest’ or ‘carried interest’ in exchange for their services and receive their share of the income of a fund. The prevailing view until recently has been that, as long as such managers invest capital into funds, the carried interest will be considered a capital gain and taxed at capital gains rates, and if the managers are organised as LLCs, the corporate stockholders’ income in the form of dividends and gains on stocks or ownership interest in other companies would also be exempt from taxation in accordance with the
exemption method. However, the tax authorities have initiated several administrative actions challenging the prevailing view by seeking to treat such capital gains as income, subject to ordinary income taxation as salary at a higher tax rate.

In December 2013, Oslo District Court rejected the tax authorities’ primary claim in a dispute between the tax authorities, on one side, and Herkules Capital (a Norwegian private equity fund’s advisory company) and, on the other, three key executives employed by the advisory company who had an ownership interest in the advisory company. The Court concluded that there was no basis for considering carried interest as income from labour to be taxed as wage and salary income at a much higher maximum tax rate (now 46.7 per cent) in accordance with the tax authorities’ primary position. The Court also rejected the tax authorities’ argument that distributions from a private equity fund to its partners should be subject to additional payroll tax (14.1 per cent). However, the Court concurred with the tax authorities’ alternative claim that such profit is subject to Norwegian taxation as ordinary income from businesses at the then-prevailing tax rate of 28 per cent (now 23 per cent). The taxpayers, being the adviser and the key executives, had not argued that carried interest should be taxed as a capital gain allocated to the general partner, as the general partner (in this particular case) did not have any ownership interest in the fund. The question of whether carried interest should be treated as a capital gain was therefore not considered by the Court.

The taxpayers filed an appeal, and in January 2015, the Court of Appeal reversed the District Court’s ruling and upheld the tax authorities’ original tax assessment (i.e., that the carried interest should be considered as salary income for the relevant key executives). The Court of Appeal further concluded that the distribution to the key executives of such profits in this particular dispute also was subject to payroll tax (at 14.1 per cent) under Norwegian law, and ordered the key executives to pay a 30 per cent penalty tax on top.

The taxpayer appealed the ruling to the Norwegian Supreme Court, and in November 2015, the Supreme Court finally overturned the Court of Appeal and invalidated the tax authorities’ tax assessment. The Supreme Court concluded that the carried interest should be considered as ordinary income from business taxed at the then-prevailing tax rate of 28 per cent (now 23 per cent), but that such income could not be considered as salary income for the relevant key executives. As such, there could be no question of payroll taxes on such distributions.

viii Group contributions

Norwegian companies cannot file consolidated tax returns or form fiscal unities, but a transfer of taxable income within an affiliated group of Norwegian entities is possible through group contributions to offset taxable profits against tax losses in another Norwegian entity. It is possible to grant more group contributions than taxable income, but the grantor company will not be able to deduct the excess amount. This excess amount, which is not deductible for the grantor, would equally not be taxable for the recipient. The distributable reserves form the limit for total group contributions and dividend distributions. To enable group contributions, the contributing and receiving entities must be corporate entities taxable in Norway, an ultimate parent company must hold more than 90 per cent of the shares and voting rights of the subsidiaries (either directly or indirectly) at the end of the parent’s and the subsidiaries’ fiscal year, and the companies must make full disclosure of the contribution in their tax returns for the same fiscal year. Furthermore, the Norwegian group contribution rules are, under certain conditions, also applicable to Norwegian branches of foreign companies that are resident within the EEA. As from 1 January 2018, Parliament has implemented a rule...
allowing a grantor company to deduct group contributions to a recipient resident within the EEA, provided the recipient has a tax loss carried forward from previous business activity in Norway, subject to the recipient reducing the tax loss carried forward with an amount equal to any group contributions received.

ix  Stamp duty and capital duties
Norway does not levy capital duties. Stamp duty is triggered only if real property is acquired. If the shares in a company owning real property are acquired, no stamp duty is levied.

x  The 2016 Norwegian tax reform
In October 2016, the government released is fiscal budget for 2017, *inter alia*, following up on a previous proposal for a broader tax reform (proposed reform) issued in October 2015.

In the proposed reform, the government originally stated that it intended to adopt a rule allowing it to introduce withholding tax on interest and royalty payments. However, the government did not follow through on these proposals in the proposal in either the 2017 or the 2018 fiscal budget. It is not yet clear if any legal changes will be implemented, nor the potential timing of any changes nor the applicable withholding tax rate. In March 2017, the Ministry of Finance also issued a report further elaborating on the proposed reform to reduce the possibility for treaty shopping by implementing a rule stating that all entities established and registered in Norway will have Norwegian tax domicile, unless a treaty with other states leads to a different result. Consequently, companies registered in Norway shall in the future never be considered ‘state-less’. However, this rule has not yet been implemented by Parliament.

In the 2017 fiscal budget, the government also states that it intended to submit a consultation paper for amending the Norwegian CFC rules. The consultation paper was originally expected to be issued during the course of 2017, but it has not yet been issued.

See Section VIII.vi regarding further proposed restrictions on the interest deduction limitation regime.

Instead of its original plan to implement VAT on financial services rendered against compensation, and a special tax on financial institutions’ income on margins, as referred to in last year’s edition, from 1 January 2017, the government introduced a new tax for the financial services industry. Corporate income tax for taxpayers within the financial services industry remains at 25 per cent instead of being lowered to 24 per cent (now 23 per cent), as proposed for other businesses. At the same time, the government introduced a 5 per cent special payroll tax, which for most financial institutions will mean, in effect, that instead of paying 14.1 per cent payroll tax, the same institutions will have to pay 19.1 per cent. This new regime applies to parties operating within the financial services industry that provide VAT-exempted services under Section 3-6 of the Norwegian VAT Act.

IX  COMPETITION LAW
Under Norwegian law, an acquisition, merger or other concentration involving businesses must be notified to the NCA if the following conditions are met: the undertakings concerned on the target side have a group turnover in Norway exceeding 100 million kroner; the acquirer has a group turnover in Norway exceeding 100 million kroner; and the combined group turnover of the acquirer and the target in Norway is 1 billion kroner or more. The NCA is empowered to issue decrees ordering that business combinations that fall below
these thresholds still have to be notified, provided that it has reasonable cause to believe that competition is affected, or if other special reasons call for such investigation. Such a decree has to be issued no later than three months after the date of a transaction agreement or the date when the control was acquired, whichever comes first.

On 1 January 2014, Norway implemented a more comprehensive form of notification (more similar to a Form CO), though more limited in substance than the former ‘complete’ filing form. However, the Ministry of Trade, Industry and Fisheries has also adopted a simplified procedure for handling certain transactions that do not involve significant competition concerns within the Norwegian market – a short-form notification that is similar to the EU system. In March 2016, Parliament adopted amendments to the simplified merger control procedure, which now covers:

a) joint ventures with no or *de minimis* actual or foreseen business activities within Norway. A turnover and asset transfer test of less than 100 million kroner is used to determine this;

b) the acquisition of sole control over an undertaking by a party that already has joint control over the same undertaking; and

c) concentrations under which one or more undertakings merge, or one or more undertakings or parties acquire sole or joint control over another undertaking, provided that (1) none of the parties to the concentration is engaged in business activities in the same product and geographic market (no horizontal overlap), or in a product market that is upstream or downstream from a product market in which any other party to the concentration is engaged (no vertical overlap); (2) two or more of the parties are active on the same product or geographical market (horizontal overlap) but have a combined market share not exceeding 20 per cent (previously 15 per cent) (horizontal relationships); or (3) one or more of the parties operates on the same product market that is upstream or downstream of a market in which the other party is active (vertical overlap), but none of the parties individually or in combination has a market share exceeding 30 per cent (previously 25 per cent).

After receipt of a filing under the new rules, the NCA now has up to 25 working days to make its initial assessment of the proposed transaction, allowing, however, for pre-deadline clearance, so that at any time during the procedure, the NCA can state that it will not pursue a case further. The NCA must, prior to expiry of this deadline, notify the parties involved that a decision to intervene may be applicable. If it issues such a notice, it has 70 working days from the date the notice was received to complete its investigation and reach a conclusion. This basic period can be extended under certain circumstances. Since an amendment in 1 July 2016, the statutory timetable for clearance under the Norwegian merger control regime allows 145 working days total case handling time.

There is no deadline for filing a notification, but a standstill obligation will apply until the NCA has cleared a concentration. As under EU merger rules, a public bid or a series of transactions in securities admitted to trading on a regulated market such as the OSE can be partly implemented, notwithstanding the general standstill obligation. For such exemption to be effective, the NCA must be notified about the acquisition immediately (normally the day on which control is acquired).

A simplified notification may, under the new regime, be submitted in Danish, English, Norwegian or Swedish, whereas a standardised notification has to be submitted in Norwegian. Since 1 July 2016, the substantive test (which was previously based on a
substantial lessening of a competition test) has now been aligned with the same substantial impediment to efficient competition test as applicable under the EU rules, meaning that Norway must now apply the same ‘consumer welfare standard’ as the Commission instead of the previous ‘total welfare standard’.

From 1 April 2017, the power previously held by the King Council to intervene in merger control cases has been abolished. These powers have been transferred to an independent appeal board, which now handles appeals in merger control cases.

Failure to comply with the notification duty leads to administrative fines. The NCA may issue fines of up to 10 per cent of the undertaking’s worldwide turnover. The highest fine so far amounted to 25 million kroner and was issued to Norgesgruppen in 2014. In principle, breaches can also be subject to criminal sanctions, but this has not yet occurred.

X OUTLOOK

In general, we believe the outlook for deal activity in 2018–2019 to be good. During the first four months of 2018, global growth seems to have continued. There appears to be continuing and strong optimism regarding growth and, for the first time, it looks as if growth is speeding up and away from its average rather than recovering back towards it. These expectations are largely driven by growth in developed economies, in particular the eurozone and the United States. At the beginning of 2018, corporations and private equity sponsors predicted an acceleration of M&A activity in 2018, in both the value and number of deals. Acquiring or collaborating with technology providers to drive innovation in their processes, rather than as an asset in its own right, seems to be a key consideration across all sectors. This applies, for example, in energy, life sciences, telecommunications, transport and financial institutions. This trend looks set to continue with global M&A reaching near record levels in Q1 2018, and corporates seeming to view M&A deals as crucial for strategic growth.

Despite a 16.6 per cent decline in deal volume for Q1 2018 compared with Q1 2017, there is a lot of optimism around.

Nevertheless, there are still some uncertainties, such as the possible effects of high housing prices, which could turn out to be unfavourable. For now, capital continues to be both inexpensive and plentiful. Still, many experts predict a steeper yield curve and, as a result, the Norwegian Central Bank may raise interest rate during the next 12 to 24 months. In combination with stricter leveraging regulations, this could trigger a further housing market correction. If so, the critical issue is to what extent the market is heading for a soft or a hard landing. An IMF house-price regression exercise has recently suggested that Norway’s house prices were overvalued by 15 per cent at the end of 2016, which suggests a soft landing being possible. A housing market correction is still expected to slow investment growth somewhat in 2018, and this could indirectly contribute to less deal activity in the market.

Nonetheless, we believe that many investors continue to view Norway as a good place to invest owing to its highly educated workforce, technology, natural resources and well-established legal framework for M&A transactions. Even if it is far from certain that 2018 will better 2017 in the number of deals, we believe the total M&A deal volume in the Norwegian market will remain relatively strong in 2018, with certain sectors showing a clear increased activity.

One sector in which we believe there will be more activity in 2018 than last year is the energy sector, in particular within the oil and gas segment. Still, things often shift rapidly in today’s market environment: a slight short-term improvement in oil prices combined with
executives’ fears of losing opportunities to competitors may have a substantial effect on the level of ‘optimism’ in the market and potential investors’ willingness to carry out deals. Many businesses are currently driven by rapid technology changes and the battle for customers. Consequently, businesses are fighting to stand out from their competitors and cross-sector convergence (i.e., expanding beyond traditional core activities to acquire new capabilities) is one way to be differentiated, typically by adding new technology through acquisitions. This is an important factor currently spurring M&A activity around the world, which is also influencing the Norwegian M&A market. Many Norwegian businesses possess important technology and intellectual property rights that may be useful in sectors and businesses other than those for which they were originally developed. We have recently observed an increase in interest from foreign investors wanting to acquire Norwegian technology through M&A, and we believe this is likely to continue irrespective of how oil and gas prices develop.
Chapter 37

PANAMA

Andrés N Rubinoff

I OVERVIEW OF M&A ACTIVITY

Panama’s economy continues to lead in Latin America with a growth in gross domestic product (GDP) of 6.2 per cent in the first quarter of 2017, compared with the same quarter in 2016. The economy has been supported by the expanded Panama Canal, effectively counterbalancing the slow economic growth worldwide and the appreciating US dollar. Fitch Ratings affirmed Panama’s rating as BBB (stable) in February 2017 and forecast a real GDP growth above 5 per cent for 2017 to 2018, one of the highest rates in the BBB category.

The macroeconomic impact of the Panama Papers has been negligible. In fact, the strong and well-regulated local banking sector emerged from the storm largely unscathed, as laws being rolled out prior to the scandal came into effect. Because of these measures and similar regulatory efforts, as of June 2017 the OECD officially labelled Panama as ‘largely compliant’, as the country complies with two of OECD’s three international transparency standards. This label effectively removes Panama from the blacklist of countries deemed ‘tax havens’. The OECD’s financial action group was due to release a report in August 2017 with the results of its multifaceted comprehensive evaluation of Panama’s regulatory practices. Notwithstanding, increased compliance costs and perceived reputational risks are likely to lead some multinational companies in certain sectors, such as financial and insurance services, to take a renewed look at their in-country assets, creating a space for acquisition by more regional players.

M&A activity in Panama was expected to remain robust throughout 2017, as industries such as logistics, energy and mining maintained a vibrant economic growth. Large infrastructure projects such as the US$800 million expansion of the Tocumen International Airport, the US$1.8 billion construction of the second line on the metropolitan transport system and the planned US$2.6 billion construction of a third line are also contributing factors in the increasing foreign direct investment in Panama. The aforementioned third metro line, a monorail system stretching 25km west of Panama City, was in the bidding process. It will cross the Canal over the ‘Fourth Bridge’, which will house the metro line and eight lanes to meet the needs of the rapidly growing cities west of the capital. The Fourth Bridge project, as it is commonly known, opened for bids in August 2017 and was expected to cost an estimated US$1.5 billion.

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The Panama Canal expansion project’s recent inauguration is expected to increase M&A activity in the future. The Panama Canal, the backbone of the Panamanian economy, was predicted to contribute approximately US$1.6 billion to the national revenue in its first year of expanded operations, up from US$1.1 billion in 2016.\(^4\) The Canal’s contribution to the national revenue is expected to triple in the next 10 years.\(^5\) Additionally, the 22.2 per cent increase in gross tonnage going through the Canal has provided new business for the logistics and maritime service industries. To contribute further to the growth of these industries, President Juan Carlos Varela has pledged US$3.2 billion for developing various civil works and infrastructure projects. To aid these goals, the President created the Logistics Industry Council, which seeks to provide renewed focus and attention to the sector.

The energy sector in Panama will continue to experience government and foreign direct investment. Given Panama’s long-running sustained economic growth, it is not surprising that energy demand in the country is expected to keep increasing at an annual rate of between 4.8 per cent and approximately 7.4 per cent. Investment in the clean energy sector has also experienced significant growth and, at the going rate, clean energy production is expected to surpass 10,000 megawatts in 2018.\(^6\) Under this scenario, the government has announced public works regarding new transmission lines. Transmission Line 3, with a current cost of US$400 million and in the final stages of construction, and Transmission Line 4, which will have an approximate cost of US$450 million, will cement the connection between heavy hydroelectric energy production in the west and the east’s increasing demand.\(^7\) The latter project has attracted foreign investment, and further increasing demand is expected to generate further private direct investment in new projects in this fast-growing sector.

The International Monetary Fund (IMF) Western Hemisphere Department recognised the positive future of Panama’s growth due to the expansion of the Panama Canal, the development of several services industries, the approval of free trade agreements with the United States, the European Union and Canada, as well as the growth of the mining industry. The latter has increased thanks to copper mining, which has only recently started to be tapped. The Cobre Panama copper mine, now controlled by First Quantum Minerals, was scheduled to be fully operational by the end of 2017, with an estimated production of 320,000 tonnes of copper per year. As noted in an IMF Country Report for 2014, the copper mine was expected to bring about ‘US$6½ billion over 2013–17, about US$1½ billion of which have already invested’.\(^8\)

Panama is consistently rated by international indexes as one of the best countries in Latin America for business and investment. The World Bank’s Doing Business 2016 ‘ease of doing business’ index ranked Panama 69th of the 189 surveyed countries. This may be due to its encouragement of foreign investment through legal incentives. In 1998, the government enacted the Investment Stability Law, which guarantees equal treatment under the law as is given to their domestic competition, and guarantees the same commercial and fiscal conditions for 10 years to foreign investors who invest at least US$2 million in Panama. Under

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\(^7\) [impresa.prensa.com/economia/BLICITARIA-LINEA-STABILITARIAS-TRASPONERIAL_0_4721527869.html](impresa.prensa.com/economia/BLICITARIA-LINEA-STABILITARIAS-TRASPONERIAL_0_4721527869.html).

Law 41 (2007), Panama has motivated multinational companies to locate their headquarters in Panama through tax incentives. As of January 2017, 134 international companies have been established under this Law, including major multinationals such as Hyundai, Procter & Gamble, AES, Halliburton Hewlett-Packard, Peugeot/Citroën, Pan-American Life Insurance Company, Caterpillar, LG, 3M, Western Union and Roche, owing to the various taxation, immigration, labour and employment incentives offered specifically to benefit multinationals that establish their regional offices or headquarters in Panama.9

II GENERAL INTRODUCTION TO THE LEGAL FRAMEWORK FOR M&A

The relevant Panamanian laws and regulations governing business combinations include the Corporations Law, the Limited Liability Company Law and the Commercial Code, which is supplemented by the Civil Code. As combinations generally cause taxable events, the Tax Code and its regulations (especially Executive Decree 18 of 1994, which establishes a special regime regarding share-for-share mergers) and Law No. 18 of 2006, which created a special capital gains regime, are also pertinent. In the case of publicly traded companies, Decree Law No. 1 of 1998 and its regulations (Securities Law) govern tender offers, proxy statements and rules of disclosure, among other matters.

Business combinations in Panama are usually structured as share or asset purchases, tender offers or mergers, but other techniques can also be used. One example is the capitalisation of shares of two operating companies to a holding company incorporated for that purpose with joint participation in the holding company. In the case of publicly traded companies, combinations usually involve a two-step process that begins with a tender offer (either for shares, cash or a combination of both) followed by an actual merger.

III DEVELOPMENTS IN CORPORATE AND TAKEOVER LAW AND THEIR IMPACT

Corporate and takeover law can be divided into two kinds of transactions: mergers and share and asset purchases. In the case of mergers, Panama law allows a company to be absorbed by another regardless of the place of incorporation of either firm (merger by absorption). It also allows two companies to merge, forming a new consolidated body. Once a merger becomes effective, the absorbed company ceases to exist as a legal entity, and the surviving company assumes all the assets, rights, licences, capital, liabilities and obligations of the absorbed company by universal succession. Unless the articles of incorporation state otherwise, a merger agreement must be executed by a majority of the directors of each company, and approved by the holders of a majority of issued and outstanding shares of each firm. The merger agreement must then be registered with the Registry of Companies in Panama to bring it into effect, unless a later effective date is defined in the merger agreement.

Regarding share and asset purchases, unless the articles of incorporation state otherwise, the acquisition of a company generally requires approval from a majority of the directors of the acquiring company regardless of whether it is structured as a share or an asset purchase.

On the other hand, the sale of a company, if it represents all or substantially all the assets of the seller, generally requires approval from both a majority of the directors and of the holders of all issued and outstanding shares with the voting rights in the event of selling a company.

IV FOREIGN INVOLVEMENT IN M&A TRANSACTIONS

Foreign direct investment continues to be a principal driver of M&A activity, and in almost all the more recent M&A transactions in Panama, foreign and multinational corporations have targeted local companies. Political instability in nearby Latin American countries has also been a substantial driver for investment into Panama, as individuals and companies seek to diversify their country risk.

Generally, there are no foreign ownership restrictions in Panama. Because of issues of national security and national interest concerns, however, ownership of local companies by foreign governments or nationals is restricted in certain industries, including, *inter alia*, aviation, radio and television, and retail trade. In the case of the retail services market, foreign participation is generally prohibited with very few exceptions.

V SIGNIFICANT TRANSACTIONS, KEY TRENDS AND HOT INDUSTRIES

Most of the important sectors in the Panamanian economy have been subject to cross-border acquisitions, but M&A activity is expected to continue to be distributed across several industries, led most likely by the traditional financial services (including insurance) and energy sectors, followed by the food and retail industries (both wholesale and consumer sales). The aftermath of the *Panama Papers* and the controversy surrounding money laundering allegations involving a prominent retail trade group have led to stricter tax, regulatory, and anticorruption compliance legislation in the country. Consequently, consolidation among medium and small banks is still expected to pick up, spurred by reduced access to correspondent banks, which are limiting their services because of local regulatory burdens, and increased compliance standards imposed on foreign banks and the perceived reputational risk stemming from the publication of the *Panama Papers*. This is a current issue in the Panamanian financial services sector that may have further long-term implications.

Given the aforementioned demand for energy in Panama and the region, the energy sector has been the object of recent important acquisitions and new market entrants, including the acquisition by CELSIA (part of the Colombian conglomerate Grupo Argos) of GDF Suez assets in Panama and Costa Rica for a reported US$830 million, and InterEnergy Holding’s simultaneous acquisition and US$300 million project financing of the construction of Phase II and Phase III of the Penonomé wind power plant, the largest wind farm in Central America. Now operational, the plant produced 305,000MWh in the first quarter of 2017, representing 10 per cent of the country’s total energy demand. Significant acquisitions and joint ventures are expected in the next few years in this sector as Panama continues to find and incentivise new sources of energy for its rising demand, while further regulating its existing non-renewable and renewable resources.

Increased deal activity is expected following the now-complete Canal expansion in the logistics, transportation and distribution and maritime industries, which represent approximately 20 to 25 per cent of the country’s GDP. To that end, the government acquired Transporte Masivo de Panamá, SA (Mi Bus), the concessionaire and operator of the mass transportation system in the metropolitan area of Panama City. The Panama Canal Authority
is drawing up plans for a new port terminal in Corozal, which is near the Pacific entrance to the Canal and capable of accommodating Post-Panamax ships with docking facilities with an estimated depth of 60 feet, and the capacity to handle 5 million twenty-foot equivalent units in a 296-acre area.

In recent years, M&A deals in Panama have had many drivers. Certain deals have been instigated by the need to consolidate in a very competitive environment, others have been undertaken to control costs and exploit synergies, and yet others have been fuelled by the global economy and the need to develop new international markets and expand market share. Some of the largest transactions in Central America have included a Panamanian target company, independent of whether it is an operating company or a holding company registered in Panama with operations in the region. Additionally, we are seeing a move from New York law or New York-run deals to Panama law or Panama-run deals for Latin America-based transactions that do not necessarily have a connection to Panama.

VI  FINANCING OF M&A: MAIN SOURCES AND DEVELOPMENTS

M&A financing in Panama is usually provided by local and international banks, as there are no limitations on international lending. With the end of the financial crisis, deals have also been funded by private equity firms or through local and international securities issues.

VII  EMPLOYMENT LAW

In a merger scenario, the surviving company assumes the labour relations and liabilities of the absorbed company. Similarly, in share acquisitions, the target company retains responsibility for labour relations and liabilities. Asset acquisitions, however, present a special case. If the sale comprises all or almost all the assets, causing business operations to be transferred, both the buyer of the assets – the new employer – and the seller are, for a period of one year following the acquisition, jointly and severally responsible for all labour liabilities that arise prior to the acquisition of the assets or business. Furthermore, employees retain all their rights and benefits, and no adverse changes can be made to their terms of employment. Thus, in many asset acquisitions, insofar as may be legally feasible, buyers require sellers to terminate all or certain labour relations as a precondition to closing a deal, in order to rehire some employees on more favourable terms. Labour unions and employees must be notified of the employer substitution even though they cannot prevent it from taking place.

VIII  TAX LAW

One of the main components of any sell-side deal structuring is taxation. The structure of an acquisition is usually influenced to a large extent by the need to make the transaction tax effective for the seller, without causing adverse tax consequences to the buyer. As Panama generally follows a territorial system of taxation, only Panama-source income (generally income and capital gains realised in connection with a trade, business or real estate transaction in Panama) is taxable. Thus, mergers or acquisitions of companies organised in Panama that do not carry out any trade or business or own assets within the country are generally not taxable. Mergers or acquisitions are generally structured as either share-for-share transactions
or share-for-cash transactions, or a combination of both. Acquisitions can also be fashioned as a straight purchase of shares or a purchase of assets. A brief description of the tax treatment for each follows.

Share-for-share mergers are tax-free transactions, provided that no cash is paid out (except up to 1 per cent of the value of the transaction for adjustments of fractional shares) and certain other accounting parameters are followed. In a share-for-share merger, the shareholders of the merged company keep a tax basis on the shares of the surviving company that they receive equal to their average pre-merger tax basis of the surrendered shares.

Share-for-cash mergers, on the other hand, are not tax-free transactions. Gains realised by sellers in these transactions, which are deemed to be gains from Panama-sourced income, are subject to a 10 per cent capital gains tax. The capital gain is the difference between the selling price allocated to Panamanian sources and the tax basis of the shares owned by the selling shareholder. Furthermore, the law requires buyers to withhold 5 per cent of the total purchase price allocated to Panamanian sources (as an advance of the capital gains tax) and directly pay this amount to the tax authorities within 10 days of the transfer of the shares. It is important to note that a buyer, as well as the target company whose shares are being acquired, are jointly and severally liable with the buyer for the payment of the 5 per cent advance capital gains withholding. If the 10 per cent capital gains tax on the realised capital gain is less than the 5 per cent advance withholding, sellers can request a tax credit for the difference. This credit must be used in the same fiscal year as that in which the capital gain is realised. Alternatively, sellers can choose to treat the 5 per cent advance capital gains withholding as the final and definitive capital gains tax payable in connection with the sale of the shares. In practice, most sellers pay the 5 per cent purchase price capital gains withholding, as it is difficult to request and use the tax credit in the same year that the transaction took place.

Share purchases are subject to a 10 per cent capital gains tax on Panama-sourced gains in the same manner that share-for-cash mergers are taxed, including the 5 per cent advance withholding obligation. The Department of Revenue of the Ministry of Economy and Finance has repeatedly taken the position that capital gains tax applies to the sale of the shares not only of Panamanian corporations, but also of any upstream company, regardless of its jurisdiction of incorporation, as long as this company, directly or through one or more subsidiaries, has Panama-sourced income. Consequently, gains derived from the direct or indirect transfer of shares of a legal entity that has obtained Panama-sourced income is subject to tax at a rate of 10 per cent.

Following a tax reform (Decree Law 135 of 2012), if a transaction involves, indirectly, the transfer of shares of a Panamanian company with Panama-sourced income, the seller and buyer can now apply pre-established calculations to determine the capital gains tax due on the percentage of the transaction’s purchase price that is attributable to the Panamanian assets. To pay the capital gains tax, the buyer and seller will need to file a joint sworn affidavit setting forth the total capital gains tax paid and the calculations used to arrive at the figure. In addition, the buyer, who is responsible for the payment, must obtain a temporary tax identification number in Panama, known as 8-NT, and report and pay the capital gains tax. This temporary registration has no additional tax implications or reporting requirements in Panama for the buyer.

Asset purchases are generally taxable events in Panama. Gains realised on the sale or disposition of assets located in Panama are generally subject to a 10 per cent capital gains tax. In addition, the transfer of chattel property, such as inventory or equipment, is subject to a value added tax equal to 7 per cent, and the transfer of real estate is subject to a 2 per cent
transfer tax. In addition, buyers of an ongoing business concern must be aware that they will become liable for past taxes of the business, even if they are buying the assets of the business and not shares of the company.

Frequently, M&A transactions involve either a pre-closing dividend to exclude assets from the transaction or a post-closing dividend to distribute gains to shareholders. In this regard, as a general rule, corporations in Panama are subject to a 10 per cent dividend tax (20 per cent if the shares are issued to the bearer) on Panama-sourced income. Thus, income that is not Panama-sourced is generally not subject to dividend tax. However, following the recent tax reform, if the company paying the dividend engages in commercial or business activities in Panama that require the company to obtain a business licence, then in addition to paying the 10 per cent dividend tax on Panama-sourced income, it is also subject to a 5 per cent dividend tax on non-Panama sourced income.

Goodwill is another frequent point of conflict between buyers and sellers. Buyers generally want to be able to claim a tax deduction for the amortisation of any goodwill paid in the acquisition. However, amortisation of goodwill is only deductible in Panama if the seller recognises it as income on its annual tax return.

IX  COMPETITION LAW

There is no mandatory merger control approval process in Panama; the process is entirely voluntary. That said, with the new antitrust and competition regime established by the Competition Law, economic concentrations created by the mergers of conglomerates within the Panamanian market have come under increasing, albeit still limited, scrutiny by regulators. The Competition Law prohibits economic concentrations whose effects may unreasonably restrict or harm free competition. An ‘economic concentration’ is defined as the merger, acquisition of control or any other act pursuant to which corporations, associations, shares, trusts, establishments or any other kind of assets are combined, and which occurs between suppliers or potential suppliers, customers or potential customers, and other competing or potentially competing economic agents. The law applies to any acts or practices that may unreasonably restrict or harm free competition, and whose effects take place in Panama, regardless of where those acts have been carried out or perfected.

The Competition Law does not prohibit all economic concentrations, but only those whose effects may unreasonably restrict or harm competition. In addition, the Competition Law expressly provides that the following business combinations shall not be deemed prohibited economic concentrations: joint ventures formed for a definite period of time to carry out a particular project, which is also contemplated in other jurisdictions; economic concentrations among competitors that do not have harmful effects on competition and the market; and economic concentrations involving an economic agent that is insolvent, if certain conditions are met, which is, roughly speaking, equivalent to the failing company exemption prevalent in other jurisdictions.

Moreover, economic concentrations with restrictive effects on competition may obtain clearance from the Competition Authority if the restrictive effects of the concentrations are outweighed by their contribution to obtaining further efficiencies, such as:

a  improvements in commercialisation and production systems;
b  fostering technical and economic progress;
c  improvements in the competitiveness of the industry; and
d  contributions to consumer interests.
If advance verification for the economic concentration is sought and approved, the economic concentration cannot be subsequently challenged. If no advanced verification is sought and the transaction has been consummated, the Competition Authority may file a lawsuit with a specialised superior court within three years of the transaction’s effective date if it considers the economic concentration to unreasonably restrict or harm free competition, seeking that conditions be imposed on the parties to ensure competitiveness in the marketplace, or seeking a partial or complete divestiture of the concentration (or both).

X OUTLOOK

Panama’s economy is expected to grow at a moderate and sustainable rate, despite the perceived reputational damage to the financial and legal services industries. On this matter, the government has countered these issues by cooperating and aligning with international standards, thus making firm commitments to creating a more transparent environment for foreign investors. For example, the government has committed to adopt data-sharing arrangements consistent with US FATCA and the OECD’s Common Reporting Standards, and has implemented several strict anti-money laundering regulations applicable to both the financial and non-financial sectors. Multinational corporations, regional conglomerates and private equity firms continue to seek and take advantage of the country’s unique geographical position, its free market system and investor-friendly climate, which will cause the prevalence of cross-border M&A in Panama to increase. A recently adopted bankruptcy law (similar to Chapter 11 under the US federal bankruptcy laws) is also likely to spark interest in distressed assets and companies. Undoubtedly, Panama will remain in the spotlight for foreign investors, and the body of legislation governing M&A in Panama will continue to evolve as cross-border transactions become more complex.
I OVERVIEW OF M&A ACTIVITY

The Portuguese economy continued to show some positive signs in the past year, in particular with GDP growing 2.7 per cent in 2017 (GDP started to grow in 2014, at a rate of 0.9 per cent, and continued to grow in 2015 and in 2016, at a rate of 1.5 and 1.4 per cent, respectively, in contrast with the 1.4 per cent decrease in 2013 and the 3.3 per cent decrease in 2012). The first quarter of 2018 registered GDP volume growth of 2.1 per cent compared with the first quarter of 2017.

In addition, 2017 was the second year after the conclusion of the financial assistance programme with the European Commission, the International Monetary Fund and the European Central Bank, which was initiated in 2014 further to Portugal’s bailout in 2011 and the execution of a memorandum of understanding with those entities in May 2011, and this has also contributed to restoring confidence in the Portuguese economy.

All these signs of growth have been reflected positively in Portuguese M&A activity during the past year, both in terms of number and volume of deals: there were more than 320 M&A deals, and the 127 transactions with disclosed value totalled approximately €11.4 billion (13.58 per cent higher than the value registered in 2016). The following events have been key factors for this dynamic in the Portuguese M&A market during the past couple of years:

a Several privatisations, foreseen under the Portuguese financial assistance programme, were carried out, such as:

• the sale of EGF (a company engaged in the treatment and management of wastewater and solid urban waste, which was sold to SUMA, a joint venture between Mota-Engil and ACS, companies active in the Portuguese and Spanish construction sector respectively);

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1 Francisco Brito e Abreu is a partner and Joana Torres Ereio is a senior associate at Uría Menéndez – Proença de Carvalho.
• the privatisation of CP Carga (a railway freight transport operator) through the sale of 95 per cent of the company’s share capital to MSC Rail (a subsidiary of the Swiss MSC Mediterranean Shipping Company); and

• the sale of TAP (the leading Portuguese airline company, 66 per cent of which was acquired by a consortium headed by David Neeleman (owner of, inter alia, the Brazilian airline Azul) and Humberto Pedrosa (owner of the Portuguese transportation group Barraqueiro), which was partially reverted upon the new government taking office in November 2015).

b Portuguese banks and other entities in the financial and insurance sectors have focused on selling non-core assets and businesses.

c In August 2014, Espírito Santo Group, a conglomerate that comprised, inter alia, one of the biggest banks in Portugal, Banco Espírito Santo (BES), collapsed, forcing a profound reorganisation in the group, including the transfer of part of BES’ businesses to a new bank (Novo Banco), and leading to the divestment of several businesses and to the sale of Novo Banco itself.

d The collapse of the Espírito Santo Group resulted in significant losses in several relevant Portuguese companies and, in particular, had an impact on Portugal Telecom, the biggest Portuguese telecommunications player, affecting its merger with Brazilian Oi (a deal that was aimed at creating one of the 20 biggest telecom companies in the world with more than 100 million clients) and leading to the acquisition of its Portuguese business by Altice, which was completed in June 2015.

e International investment and private equity funds have been particularly active in the Portuguese market, presenting bids in most of the relevant deals in the tourism, real estate, insurance and banking sectors.

f Chinese and Angolan investors have also played a significant role in M&A activity, acquiring companies in several business sectors.

g 2014 was a turning point for the real estate sector, with relevant deals in all segments, and this trend has been reinforced year on year.

h The private equity fund Revitalizar, created in 2013 by the government and managed by Portuguese private equity firms, invested more than €207 million between 2014 and 2017 in approximately 100 Portuguese small and medium-sized companies.5

II GENERAL INTRODUCTION TO THE LEGAL FRAMEWORK FOR M&A

The Portuguese legal framework governing M&A comprises, in particular, the following laws:

a the Civil Code, enacted by Decree-Law No. 47344, of 25 November, as amended, which contains the general rules governing sales, purchases and contracts;

b the Commercial Companies Code, enacted by Decree-Law No. 262/86, of 2 September, as amended (PCCC), which includes the general framework governing Portuguese companies (the most common are sociedades anónimas, which may be listed or non-listed companies, and sociedades por quotas, both of which are limited liability companies) and also the legal regime governing share capital increases and decreases, mergers and demergers, transfers of shares in sociedades por quotas and financial assistance;

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c the Securities Code, enacted by Decree-Law No. 486/99, of 13 November, as amended, which is applicable to listed companies but also contains the general regime regarding some matters, such as the transfer of shares in sociedades anónimas;
d the Competition Code, enacted by Law No. 19/2012, of 8 May;
e the Labour Code, enacted by Law No. 7/2009, of 12 February, as amended; and
f the private equity legal regime, enacted by Law No. 18/2015, of 4 March.

In addition, regulated sectors such as banking, financing and insurance are governed by specific laws and regulations, some of which are issued by the respective regulatory entities. Moreover, privatisations are specifically governed by laws enacted by the government containing the applicable regime for each privatisation.

III DEVELOPMENTS IN CORPORATE AND TAKEOVER LAW AND THEIR IMPACT

i Financial sector: structural reforms

A memorandum of understanding established as the main goals for the financial sector, inter alia:

a the preservation of its stability;
b an increase of liquidity and a balanced deleverage of the banking sector;
c the reinforcement of banking regulation and supervision;
d the restructuring of Caixa Geral de Depósitos, the state-owned bank; and
e the reinforcement of the legal framework governing the restructuring and winding up of credit entities and of the deposit guarantee fund, as well as the legal framework applicable to the insolvency of natural and legal persons.

In line with these goals, profound changes have been implemented in the legal framework governing the financial sector, and most of said goals, even if to a variable extent, have been accomplished.

Decree-Law No. 298/92, of 31 December, which governs credit institutions and financial entities, has been the object of an in-depth reform in the past few years, and enacted by several laws and decree-laws, in particular:

a Law No. 23-A/2015, of 26 March, which transposes Directives 2014/49/EU, of 16 April 2014, and 2014/59/EU, of 15 May 2014. Inter alia, the Law:

- increased the powers of the Bank of Portugal regarding recovery measures;
- amended the rules applicable to deposit guarantee schemes;
- increased the number of possible resolution measures that may be determined by the Bank of Portugal, allowing, in particular, the segregation of assets to an asset management vehicle;
- allowed the Bank of Portugal to determine internal recapitalisation measures (bail in);

6 Listed companies are overseen by the Portuguese Securities Market Commission (CMVM).
7 In particular, Decree-Law No. 298/92, of 31 December, as amended, governs credit institutions and financial entities, which are supervised by the Bank of Portugal, and Decree-Law No. 94-B/98, of 17 April, as amended, governs the activity of insurance companies, which are supervised by the Portuguese Insurance and Pension Funds Authority (ASF).
• established specific rules regarding financial support between companies pertaining to the same group; and
• imposed an evaluation of the assets and liabilities of the entities subject to resolution measures before the same are implemented.

b Decree-Law No. 20/2016, of 20 April, which sets forth that shareholders’ general meetings of credit institutions whose articles of association establish voting caps must take place every five years to resolve on the maintenance or revocation of said voting caps (otherwise, said voting caps will be considered forfeited).

c Law No. 16/2017, of 3 May, which requires banks to disclose the identification of the shareholders with qualified shareholdings within the banks, as well as the beneficial owner of those same shareholdings.

ii Corporate laws

In February 2015, the legal regime governing the issuance of preferred shares and bonds contained in the PCCC was amended by Decree-Law No. 26/2015, of 6 February.

The main goal of these amendments was to decrease Portuguese companies’ dependence on banking financing and to stimulate the use of alternative financing structures, giving companies more freedom to issue hybrid capitalisation instruments.

In 2017, there were two relevant amendments to the PCCC.

Bearer securities

Aiming at preventing corruption, money laundering and tax fraud, and increasing transparency in the capital markets, Law No. 15/2017, of 3 May, prohibits the issue of bearer securities, creating a transitional six-month period (until 4 November 2017) to convert existing bearer securities into registered securities. This Law came into force on 4 May 2017.

As a consequence, all securities issued by Portuguese entities, including shares, must be registered securities, meaning that issuers must be able to identify their holders at any time.

Pursuant to this Law, bearer securities that were not converted into registered securities within the aforementioned six-month period cannot be validly transferred, and their holders’ right to participate in distribution of results is suspended until such conversion is completed.

Conversion of shareholder loans into share capital

Pursuant to Decree-Law No. 79/2017, of 30 June, the shareholders of limited liability companies by quotas that gather the necessary votes to approve the amendment of a company’s articles of association may approve a share capital increase by conversion of shareholders’ loans granted by them to the company by means of a simple communication to the company’s directors.

After receiving said communication, the directors must inform the remaining shareholders, who have 10 days to oppose the share capital increase, which only becomes effective if none of the latter opposes the conversion.

iii Private equity

The private equity legal regime has also been the object of reform in the past few years, with the regime enacted by Law No. 18/2015, of 4 March (which partially transposes Directive No. 2011/61/EU, of 8 June 2011, on Alternative Investment Funds Managers, and Directive
No. 2013/14/EU, of 21 May 2013) replacing the regime enacted in 2007, and which also regulates, for the first time, investment in social entrepreneurship and in specialised alternative investments.

One of the main modifications is the creation of two different regimes applicable to private equity companies depending on the value of the portfolios under their management: a stricter regulatory regime is applicable to entities that manage private equity funds whose portfolio value is higher than €100 million when such portfolio includes assets acquired with the use of leverage, or €500 million when such portfolio does not include such assets, and in relation to which there are no reimbursement rights that may be exercised within a period of five years as of the date of the initial investment. Private equity companies that do not fall under these thresholds may also be governed by this stricter regime, provided that they opt in.

The stricter regime applicable to private equity companies entails, in particular:

a. an authorisation from the CMVM prior to their incorporation (as opposed to a prior registration with the CMVM as applicable for other private equity companies);

b. that all reasonable measures shall be taken and adequate procedures shall be implemented to identify, prevent, manage and monitor conflicts of interest that may be harmful to the interests of the private equity funds under their management and their investors;

and

c. the obligation to functionally and hierarchically separate the functions of risk management from the operating units, including the portfolio management.

Private equity companies falling under the lighter regime set forth in this Law, but that manage portfolios whose net value exceeds €250 million, must incorporate an additional amount of equity that shall be equal to 0.02 per cent of the amount by which the portfolio’s net value exceeds €250 million.

The management regulations of private equity funds may establish the division of funds into several independent sub funds represented by one or more categories of investment units.

In line with this regime, the CMVM has also issued a new regulation governing these matters: Regulation No. 3/2015.

IV FOREIGN INVOLVEMENT IN M&A TRANSACTIONS

i M&A transactions headed by strategic foreign investors

Activity in the Portuguese M&A market in past years has been to a large extent due to the role of foreign investors – especially Chinese, US, Spanish, German and Angolan investors – who have played a key role in the revitalisation of the Portuguese economy.

This phenomenon is related not only to the pressure of Portuguese companies and the state to divest, which has created excellent opportunities for investors, but also to the fact that Portugal is regarded as a strategic hub between Europe and countries such as Angola, Brazil, Mozambique and other former Portuguese colonies.

Chinese investment has played a particularly relevant role in this, beginning with the acquisition, in 2011, by China Three Gorges Corporation from the state of a 21.35 per cent shareholding in EDP, the biggest electricity producer, distributor and trader in Portugal, for €2.7 billion, followed by the acquisition in 2012, by State Grid Corporation of China,

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8 All amounts indicated for the transactions indicated below result from publicly available sources.
of a 25 per cent shareholding in REN, the largest Portuguese energy grid company, for approximately €387 million. At the beginning of 2014, Fosun International acquired from the state 80 per cent of Caixa Seguros, the largest Portuguese insurance group, including the companies Fidelidade and Multicare, for €1 billion, and in October 2014 Fidelidade acquired 96 per cent of Espírito Santo Saúde, one of the biggest health groups in Portugal, after this company’s successful initial public offering at the beginning of 2014 for more than €455 million.

The following are some of the most relevant recent deals featuring Chinese investors:

a in September 2015, Haitong International Securities Group acquired BESI (the investment banking unit of the Espírito Santo Group and the largest Portuguese investment bank, and now called Haitong Bank Portugal) from Novo Banco for approximately €380 million. In May 2017, Haitong China made a €60 million share capital increase in Haitong Bank Portugal;

b in August 2016, Hainan Airlines acquired 23.7 per cent of Azul, the Brazilian airline company that is part of the consortium that won the privatisation of TAP, for €450 million. By July 2016, Hainan Airlines had already paid €30 million for bonds convertible in TAP’s share capital;

c in November 2016, Fosun acquired 16.7 per cent in Millennium BCP in a share capital increase reserved to it and increased that stake to 24 per cent in a new share capital increase that took place in February 2017 for a global investment of €549 million;

d in May 2017, Luz Saúde announced the acquisition of 90.41 per cent of the British Hospital group from Capital Criativo;

e in June 2017, a subsidiary of China Three Gorges Group (ACE Portugal Sàrl) acquired 49 per cent of EDPR PT – Parques Eólicos, a 422MW wind farm, for €248 million;

f in November 2017, China Tianying acquired the insurance companies Groupama Seguros de Vida and Groupama Seguros for an undisclosed amount.

g in June 2017, EDP sold 49 per cent of EDPR PT – Parques Eólicos to a subsidiary of China Three Gorges Group for €242 million.

h in May 2018, China Three Gorges launched a takeover offer over EDP and EDP Renováveis.

European investors have been more active in recent years. Examples include the acquisition of SAPEC Agro Business (engaged in crop production products and crop nutrition, with sales in over 70 countries) by Bridgepoint, completed in January 2017, for €456 million; the takeover launched by Caixabank on Banco BPI, which was successfully completed and entailed an investment of €645 million; and the acquisition of Ascendi by Ardian for €600 million. In line with this trend, of the 116 inbound acquisitions completed in the past year, 86 were carried out by European investors, with Spain and the United Kingdom sitting in first and second place, respectively.9

Angolan investors have been very active in the Portuguese market. Key players include Isabel dos Santos, daughter of the Angola’s former president and Africa’s richest woman, who already owns shareholdings in, inter alia, GALP (the largest Portuguese oil and gas company), NOS (one of the leading companies in the telecommunications sector, resulting

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from a merger between Optimus and ZON) and EuroBic (an Angolan private bank based in Portugal); and António Mosquito, who owns controlling shareholdings in Controlinveste (one of the largest Portuguese media groups) and Soares da Costa (in the construction sector). In June 2015, Isabel dos Santos acquired 65 per cent of Efacec Power Solutions (the core company of Efacec Group, the largest Portuguese electric group) from Mello Family and Têxtil Manuel Gonçalves for approximately €200 million.

American funds have also been very active in the Portuguese market, and have participated in most of the bids for relevant transactions in the past few years. In particular, in March 2015 Lone Star acquired Garvecat (owner of the Vilamoura resort in the Algarve) from Caixa Catalunya for €200 million, and in November 2015 sold three shopping centres to Deutsche Bank for approximately €200 million. More recently, Lone Star has completed several other deals in the real estate sector (see below) and acquired a controlling stake in Novo Banco. In January 2016, North Bridge acquired a minority stake in Outsystems, a Portuguese company engaged in the production and development of software, which holds subsidiaries in Brazil, Dubai, the Netherlands and the United States, for €50 million. In March 2016, the Carlyle Group acquired 50 per cent of Logoplaste (an industrial group engaged in the manufacturing of rigid plastic packaging) for €570 million.

**ii M&A transactions headed by national investors in key destinations**

In 2017, outbound acquisitions were mainly carried out in European companies, with Spain, France and the United Kingdom leading the rankings.10

**V SIGNIFICANT TRANSACTIONS, KEY TRENDS AND HOT INDUSTRIES**

In addition to the transactions listed in the preceding section, the following are some of the other most important M&A deals that have taken place in the past few years.

**i M&A transactions related to financial and insurance institutions**

In the context of the requirements both at a local and at an EU level regarding ring-fencing and the separation of banks’ deposit-taking functions from more risky businesses, several banking and insurance groups have been selling non-core businesses. The increasingly strict regulatory requirements in both the banking and insurance sectors have also led to strategic divestments by several players.

The following are examples of deals in these sectors:

- **a** in April 2016, Bankinter (a Spanish bank) acquired the retail and insurance business of Barclays Portugal for approximately €160 million;
- **b** in December 2016, Real Vida Seguros (pertaining to the Portuguese Patris group) acquired both a controlling stake in Banif Pensões from Oitante and 100 per cent of Finibanco Vida from Montepio Geral;
- **c** in February 2017, the Chinese conglomerate Fosun completed the acquisition of a 24 per cent stake in Millennium BCP for a global investment of €549 million (see above);

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again in February 2017, Caixabank successfully completed its takeover of Banco BPI, raising its stake from 45 to 84.5 per cent, for €645 million;

in August 2017, Novo Banco entered into an agreement to sell 90 per cent of its Cape Verdean subsidiary (Banco Internacional de Cabo Verde) to IIBG Holdings BSC, a transaction that was approved by the Cape Verdean antitrust authorities in May 2018;

in October 2017, Lone Star completed the acquisition of 75 per cent of Novo Banco for a global investment of €1 billion.

in March 2018, Novo Banco sold the business of its Venezuelan subsidiary to BANCAMIGA, Banco Universal for an undisclosed amount; and

again in March 2018, Deutsche Bank agreed to sell the retail, private and commercial clients business of its Portuguese branch to the Spanish bank Abanca, a deal that is expected to be completed by June 2019.

Finally, Santa Casa da Misericórdia de Lisboa, a non-profit organisation operating under the control of the government that operates lotteries, lotto games and sporting bets, is considering acquiring a stake of up to 2 per cent in the Portuguese bank Montepio Geral.

ii M&A related to the collapse of Espírito Santo Group

Further to the fall of Espírito Santo Group, and to the insolvency or pre-insolvency of some of the holdings of the Group, several deals took place as a way to divest non-core assets.

In addition, in 2016, the Bank of Portugal started negotiations regarding the sale of Novo Banco, a bank that resulted from the transfer of part of Banco Espírito Santo's businesses after its collapse in August 2014. In October 2017, the sale of Novo Banco to Lone Star was completed for a global investment of €1 billion. Portugal’s bank resolution fund retained the remaining 25 per cent of Novo Banco.

iii Energy sector

The energy sector has also been particularly active in the past few years.

As far as renewable energy is concerned, the past couple of years saw some of the biggest wind asset portfolios being sold, including the sale of Iberwind to Chinese group Cheung Kong for €1 billion, the sale of Finerge to First State for €900 million and the sale of a stake in EDF Energies Nouvelles’ wind business in Portugal to Lancashire County Pension Fund, all in 2015. In May 2018, New Finerge, the company that acquired the Finerge wind farm business in 2015, announced the acquisition of five companies engaged in the wind sector. This deal is now pending antitrust approval.

Several deals also took place in the gas sector. In October 2016, Marubeni and Toho Gas acquired from Galp Gás a 22.5 per cent stake in its natural gas distribution business for €138 million. In March 2017, Artá completed the acquisition of Gascan from Portuguese private equity Explorer for €70 million. In October 2017, REN completed the acquisition of EDP Gás from EDP for €532 million.

iv Real estate and construction sectors

The real estate sector contributes very significantly to the activity levels in Portuguese M&A, and 2017 confirmed this trend: real estate was the most active sector in number of deals, with some of the highest levels of activity ever seen.
Since 2017, the sale of shopping centres has been particularly prevalent, with a global €1 billion investment expected in 2018. For instance:

a Dolce Vita Tejo (the second-biggest shopping centre in Portugal) was sold by Baupost and Eurofund to AXA Investment Managers for €230 million;

b Sintra Retail Park, Fórum Sintra and Fórum Montijo, valued at €400 million, were sold by Blackstone to Auchan;

c a controlling stake in the entity holding MaiaShopping and GuimarãesShopping was acquired by Ocidental Seguros (pertaining to Ageas insurance group) from Sonae Sierra; and

d Fórum Coimbra and Fórum Viseu were sold by Locaviseu to Greenbay and Resilient for a global amount of €220 million.11

Moreover, several logistic platforms were sold, such as:

a EIPA II in Azambuja, totalling 54,640 square metres, was acquired by Deutsche Asset Management from ECS Capital;

b four of DIA’s logistic platforms in Spain and Portugal were acquired by Blackstone for €90 million; and

c Logicor (one of the largest European logistic platforms) was sold by Blackstone to China Investment Corporation for a global amount of €12.250 billion.

Related to the dynamism seen in the real estate sector, the construction sector has also been quite active, with the sale of several construction companies such as Grupo Elevo (sold in September 2017 by Vallis Construction Sector for €90 million), Opway (sold in December 2017 by the company’s management team for an undisclosed amount) and Ramos Catarino (sold in May 2018 by the Catarino family for an undisclosed amount), all of which were acquired by Nacala Holdings.

In addition, Teixeira Duarte, one of the biggest Portuguese construction companies, has a divestment plan in motion to sell assets valued at €500 million, including Lagoas Park, a business park near Lisbon, its 7.5 per cent stake in Lusoponte (both of these are expected to be completed in 2018) and its 9 per cent stake in Auto-Estradas do Baixo Tejo.

VI FINANCING OF M&A: MAIN SOURCES AND DEVELOPMENTS

As a result of the financial crisis, and of the considerable decline of leveraged loan transactions and longer-term financings by bank syndicates, Portuguese companies have resorted to alternative sources of financing to support both their M&A investments and their current businesses. In particular, the issuance of corporate bonds (including high-yield bonds), as well as factoring and financial leases, have become more and more common.

Bank restructurings in Portugal have also opened a window of opportunity for an influx of alternative financing to traditional banking, notably through hedge funds, private equity and capital venture operations.

In particular, private equity funds, both local players and some of the major international private equity funds, have been quite active in Portugal, seeking to turn the recession into an advantage for specific investment transactions.

Additionally, a shift from Portuguese-style (short-form) documentation to Loan Market Association-based documentation governed by Portuguese law is a new trend noted in the banking sector, triggered by the risk aversion of Portuguese banks.

Currently, and in line with the revitalisation of the Portuguese market, banks are more willing to finance companies, both local and foreign investors (even though most foreign players obtain financing abroad). This contrasts with the situation seen until recently, where companies felt the need to go to foreign markets to obtain financing.

VII EMPLOYMENT LAW

In 2017, further to some high-profile transactions that were the subject of extensive media coverage, the government’s attention was drawn to the employment rules governing transfers of undertakings, which resulted in a series of substantial amendments, recently approved by Law No. 14/2018, of 19 March, which amended the Portuguese Labour Code and substantially changed the employment-related rules governing transfers of undertakings or parts of undertakings. The most striking aspects of this new legislation are as follows:

The term of the transferor’s joint and several liability with the transferee for the credits of employees resulting from the execution, breach or termination of their employment agreements has been extended from one to two years following the transfer.

The Portuguese labour authorities – the Ministry of Labour and the Labour Inspectorate – now have an active role regarding information and consultation duties within transfers of undertakings. Particularly relevant is the new obligation of the transferor to inform the Labour Inspectorate of the content of the contract executed with the transferee and, where a transfer of an economic unit takes place, to provide details of all the elements forming part of such unit (however, in companies with fewer than 50 employees, this information needs only to be provided upon the express request of the Labour Inspectorate).

The role of trade unions is enhanced; they are now considered employees’ representatives under the new framework, regardless of whether a union delegate has been appointed for the company or not.

If no representative structures for employees are already in place, employees can now nominate an ad hoc representative committee. This committee will represent them in the consultation phase (if applicable).

There is also a reinforcement of the information duties for the transferor and transferee, along with extended deadlines (which, in some cases, may entail a two-month procedure prior to a transfer). According to the new rules, the parties to the transaction must inform employees and their representatives of the content of the contract agreed between them (without prejudice to the right to omit specific information where that data could potentially harm or seriously affect the company’s operation). What the content that should be disclosed is, however, unclear, and may give rise to different interpretations.

There is now an express acknowledgement of employees’ right to oppose the transfer of their employment agreements whenever the transfer can cause them serious damage. This opposition right was the most substantial change to the regime. As per the new wording of the law, a transfer may cause serious damage to an employee where there is an evident lack of solvency or a precarious financial situation of the transferee, or even when, in the employees’ view, the transferee’s human resources policies do not warrant their trust. Considering that
the grounds under which employees may oppose the transfer of their agreements are based on undetermined concepts, it will be up to the labour courts to determine how easy or difficult bringing an allegation of serious damage will be.

By opposing the transfer of their employment agreements to the buyer (which has to be expressed, in writing, before the transfer takes place), employees may choose between maintaining their employment relationship with the transferor; or terminating the employment agreement with cause, in which case they are entitled to compensation identical to that provided for in the event of collective redundancies.

These rules concerning a transfer of an undertaking entered into force on 20 March 2018 and apply to all such transfers occurring as of that date.

It should be stressed that these labour rules do not apply to share purchase deals. In fact, this regime merely concerns the transfer by any means (spin-off, merger, assignment, etc.) of an undertaking, an establishment, or part of an undertaking or an establishment constituting an autonomous unit.

VIII TAX LAW

No significant developments that had an impact on M&A activity occurred in the past 12 months.

It should be noted, however, that the conditions for the qualification of the relevant shareholding under the participation exemption regime were changed as of January 2016 as follows: the minimum percentage of participation was increased from 5 to 10 per cent, but, in turn, the minimum holding period required was decreased from 24 to 12 months prior to the distribution of dividends or the disposal of the relevant participation.

IX COMPETITION LAW

Even though no relevant modifications to the merger control legal framework were registered in the past year (the Portuguese merger control framework was further aligned with the EU merger control framework with the entry into force of the new Competition Act in 2012, which has remained unaltered since), the simplified filing form and pre-notification contacts have been increasingly used, enabling a swifter assessment and earlier decisions regarding uncomplicated matters.

To increase transparency, at the end of each year, the Portuguese Competition Authority (PCA) publishes its strategic priorities regarding competition policy for the following year on its website. According to a statement issued by the PCA, its main priorities for 2017 were the following:

a reinforcing its ex officio capabilities to conduct investigations;

b increasing the swiftness and effectiveness of investigations, including with regard to merger control;

c increasing the fight against cartels; and

d strengthening the legal and economic grounds of its decisions by consolidating its internal checks and balances mechanism.12

12 Available at www.concorrencia.pt/vPT/A_AdC/Instrumentos_de_gestao/Prioridades/Documents/AdC_Prioridades_2017.pdf.
Portugal

In line with this set of priorities, the PCA continues to actively pursue its goal of protecting and promoting competition in the Portuguese economy. It is becoming more dynamic, and has invested in its technical capacity, having reorganised its antitrust division.

With regard to merger control, the PCA is expected to continue to promote the use of the simplified filing form, as well as pre-notification contacts, to deliver swifter decisions and enhance transparency in the market. Moreover, it seems that the PCA’s merger control decisions are increasingly subject to judicial review. In 2015, the Portuguese Competition, Regulation and Supervision Court rejected, on one hand, the appeal by Media, Zon Optimus and Portugal Telecom related to the PCA’s decision to initiate an in-depth investigation of this concentration and, on the other, another claim by these undertakings alleging that the concentration had been tacitly approved.13

Again in 2015, the Portuguese Competition, Regulation and Supervision Court confirmed the PCA’s decision in Arena Atlântida/Pavilhão Atlântico*Atlântico.14

More recently, the PCA’s clearance decision of the SUMA/EGF concentration (a merger between two relevant companies operating at different levels of the Portuguese waste management market), which followed an in-depth investigation, was fully endorsed by the Portuguese Competition, Regulation and Supervision Court, as all the appeals introduced by several of the Portuguese municipalities and main competitors against the PCA’s approval were entirely dismissed by the Court.

X OUTLOOK

M&A activity is expected to continue at a good pace in upcoming months.

The following point to the maintenance of the levels of activity in the sector in Portugal:

a the continuing improvement of the Portuguese economy;
b the ring-fencing process and the restructuring of local players;
c increasing access to financing; and
d the sustained interest of foreign investors, including major international investment funds, in Portugal.

Some interesting transactions are currently ongoing, such as the public takeover launched by China Three Gorges over EDP and EDP Renováveis. In addition the acquisition of Media Capital by Altice, one of the leading media groups in Portugal, is pending antitrust approval, which shall be issued at any moment.

In addition, important deals are in the pipeline, including the sale of Partex Oil and Gas by Fundação Gulbenkian (after negotiations with CEFC China Energy ceased in April 2018 in a deal valued at €500 million), and several real estate transactions such as the sale of Lagoas Park and a stake in Lusoponte by Teixeira Duarte, and the sale of real estate portfolios by insurance companies and financial institutions.

I OVERVIEW OF M&A ACTIVITY

During the past year, there has continued to be sustained M&A activity in the domestic market involving Qatari investors and institutions, while a significant number of outbound investments focused primarily on Europe and the United States.

In the local market, Qatar Petroleum oversaw the integration of its subsidiaries QatarGas and RasGas, a transaction that created the world’s largest liquefied natural gas company, which was by far the largest and most complex domestic M&A transaction in Qatar in 2017. In another interesting deal, Vodafone Group Plc sold its stake in Vodafone Qatar to Qatar Foundation for £266 million.

Advanced discussions regarding the contemplated merger between Qatari banks Masraf Al Rayan, Barwa Bank and International Bank of Qatar have ceased. Mergers of Qatari banks and financial institutions are, however, still being considered.

That said, outbound activity remains the cornerstone of M&A in the region, as highlighted by the most recent acquisition by Qatar Holding LLC of a majority stake in Banvit Bandirma Vitaminli Yem Sanayi AS, a Turkish-listed company operating in the poultry sector, through a joint venture with BRF GmbH, and the €506.8 million sale by Qatari Diar of its entire stake in French publicly listed company Veolia Environnement, representing approximately 26.1 million shares and 4.6 per cent of the share capital.

II GENERAL INTRODUCTION TO THE LEGAL FRAMEWORK FOR M&A

i General overview of the legal system

In accordance with the 2004 Constitution, Shariah law is the primary source of Qatari legislation. In addition, legislation is based on the Civil Code and the Commercial Law. The Civil Code gives natural and legal persons the freedom to agree on all matters, without limitation, provided that their agreement does not conflict with the law, public policy or morality. The Commercial Law regulates commercial activities, business agencies, commercial concerns, trade names and commercial contracts in general. The Commercial Law also regulates banking transactions, bills of exchange, promissory notes and cheques, and provides a first set of substantive provisions regarding bankruptcy under Qatari law.

1 Michiel Visser is a partner and Charbel Abou Charaf is a local partner at White & Case LLP.
2 Law No. 22 of 2004.
3 Law No. 27 of 2006.
ii Other legal frameworks
While they see very little M&A activity, the Qatar Financial Centre (QFC), established by Law No. 7 of 2005, and the Qatar Science and Technology Park (QSTP), established by Law No. 36 of 2005, provide two additional legal frameworks for companies in Qatar, with considerable advantages.

The QFC
Companies licensed by the QFC are subject to a separate set of rules and regulations that enable them to enjoy various commercial benefits related to M&A. However, given that most QFC firms are subsidiaries or branches of parent companies, there is rarely any M&A activity at the level of QFC entities. This trend could change, given recent developments at the QFC, with a noticeable increase in newly incorporated holding companies and special-purpose vehicles that could be involved in M&A.

The QSTP
Similarly, the QSTP is a free zone, affiliated with Qatar Foundation, designed to promote and support research and development, technology and the investment activities that serve the objectives of the QSTP. It has rarely seen any M&A activity, given that its members are largely international companies.

iii Corporate law
General overview
M&A activity is primarily governed by the new Companies Law. It is also regulated by Qatar Financial Markets Authority’s Law No. 8 of 2012, as amended, and by the Investment of Foreign Capital in the Economic Activity Law (Foreign Investment Law).

Under the Companies Law, a company can have multiple forms. The two most widespread types of companies in Qatar are the limited liability company (LLC) and the joint-stock company (JSC) in the form of a private JSC.

iv Private acquisitions
Mergers
Under Qatari law, a merger occurs when one company is merged into another company, or one or more companies are merged into a new company. The merger contract will contain terms providing for, *inter alia*, an evaluation of the liabilities of the merged company and the number of shares allocated to the capital of the merging entity. The merger shall only be valid if previously approved by the competent corporate bodies of the companies involved, in accordance with the respective articles of association (articles). Mergers in Qatar are rare, and the merger provisions of the Companies Law are consequently infrequently invoked.

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4 Law No. 11/2015.
5 Law No. 13 of 2000, as amended.
Demergers

The Companies Law provides that a company can split into two or more companies, whereby each company will be deemed an independent legal entity and can take on any of the legal forms mentioned in subsection ii.

A demerger must be approved by a decision issued by the extraordinary general assembly (EGA) of the company, with the favourable vote of shareholders representing at least 75 per cent of the share capital. The resolution for demerger should outline the names of the shareholders and their shareholdings, the rights and obligations in respect of all the companies resulting from the demerger, as well as the manner by which assets and liabilities are to be distributed among them.

In the event that the shares of the company to be demerged are traded on Qatar’s main stock exchange, the Qatar Exchange, the shares of the companies resulting from the demerger shall be tradable upon issuance of the demerger decision.

Finally, it is important to note that the Companies Law allows the shareholders that voted against the demerger to exit from the company. However, no further details are provided for in the Companies Law regarding the exit process.

Acquisitions

An acquisition will only be deemed valid if the following requirements are met:

a. the acquiring company and the target company must each issue a resolution by their respective EGA approving the acquisition, setting out the waiver of the right of first refusal of existing shareholders: these resolutions are to be certified by the Ministry of Economy and Commerce;

b. the acquiring company must issue a resolution to increase its capital and thereafter allocate that increase to the shareholders according to their shareholdings in the company, in accordance with its articles;

c. completion of the procedures to transfer ownership of the shares of the target, which will not be opposable until the shares are duly registered in accordance with the provisions in the Companies Law;

d. if the acquisition is a buyout, the acquiring company must pay the value of the shares and deposit the shares in a special account to distribute them to the shareholders that were registered at the time the EGA approved the sale of shares;

e. if the acquisition was made through share or bond conversion, the acquiring company must submit those shares or bonds to the target for the target to distribute them to the shareholders that were registered at the time the EGA approved the acquisition;

f. the target must amend its constitutional documents, including the articles, and elect a new board of directors accordingly; and

g. the acquiring company must take all necessary measures to preserve the rights of the minority shareholders, including offering to purchase the stock or voting rights of the minority shareholders for a value not less than the value of the stocks or shares covered by the acquisition, or the value determined by an expert in accordance with the provisions of the Companies Law.
Public M&A

Overview of the Securities Market Regulation

The Qatar Financial Markets Authority (QFMA) is governed by Law No. 8 of 2012, which establishes the rights of the QFMA to regulate takeovers and mergers of public companies. The relevant rules and regulations issued by the QFMA are the Mergers and Acquisitions Rules of 2014, discussed in further detail in Section III. Although it is not mandatory, listed companies should also be in compliance with the Corporate Governance Code (the CG Code), the latest version of which was issued by the QFMA in 2016 and which operates a ‘comply or clarify’ principle. In other words, a public joint stock company that opts out of certain provisions of the CG Code must provide justification for doing so to the QFMA, which, if it accepts the reasons for non-compliance, takes into account public interest, the interests of the market or the need to protect investors. The company in question must also disclose its non-compliance in the annual corporate governance report, which must be signed by the chairman of the board of directors, published and submitted to the QFMA.

The QFMA rules and regulations provide specific listing, disclosure and notification requirements for public companies.

M&A in certain regulated industries

While M&A activity is generally conducted in accordance with the above-mentioned steps, certain regulated industries provide for particular processes.

The financial sector

The Qatar Central Bank (QCB) is governed by the QCB Law, which details the mechanism for the merger of financial institutions, subject to the thresholds and procedures set out in the Companies Law and the restrictions set out in the Foreign Investment Law.

Under the QCB Law, two or more financial institutions can merge in one of two ways: two or more companies can merge into a new company or the target can merge into the acquirer. In both cases, the following steps must be taken:

- approval of the QCB for the merger is required;
- a preliminary agreement, or plan of merger (called an ‘initial agreement’ under the QCB Law), must be signed by the parties;
- prior to signing such an agreement, a full due diligence review must be undertaken; and
- an application for merger containing certain documents and information must be submitted to the QCB, following which the Governor of the QCB has 60 days to issue a decision approving or rejecting the merger. That decision is appealable.

In addition, the QCB Law imposes the creation of committees at the level of the companies intending to merge, on which the QCB must be represented. The exchange of information between the merging companies is also strictly regulated: any exchange requires prior approval by the Governor of the QCB; and the content of the exchange and the identity of its recipients are restricted.

A merger can be imposed by the QCB on any financial institution facing problems that have a ‘fundamental effect’ on its financial condition.

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6 Law No. 13 of 2012.
The QCB Law does not shed much light on the legal framework governing acquisitions of financial institutions, but addresses the issue in a single provision requiring the approval of the QCB on any acquisition, pursuant to the terms and conditions set by the QCB, and applying the benefits and privileges granted under the merger provisions to any such acquisition. In practice, it seems that the QCB is applying the acquisition provisions of the Companies Law as set out in subsection iv.

The telecommunications sector
Legislation in the telecommunications sector consists of various laws and regulations. The main governing act is the Telecommunications Law (the Telecom Law). As the regulator of this sector, the Supreme Council for Information and Technology (formerly known as ictQATAR and currently known as the Communications Regulatory Authority (CRA)) plays a key role.

The Executive By-Law for the Telecommunications Law (the Executive By-Law) and various CRA notices and instructions, including the 2011 instruction regarding the calculation and payment of the licence fee and industry fee, and the 2012 Radio Spectrum Policy, have helped shape the sector.

The Telecom Law grants discretionary power to the CRA regarding changes of control. Under Article 13, the Executive By-Law also requires approval by the CRA if an individual licence is assigned to another person, where the term ‘assignment’ includes a transfer of the licence or a change of control of a licensee.

Finally, the target company must deliver to the CRA written notification of an intended transaction no later than 60 days prior to the intended completion date of the transaction.

We understand that these provisions were applied during the sale of the stake of Vodafone Qatar to Qatar Foundation.

III DEVELOPMENTS IN CORPORATE AND TAKEOVER LAW AND THEIR IMPACT
Until recently, the regulations on securities contained little more than basic provisions on tender offers for shares traded on the Qatar Stock Exchange. Consequently, the offer structure and content were primarily based on the contractual arrangements of the parties, which were often subject to considerable amendments resulting from a rather ‘heavy’ (but necessary) interaction with the QFMA to obtain guidance throughout each stage of the process. On 9 March 2014, the QFMA published the Merger & Acquisition Rules (the M&A Rules), thereby providing a more comprehensive, albeit complex, legal framework for public takeovers.

i The M&A Rules
Scope
The M&A Rules have a wide scope of application since they generally apply to all acquisitions or mergers where one of the parties is a listed company in Qatar (direct acquisitions) or a subsidiary of a listed company (indirect acquisitions).

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7 Decree-Law No. 34 of 2006.
8 ictQATAR Decision No. 1 of 2009.
Exceptions

With the exception of a few provisions, including certain disclosure obligations, the M&A Rules do not apply to:

a) acquisitions or mergers performed outside the state of Qatar; and
b) indirect acquisitions, provided that the subsidiary of the listed company (1) has conducted business activities in the past three years, or (2) where there was no conflict of interest between the listed company (or its subsidiary) and the counterparty to the acquisition or merger.

It is unclear from the M&A Rules whether the above conditions are mutually exclusive, or whether the ‘or’ should rather be read as ‘and’, thus rendering both conditions as requirements for the purposes of the exemption. A literal approach to interpretation would militate against considering the conditions cumulative. Furthermore, there is no guidance in the M&A Rules as to what exactly would constitute a ‘conflict of interest’ relevant in this context.

Notwithstanding this exemption, listed companies are required to comply with certain (rather substantial) disclosure obligations, both prior to an acquisition or merger, with respect to indirect acquisitions, and immediately upon approval being granted by the regulators of the offeree company with respect to acquisitions or mergers implemented outside the state, and at completion of the transaction in both cases.

Pre-completion obligations

In particular, with regard to pre-completion obligations, listed companies are required to disclose certain information to the QFMA and the market, including:

a) details of the offeror, the offeree company (i.e., the target), the major shareholders (i.e., shareholders owning 5 per cent or more of the share capital of a company), and the directors and senior executives;
b) with respect to indirect acquisitions only, details of the subsidiary, its business and the degree of dependency on the listed company;
c) details of the minimum and maximum number of shares that can be acquired under the offer;
d) the offer price;
e) the purpose of the acquisition or merger;
f) the envisaged timetable;
g) an indication of the consequences that the offer may have on the financial position of the listed company and its shareholders;
h) the advantages and disadvantages possibly arising from the acquisition or merger; and
i) the disclosure of any conflicts of interest among the offeror, the offeree, their independent advisers and ‘any person having a relationship with the acquisition or merger’ (collectively, concerned persons), the members of their respective board of directors or major shareholders.

Completion obligations

Immediately upon completion of an acquisition or a merger, listed companies are required to provide the QFMA and the market with a statement setting out the outcome of the transaction, including an indication of the actual percentage and value of the shares that have been acquired (to rectify any differences or discrepancies with the information disclosed
in the previous communication mentioned above), and the effects of any difference on the content of any such previous disclosure. In addition, listed companies have to submit to the QFMA the execution copy of the merger or acquisition agreement.

Finally, the M&A Rules provide that if the procedures for the implementation of the acquisition or merger are not completed (it is not clear whether partial completion would be carved out), presumably within the timeline indicated within the timetable outlined below, a listed company is required to notify both the QFMA and the market of the reasons for this, and provide information as to whether it is expected that the situation will be temporary or final. Again, the M&A Rules appear incomplete, as they do not offer guidance on the triggering event of this disclosure obligation, nor specify the period within which this obligation must be complied with.

**Intention to launch an offer, application, timetable and offer document**

The M&A Rules require listed companies to ‘immediately disclose’ to the QFMA and the market the intention to submit an offer, as well as any ‘initial understandings’ with relevant parties concerning the offer. We believe that such a disclosure could not be made efficiently (without otherwise adversely affecting the outcome of the offer) prior to having reached a fair degree of certainty in respect of the actual intention to launch an offer.

Following that disclosure, the offeror is required to submit to the QFMA the following main documents: an application for the acquisition or merger, an ‘offer’ document and a timetable for the implementation of the acquisition or merger (collectively, documentation).

**Timetable**

The M&A Rules require the offeror to submit to the QFMA a proposed timetable for the acquisition or merger within two weeks of the date of notification regarding the intention to launch an offer. The timetable must include, *inter alia*:

- the final offer document;
- an opinion issued by the board of directors of the offeree company; and
- proposals with respect to relevant dates, including:
  - the first permitted closing date of the offer;
  - the date on which the offeree company may announce its profits or dividends forecast, asset evaluation or proposal for dividend payments;
  - the date for the public announcement of the offer;
  - the final date for meeting all conditions; and
  - the final date by which to pay the relevant consideration to the shareholders of the offeree.

The M&A Rules do not provide guidance or further details in respect of the above-mentioned dates, and their actual meaning in this context is therefore unclear. The QFMA must be notified immediately if it becomes apparent that the offeror or the offeree is unable to comply with the timetable.

**Applicable time periods**

The offeror is required to provide the QFMA with the documentation at least 30 days prior to the date of the meeting of the EGA held to approve the offer. The offeror is also required to provide the shareholders with the offer document within three days of the QFMA’s approval of that document and at least 15 days before the date of the EGA meeting.
Unless the QFMA extends this period, the offeror must implement the offer within one month of the date on which the offer has been approved by the EGA, or of the date of approval of the offer document by the QFMA if the EGA has not been held.

Additional disclosures
During the offer period, listed companies are required to disclose (presumably to the QFMA and the market) any dealings of major shareholders concerning the securities that are the object of the offer. These include details of any person who, individually or jointly with minor children, a spouse or with others' owns or becomes the owner of 5 per cent or more of the shares in the offeror or the offeree.

Post-completion obligations
A listed company is required to submit an acknowledgment to the QFMA confirming that completion of the acquisition or merger has occurred.

Mandatory offer
Every person who owns or intends to own, whether individually or with other persons, more than 75 per cent of the shares of the offeree company (relevant stake) is required to notify the QFMA thereof and submit a mandatory offer to buy all the remaining securities (mandatory offer). The mandatory offer must be launched within 30 days of the date on which the holding of the relevant stake is achieved. It is therefore unclear how (if at all) the obligations in relation to the mandatory offer apply to the mere intention or willingness to acquire a relevant stake.

Exemption from mandatory offer
The QFMA may grant a temporary exemption from the obligation to launch a mandatory offer provided that the relevant person owns a stake not exceeding 78 per cent of the share capital, and the 3 per cent in excess of the 75 per cent threshold set out above is disposed of within three months of the date on which the excess percentage was acquired by that person.

IV FOREIGN INVOLVEMENT IN M&A TRANSACTIONS
While the two most widespread types of companies in Qatar are the LLC and the JSC, most foreign investors choose to do business in Qatar through an LLC form because of its lighter framework.

Through the establishment of the QFC, Qatar has promoted the country as a regional hub for international finance with the aim of attracting, inter alia, banking, financial services, insurance and corporate head office function businesses. As mentioned earlier, companies licensed by the QFC enjoy an array of commercial benefits, such as 100 per cent foreign ownership and a corporation tax rate of 10 per cent on all locally sourced profits. As a result, the QFC has seen a large number of international and regional banks, financial institutions and insurance companies open under the umbrella of the QFC Regulatory Authority.

Similarly, the QSTP allows 100 per cent foreign ownership and QSTP companies can sponsor foreign employees, resulting in the attraction of major international companies.

Foreign involvement in M&A transactions is largely governed by the Foreign Investment Law, under which a foreign investor is a non-Qatari national, whereas a Qatari national is a
physical person holding a Qatari passport or a legal entity fully owned by Qataris. In general, foreign investors may invest a maximum of 49 per cent of the share capital of a Qatari company in ‘all sectors of the national economy’, so long as the remaining 51 per cent of the share capital is owned by at least one Qatari partner.

The Foreign Investment Law also provides for exceptions to further favour overseas involvement: foreign investors may own up to 100 per cent of the share capital in certain exempted sectors and upon approval from the Minister of Economy and Commerce. Exempted sectors include agriculture, industry, health, education, tourism, energy, mining, consulting, information technology, cultural services, sports, entertainment and distribution services.

However, the Foreign Investment Law prohibits foreign investment in the banking and insurance sectors unless special approval is obtained from the Council of Ministers.

Moreover, commercial agencies can only be undertaken by Qatari nationals and freehold property can only be purchased and held by Qatari nationals or GCC nationals, except in a very limited number of designated areas. More generally, foreign investors may purchase a leasehold property in certain designated areas, but only up to a term of 99 years.

Further exclusion from the scope of the Foreign Investment Law applies to companies that have been awarded their contract through concessions or special agreements for mining, exploiting or managing natural resources, unless the terms of the concession or special agreement specify otherwise.

Finally, the Foreign Investment Law does not apply to companies established or funded by the government, public institutions or organisations that are associated with foreign investors.

Foreign companies can operate in Qatar without the need to incorporate a fully fledged entity if it is only for a specific project and if they contribute to ‘the performance of a public service or utility’, upon approval from the Minister of Economy and Commerce. The meaning of ‘public service’ is interpreted broadly by the Minister, leaving plenty of room for discretion and flexibility as to what can be regarded as a ‘public service’.

Other benefits offered to foreign investors include the freedom to repatriate profits as the foreign investors deem fit and tax exemptions. Foreign capital that has been invested in exempted sectors, where a foreign investor can own up to 100 per cent of the share capital of a company, can be exempt from income tax for a period of up to 10 years from the date the newly established Qatari company starts its operations. Customs duties can also be exempted in relation to the importation of necessary equipment and materials.

Foreign involvement in publicly listed companies is governed by a different set of regulations. As a general rule, foreign investors can own up to 49 per cent of the shares listed on the Qatar Exchange upon approval by the Ministry of Economy and Commerce on the specific foreign ownership threshold set in the articles of that company.

V SIGNIFICANT TRANSACTIONS, KEY TRENDS AND HOT INDUSTRIES

The key trend in M&A activity has been to focus on the myriad opportunities for Qatari investors in the global market. Qatar’s most prominent investors, such as QIA, Ooredoo, Qatar Petroleum, Qatari Diar and Katara Hospitality, have been acquiring assets in both stable economies and emerging markets, noting, however, that since Brexit referendum, there have not been any major investments in the United Kingdom by any of the aforementioned major Qatari investors. This could mean that there are opportunities for the Qatari
institutions to benefit from investments in the UK market, whether in the real estate, finance, industry, hospitality, energy or sports sectors. In parallel, Qatari investors continue to invest in emerging markets, with a particular focus on real estate.

VI EMPLOYMENT LAW

The Labour Law\(^9\) provides the main framework for employment law and applies to Qatari employers and workers. However, it does not apply to the following individuals:

- a employees and workers of corporations and companies established by Qatar Petroleum;
- b employees and workers for government and public bodies, including the ministries;
- c officers and members of the armed forces, the police and maritime forces;
- d temporary workers; and
- e individuals working in domestic employment (including, without limitation, drivers, cooks and gardeners).

The main government body responsible for individuals working in Qatar is the Ministry of Labour.

With regard to business transactions, the main applicable provision of the Labour Law provides that employees of a target company, and their employment-related rights, obligations and benefits under the relevant employment relationships, transfer to the acquiring company. In turn, and given that the approval of the Ministry of Labour is required to transfer the sponsorship of individual employees, the acquiring company and the target company must coordinate with the Ministry of Labour to transfer the employees to the acquiring company. Where approval is given, employment relations between the employee and the acquiring company (or the new company) continue without interruption, and the transferor and the transferee are jointly and severally liable for an employee’s pay or other claims deriving from the employment relationship that have fallen due before the transfer. Finally, under the Labour Law, a transfer of business does not, in itself, constitute a legal ground to terminate any employment relationship.

i Trade unions

Although the Labour Law permits a single employees’ committee to be formed by more than 100 Qatari employees employed by the same entity, trade unions are practically non-existent. The Labour Law requires minimum employee entitlements by which employers must abide, but can amend these if in favour of the employee.

ii Qatarisation

Because of ‘Qatarisation’, whereby priority in employment is given to Qatari nationals, non-Qatari employees must demonstrate a need for their skills and the unavailability of a Qatari national to carry out the work, and acquire approval from the Ministry of Labour prior to commencement of the work.

iii Pension arrangements and social security

Pension arrangements and social security are also regulated by the Labour Law: certain insurance and social security contributions for Qatari national employees are required. Moreover, pension schemes are allowed for foreign employees and may be elected by Qatari employees if they are more beneficial than the minimum benefits provided for by law.

iv Sponsorship

Individuals require a valid residency permit and work permit, which may be applied for by an individual or an entity. In either case, the applicant is known as the worker’s sponsor. Employees who hold a valid work permit must only perform work for their sponsors. Secondment of an employee to a third party requires approval from the Ministry of Labour and is often restricted in duration.

v Immigration law

On 13 December 2016, the New Immigration Law regulating the entry, exit and residency of expatriates in Qatar entered into force, replacing the previous Immigration Law. The New Immigration Law provides notable changes, including the right for an expatriate working in Qatar to move between employers without the need for a non-objection letter from his or her existing employer (subject to the satisfaction of certain conditions), and appeals to a special committee (the Foreign Nationals Exit Grievances Council) in the event that the conduct of a current employer hinders or impedes the exit of an expatriate from the country.

The New Immigration Law has been amended by Law No. 21 of 2017. The amendments include expatriates’ right to exit the country for holiday and emergency reasons, and to leave Qatar permanently prior to the expiry of a employment contract, in each case subject to giving prior notice to the employer.

VII TAX LAW

Several taxes are worth mentioning in relation to the Qatari system: corporate income tax, withholding tax, capital gains and dividend tax, personal income tax, sales tax and double taxation.

The income tax system is subject to the Income Tax Law, under which a legal entity is considered a ‘tax resident’ for tax purposes if the company is incorporated under Qatari law, is mainly located in Qatar or has its headquarters in Qatar.

A general flat tax rate of 10 per cent applies to profits arising out of taxable activity in Qatar, but a rate of at least 35 per cent applies to oil and gas operations.

Currently, withholding tax at a rate of 5 per cent is levied on certain payments made to non-residents in relation to royalties and technical services. A tax rate of 7 per cent is levied on interest, commissions, brokerage fees, directors’ compensation, chairpersons’ and board members’ coupons, and any other payments for services carried out wholly or partly in Qatar.

There is no capital gains tax or dividend tax on Qatari companies.

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10 Law No. 21 of 2015.
11 Law No. 4 of 2009.
12 Law No. 21 of 2009.
Similarly, personal income tax, sales tax and VAT are not imposed on operations in Qatar although the Qatari authorities are examining the possibility of introducing VAT.

Qatar is a party to treaties for the avoidance of double taxation with several countries, which provides an important incentive for foreign investors operating in Qatar.

Entities licensed under the QFC are subject to a flat rate of 10 per cent on local-source profit but are not subject to withholding taxes. Wholly owned government entities incorporated in the QFC are exempt from taxes.

In the same way, entities licensed by the QSTP are fully exempt from Qatari corporate income tax.

Finally, with regard to the financial sector, a preferential tax treatment may be granted by the QCB to a merging company or a new company resulting from a merger.

**VIII  COMPETITION LAW**

Under the current legislative framework, there are no antitrust or merger control laws applicable to M&A transactions in Qatar. However, an antitrust culture is starting to emerge with the establishment of a De-monopolisation and Competition Protection Committee at the Ministry of Economy and Commerce, which has recently issued notices to large Qatari companies in relation to exclusivity and pricing matters.

**IX  DATA PROTECTION LAW**

The Data Protection Law, which entered into force in May 2017, aims to establish a certain degree of protection for the processing of personal data by granting individuals the right to withdraw consent to that processing, the right to access and review information previously provided to the data controller, and to request deletions, modifications or both to any of the information. Moreover, data controllers will be required to put in place appropriate systems and procedures for the processing of personal data to avoid any leaks or unauthorised disclosure of information. Particular information (e.g., relating to race, religious beliefs, health and criminal records) will only be processed with the prior approval of the relevant administrative unit at the Ministry of Transport and Communications. Finally, the Data Protection Law imposes high financial penalties for non-compliance, ranging between 1 million and 5 million Qatari riyals.

**X  OUTLOOK**

Despite the fall in oil and gas prices in recent years, a heavy flow of investments into the infrastructure sector and the preparations for the FIFA World Cup in 2022 have continued apace. Moreover, there has been a significant boost in the media, retail and food industries. Other sectors that are expected to continue to grow steadily include construction, real estate, hospitality, fashion and technology.
Chapter 40

ROMANIA

Horea Popescu and Claudia Nagy

I  OVERVIEW OF M&A ACTIVITY

According to the World Bank’s ‘Doing Business Report 2017–2018’, Romania is ranked 45th worldwide on the aggregate ease of doing business index, nine positions lower than the previous year. However, Romania ranks second in the European and Central Asia areas in regards of ease of doing business across borders, being surpassed only by Croatia, and has climbed in several other categories in the global rankings such as registering property, paying taxes and enforcing contracts.

From an economic perspective, Romania was the leader of the region in 2017 in terms of growth of gross domestic product. According to the first estimates published by the Romanian National Institute of Statistics, the economy rose by 7 per cent year on year in 2017 (compared with 4.8 per cent year on year in 2016), the highest growth rate since 2008. This favourable investment environment is reflected in an increase in deals, which reached levels rarely seen since the wave of privatisations over a decade ago. Investment activity was broadly spread across the manufacturing, financial services, consumer goods, and telecoms and IT sectors.

In 2017, there were approximately 153 transactions totalling approximately €3 billion, as compared to 2016 when there were approximately 136 deals at €2 billion. Of the 153 transactions in 2017, 30 deals were in the real estate and construction sector, 39 in the manufacturing sector, 13 in telecoms and IT, 11 in finance and insurance, 15 in wholesale and retail, six in the services sector, nine in the food and beverage sector, seven in the transportation and logistics sector, and 23 in other sectors.

II  GENERAL INTRODUCTION TO THE LEGAL FRAMEWORK FOR M&A

The general framework for M&A activity in Romania is mainly governed by the Civil Code and Company Law, as republished and further amended and supplemented (the Company Law). The Civil Code provides the general legal framework governing legal entities as well as the general principles applicable to mergers and demergers. The Company Law provides the applicable rules for the sale and purchase of shareholdings in Romanian companies, as well as those applicable for share capital increases, mergers and spin-offs.

1 Horea Popescu is a partner and Claudia Nagy is a senior associate at CMS Romania.
2 www.doingbusiness.org/rankings.
4 Emerging Europe M&A Report 2017/18, CMS in cooperation with EMIS.
5 Company Law No. 31/1990.
On a more practical note, registrations with the Trade Registry (which is the method for publicising operations of companies) follow the rules established by Trade Registry Law, as republished and further amended and supplemented, in addition to ancillary regulations. Depending on the business activity of the target company, the following sector regulations may also be applicable:

a for public companies, the Capital Markets Law and various secondary enactments likely apply, as will Regulation 1/2006 on Issuers and Securities Operations, as further amended and supplemented, in particular by Law No. 24/2017. Public companies come under the supervision of the Financial Supervisory Authority (FSA);

b for insurance companies, the general framework is set forth in Law No. 237/2015 on the authorisation and functioning of insurance and reinsurance activities, and the supervision of the FSA also applies;

c for banks, the main legislative framework is set forth by Government Emergency Ordinance No. 99/2006 on credit institutions and Regulation No. 5/2013 of the National Bank of Romania (NBR), and the supervision of the NBR also applies. Investors doing business in Europe may find Romanian regulations somewhat familiar, as they are the product of the implementation of EU directives into Romanian law.

Law No. 137/2002 is the main piece of legislation governing company privatisation, which continues to be of interest to many major companies that are still state-owned.

Competition law is also relevant in the M&A field, as economic concentrations between companies must be controlled and competition must remain fair at all times. The Competition Law, as republished and further amended and supplemented, is related to regulations and EU competition law, and contains provisions on notifications to the Competition Council and the European Commission, and the related requirements and thresholds.

In addition to the above, other legal provisions applicable to the particularities of each transaction may become relevant. These include, for example, environmental law, employment law and insolvency law.

III DEVELOPMENTS IN CORPORATE AND TAKEOVER LAW AND THEIR IMPACT

i Insurance, capital markets and pensions

Law No. 24/2017 regarding issuers, financial instruments and market operations entered into force with the aims of:

a better reflecting the dynamics of the capital markets;

b helping investors stay informed;

c increasing the transparency of the market; and

d improving the regime of public tenders and issuance of financial instruments.
The main provisions of the Law regulate:

a. new trading venues (organised trading facilities);

b. new instruments (e.g., securitised debt);

c. issuers’ transparency through periodical reporting, continuous information-giving and special provisions regarding events of issuers, which are now also applicable to the new trading venues; and

d. issuers’ mobility and the general applicability of the rules regarding market abuse.

ii Lending and debt collection

One of the most notable amendments was the introduction of Government Ordinance No. 25/2017 amending the Romanian Fiscal Code. This Ordinance was amended several times during the Parliamentary procedure and entered into force on 26 March 2018.

The main impact of the Ordinance on M&A activity in Romania relates to the transfer of non-performing loan (NPL) portfolios. In the past year, Romanian credit institutions have been cleaning their balance sheets following recommendations of the NBR. However, from 1 January 2018, only 30 per cent of the amount of net loss represented by the difference between the price of assignment and the value of the assigned receivable is deductible. Furthermore, in the specific case of transactions involving off-balance sheet NPLs of credit institutions, taxes may amount to a multiple of the amount received by the sellers for the assignment.

As the above amendment has major tax implications for ongoing and future transactions involving the assignment of NPLs, this particular amendment may result in a decrease in future transactions and unforeseeable additional expenses for those in progress. Furthermore, this could potentially lead to a high level of provisions throughout the banking system, which could be reflected in future ratings and financing costs.

iii Energy

In August 2017, the Regulatory Authority for Energy issued the Regulation for the organisation and functioning of the green certificates market, ensuring a transparent and non-discriminatory framework for the trading of green certificates; and the reorganisation of the green certificates markets, and of the trading regulations for the green certificates spot centralised anonymous market and the bilateral contracts market. It also limits the number of transactions involving green certificates as, according to the new Regulation, a green certificate can only be subject to a single transaction.

In addition to the above, pursuant to the law commonly referred to as the ‘Offshore Law’ (currently undergoing the parliamentary procedure), the state will not impose on petroleum companies with concessions in the Black Sea any other tax besides the current royalties for the duration of the petroleum agreements. In turn, the petroleum companies are required to work with Romanian companies and hire a local workforce. Any additional amounts demanded by the state would have to be refunded and any additional taxes imposed would entitle companies to request an equivalent reduction in corporate tax. If the value of additional taxes that could be imposed is higher than the corporate tax, the amounts will be offset from royalties or other taxes to be paid by the petroleum companies. The provisions would thus give a certain fiscal stability for companies operating in the offshore segment. Moreover, the law states that companies with activities offshore will not pay the two special taxes paid by operators in the onshore oil and gas sector: the tax on the exploitation of natural resources of 0.5 per cent, and the tax of 60 per cent (increased in 2018 to 85 per cent) on
windfall gains obtained following the liberalisation of the gas market. Therefore, for gas and oil extracted from the Black Sea, petroleum companies will only pay royalties in force on the date when this Law enters into force.

iv Tax and tariffs

As further detailed in Section VIII, there have been numerous amendments to the tax legislation, the most important of which are as follows:

a Law No. 1/2017 eliminating tariffs and non-tax charges (known as the law eliminating 102 taxes) entered into force on 1 February 2017. This Law also amends and supplements certain acts relevant to the M&A market, particularly by eliminating various fees, such as:

• fees for registration in the Trade Registry (Trade Registry Law, as republished and further amended and supplemented);
• fees for insolvency registrations with the Trade Registry (Law No. 85/2014 on the procedures to prevent insolvency and insolvency); and
• legalisation fees, such as seals and signatures, for official documents or certificates of origin for goods or other documents required to export or import goods (Government Ordinance No. 24/1992 setting forth certain public services and the fees for those services in Romania);

b Emergency Government Ordinance No. 79/2017 with multiple implications for the tax legal framework (reduction in income tax for liberal professions, restructuring of the social contributions owed by employees and employers, etc.); and

c the introduction of a split VAT system, which entered into force on 1 January 2018, requiring persons registered for VAT purposes to open a separate bank account in order to receive the VAT amounts.

IV FOREIGN INVOLVEMENT IN M&A TRANSACTIONS

According to the NBR balance of payments and external debt from November 2017, foreign direct investment in Romania amounted to approximately €4.38 billion in the first 11 months of 2017, up by almost 20 per cent compared to the same period of 2016.

The main investors in Romania were from the United States, Germany and the Czech Republic, followed by France, Austria and the Netherlands. However, companies from China have also expressed an interest in Romanian companies in the past 24 months.

The industrial sector attracts the largest share of foreign direct investment (amounting to more than one-third of all investments). Other attractive sectors, including banking and insurance, wholesale and retail, energy, construction and telecommunications, have attracted investors. In terms of geographical regions, the areas that attract the most foreign capital are (in order of importance) Bucharest (more than 60 per cent of the total), the centre and the south.10

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9 Trade Registry Law No. 26/1990.
10 InvestingRomania.com reports based on the following sources of information: AGERPRES news, analysis and estimates of financial analysts, current and periodic reports submitted to the Bucharest Stock Exchange, and news coming from listed companies.
Romania has numerous advantages for foreign investors: in addition to a large domestic market, the country has a strong industrial tradition coupled with low labour costs and taxes (among the lowest in the European Union).

In this respect, it is clear that Romania actively seeks foreign direct investment, and has taken steps to strengthen tax administration, enhance transparency and create legal means to resolve contract disputes expeditiously. However, the pace of privatisation and restructuring of state-owned enterprises has slowed, yielding mixed results in this respect.

V SIGNIFICANT TRANSACTIONS, KEY TRENDS AND HOT INDUSTRIES

According to merger market reports, in 2017 there were several transactions in Romania valued at over €100 million. The most attractive sectors for investors in 2017 were energy, manufacturing, IT, banking and financial services, and pharmaceuticals and healthcare.

i Energy sector

In the energy sector, the largest transaction was the acquisition by Enel Investment Holding BV, a subsidiary of Enel SpA, of 13.6 per cent of E-Distributie Muntenia SA and Enel Energie Muntenia SA for a total consideration of more than €401.2 million (the amount was decided through an arbitral award) from SAPE SA, a Romanian state-owned holding company that owns state shareholdings. Both target companies are active in the distribution of electricity, while Enel is a multinational manufacturer and distributor of gas and electricity with activities across Europe and Latin America.

Another noteworthy transaction was the acquisition by Electrica of Fondul Proprietatea’s shares in four of Electrica’s subsidiaries at a price of almost €165 million. The acquisition is in line with Electrica’s strategy to simplify and accelerate its transformation and streamlining programmes as well as to facilitate the financial performance and capital use from its listing. In addition, it follows Electrica IPO commitments to support strong investment plans.

Again in 2017, Fondul Proprietatea sold its shares in Enel Romania and Engie Romania for over €434 million, representing almost 19 per cent of its net assets.

ii Manufacturing

As part of the group’s strategy to enhance their presence in the Eastern European region, British group DS Smith acquired EcoPack and EcoPaper for an enterprise value of approximately €208 million. The target companies form one of the biggest integrated packaging and paper groups in Romania. Ecopaper and Repap (its recycling subsidiary) are also involved in the recycling of more than half of the paper waste collected within the Romanian territory. DS Smith is a leading global manufacturer of recycled containerboard and specialty papers.

It is worth also mentioning the signing of the asset purchase agreement regarding bundled and partially bundled assets from Olchim SA by Chimcomplex SA Borzesti (founded as a state-owned chemicals producer) for an amount of approximately €127 million. Olchim, which used to be Romania’s biggest chemical producer, subsequently went into insolvency in early 2013 with debts of more than €800 million. Concurrent with this transaction, Olchim SA signed a separate assets sale contract for other bundles of assets with Dynamic Selling Group. The transactions are expected to close in 2018.

Despite having a lower value, it is also important to mention various transactions on the wall buildings materials market, such as the acquisition of Macon by Xella, Brikston by Wienerberger and Cemacon by Dedeman (the latter two are currently subject to the
assessment of the Romanian Competition Council). After almost 10 years of limited M&A activity on the wall buildings materials market, it would appear that there is a new trend building on the forecasted growth of the constructions market.

iii  Real estate

The largest transaction registered in 2017 was the acquisition by Cerberus Capital Management and Revetas Capital Advisors of a 98.2 per cent stake in a hotel complex with approximately 86,000 square metres of gross leasable area that includes the Radisson Blu and Park Inn hotels for an amount of more than €165 million. Revetas is a specialised real estate investment firm active in most CEE countries, while Cerberus Capital Management is one of the largest private equity managers in the world with a portfolio of over €25 billion.

In early 2017, Iulius (the only Romanian developer and operator of mixed use real estate projects, with an operational portfolio that entails more than 260,000 square metres of retail space, and 106,000 square metres of office space) entered into a joint venture agreement with Atterbury Europe (a European real estate investment company jointly owned by Atterbury Property Holdings in South Africa, private equity investors and Steinhoff International Holdings through its subsidiary Hemisphere International Properties). During the past 23 years, Atterbury has become a leading name in property investment and development in South Africa and, more recently, has built a stellar reputation for being able to replicate its success outside South Africa, and in vastly different cultures.

iv  Banking and finance

Banca Transilvania acquired a majority stake (99.15 per cent) for €240 million held by Eurobank Group in Bancpost, as well as the shares held in ERB Retail Services IFN SA (ERB Retail Services) and ERB Leasing IFN (ERB Leasing). Bancpost, with €3.1 billion worth of assets, has a network of 148 branches in Romania. ERB Retail Services is a non-banking financial institution, main activities are the issuance and administration of consumer credit cards under its own brand, while ERB Leasing is a non-financial institution whose main activity is financing under financial leasing. Banca Transilvania is the largest Romanian privately owned bank and the second-largest bank of Romania. Its activity is divided in three main business lines: corporate, SME and retail.

Another important transaction was UK investment fund Argo Capital’s acquisition of the Romanian subsidiary of Bank Leumi. The acquisition was set for a price of approximately €110 million. Bank Leumi, Israel’s second-largest bank, said its decision to sell its Romanian unit is part of its strategy to concentrate its international operations in main financial centres through its subsidiaries in the United States and Great Britain. Argo Capital Management, a subsidiary of the Argo Group, is an alternative investment management company specialised in emerging markets.

In addition to the above, Alpha Bank sold two NPL portfolios (retail and corporate), which together represent one of the largest NPL sales in the region in recent years. In January 2018, a consortium of Deutsche Bank, AnaCap and APS signed the contractual arrangements to acquire the corporate NPL portfolio for an aggregate sale value of more than €100 million. The corporate transaction alone, which was completed in May 2018, is the largest corporate NPL sale in Romania in the past two years and among the largest in the local market. In September 2017, B2Holding, the leading Nordic and Central European debt purchaser, acquired the retail NPL portfolio for a sale value of more than €15 million.
v Health services

Med Life, a publicly listed Romania-based operator of healthcare facilities, has agreed to acquire Polisano, a Romania-based operator of clinics, hospitals, in vitro fertilisation centres and maternity centres, for an undisclosed consideration. The transaction will allow Med Life to continue to strengthen its market in light of 19 acquisitions in the past 18 years. For Polisano, the transaction will bring added value, and will help it sustain its commitment to continuously deliver premium services and an outstanding medical team to all patients.

Investment fund Penta has concluded a purchase contract for €350 million with A&D Pharma, Romania’s largest pharmaceutical group. Penta is a Central European investment group founded in 1994. Penta actively develops companies and projects, primarily in healthcare, financial services, retail, manufacturing, media and real estate. A&D Pharma is a vertically integrated group active especially at the wholesale level of pharmaceutical and parapharmaceutical products, and at the retail level of pharmaceutical and parapharmaceutical products, managing the Sensiblu and Punkt pharmacy networks.

In the first large transaction of 2018, German group Phoenix, a leading European healthcare provider, acquired the Help Net pharmacy chain, as well as Farmexim, the fourth-largest pharmaceutical distributor in Romania. The Phoenix group’s business exceeds €20 billion, being divided into three main divisions: distribution, retail and pharma. The value of the transaction exceeded €100 million, and the acquisition is subject to approval by the Competition Council.

vi Information technology and communications

Vitruvian Partners acquired a minority stake of 30 per cent in Bitdefender Holding for approximately €155 million. Bitdefender is a Romanian, leading global cybersecurity technology company with more than 500 million customers and business in more than 150 countries. Vitruvian is an independent pan-European private equity firm. Vitruvian provides management-centric, structurally flexible, value-enhancing support and assistance to help portfolio companies scale their operations.

Furthermore, Digi Communications, the company controlling telecom operator RCS&RDS, raised €210 million in an IPO that took place on the Bucharest Stock Exchange. The company sold a 25.6 per cent stake, making this the biggest IPO of a private company on the Bucharest Stock Exchange.

Liberty Global, the parent of UPC Romania, decided to sell its operations in Germany, Hungary, Romania and the Czech Republic to Vodafone for a total enterprise value of around €18.4 billion on an EU IFRS basis. Vodafone Romania is Romania’s second-largest mobile provider, while UPC Romania is the second-largest next generation network operator in Romania.

UiPath, a leading enterprise robotic process automation (RPA) software company, has raised more than €131 million in Series B funding following a year of record growth. The company eclipses €942 million in terms of valuation, and validates RPA as a strategic imperative for digital transformation and the path towards artificial intelligence. This latest round was led by previous backer Accel, along with participation from new investors CapitalG (one of Google’s investment vehicles) and Kleiner Perkins Caulfield & Byers, as well as previous investors Earlybird, Credo Ventures and Seedcamp.
vii  Food and beverages

Polaris Capital Management, a Danish investment fund, took over the Premium Porc Group for a consideration of more than €135 million. Premium Porc Group, which comprises 11 companies active in the production of pigs, feed and grain, as well as freight transport and project management for investment projects, carries out its main activities in Romania.

In early 2018, Purcari Wineries, market leader in Moldova and Romania on the premium wine segment, listed on the Bucharest Stock Exchange under the WINE symbol following a successful IPO of 49 per cent of its shares. This is the first listing of a Moldovan company on the Bucharest Stock Exchange. The offering was well received, with retail investors oversubscribing more than four times over, valuing the offering at over €40 million.

VI  FINANCING OF M&A: MAIN SOURCES AND DEVELOPMENTS

The dynamics of the lending market accelerated in 2017, with such evolution being supported by several factors such as:

a  the positive output gap;

b  an improvement in the financial performance of, and an increase of competition in, the banking sector, with positive consequences for the quality of lending; and

c  the low level of real financing costs.11

Pursuant to the NBR’s data, credit standards have remained steady compared to the previous period, both at the aggregate level and in regards of structure of the credits. While credit demand has not seen aggregate changes compared to the previous quarter, there is a continued moderate structural expansion of demand for long-term credits to large companies and a marginal amplitude in the case of loans granted to small companies irrespective of their maturity.12 There has been limited lending through capital markets (i.e., bonds); however, alternative lenders – including mezzanine funds, private debt funds, business development companies, insurers, asset managers and finance companies – are scouting the market and have already finalised deals.

VII  EMPLOYMENT LAW

From an M&A perspective, the rules governing the transfer of employees in an asset deal, set out by Law No. 67/2006 on Safeguarding Employees’ Rights in the Event of Transfers of Undertakings, Businesses or Parts of Undertakings or Businesses (TUPE Law), which transposes EU Directive 2001/23/EC, should be considered.

Under the TUPE Law, in order to protect employees, every time a transfer of an undertaking (or a part thereof) occurs, all of the transferred undertaking’s employees are transferred automatically by operation of law (no consent is required from the transferor, the transferee or the employees), and no cherry-picking is allowed. The purchaser must observe all rights and obligations resulting from existing employment contracts at the time of the

12  Source: National Bank of Romania Survey regarding the credits granted to non-financial companies and the population; the full survey can be found at www. billion.ro/PublicationDocuments.aspx?icid=11104.
transfer, and has the obligation to honour all rights until the relevant contracts expire or are terminated. However, the purchaser has the opportunity to renegotiate the collective agreement with the employees’ representatives one year after the transfer date.

In general, share deals do not impact employment relations at the target level (or at the subsidiary level), as the identity of the employer remains the same. Romanian legislation does, however, set out general employee-related information and consultation requirements in the context of M&A transactions, but they only apply if the proposed share deal significantly impacts working conditions. Even if the law provides that a consultation should be carried out regarding decisions that could significantly affect employees, there is no express obligation to accept employees’ proposals or to sign any related agreements. However, failure to comply with the information and consultation requirements may be sanctioned with fines.

In addition, in the case of a voluntary takeover of a public company, the target’s board must inform its employees of the terms of the takeover and the board’s position on the attempted takeover, as set out in Financial Services Authority Regulation 1/2006. The target’s employees may issue a written opinion on the matter to be provided to the bidder, the shareholders and the market.

There have been limited recent developments from an employment law perspective, and the more material ones are tax-related (as further detailed in Section VIII).

VIII TAX LAW

On 1 January 2018, additional tax cuts came into effect, making Romania one of the lowest tax jurisdictions in the EU. As previously mentioned, there have been numerous recent tax developments that affect the market of M&A transactions: for example, the VAT standard rate was reduced at the beginning of 2017 to 19 per cent (from the previous 20 per cent), alongside other fiscal easements.

Government Emergency Ordinance No. 79/2017, implementing the Anti-abuse Directive, brought the following main amendments to the Romanian Fiscal Code:

a. it transposed the general EU level anti-abuse rule;
b. it limited deductibility of interest and other costs economically equivalent to interest for corporate income tax purposes;
c. it amended the regime applicable to microenterprises; and
d. salary income tax was reduced to 10 per cent.

Another important amendment is related to the rates of the mandatory social security contributions due by employees and employers for salary income, which are now as follows:

a. social security contribution: 25 per cent (owed by employees);
b. social security contribution for special working conditions: 4 or 8 per cent depending on working conditions (owed by employers);
c. health insurance contribution: 10 per cent (owed by employees); and
d. work assurance contribution: 2.25 per cent (owed by employers).

The VAT split mechanism entered into force on 1 January 2018, requiring persons registered for VAT purposes to open a separate bank account in order to receive the VAT amounts. The split VAT regime is mandatory for companies that have outstanding VAT debts or that are under insolvency proceedings. Persons registered for VAT purposes (regardless of
whether they apply the VAT split payment system or not) must pay the VAT corresponding to acquisitions of goods from and services performed by suppliers applying the VAT split system in their dedicated VAT account.

IX  COMPETITION LAW

The Romanian Competition Council published its new Regulation regarding Economic Concentrations, which brings further clarity to the merger clearance procedure and ensures consistency between the Competition Law and its implementing legislation.

The main changes under the Regulation are:

a  it is generally recommended that the notifying parties hold consultations with the Competition Council at least two weeks prior to the notification; and

b  it eliminates the ambiguities regarding the suspension of a procedure in front of the Competition Council in cases where a transaction falls under the scrutiny of the Romanian Supreme Council of National Defence (CSAT). As such, in the event that the CSAT notifies the Competition Council that an economic concentration might raise national security concerns, the procedure in front of the Competition Council will be suspended until the CSAT either opposes the concentration or concludes that it does not represent a risk. Furthermore, the Regulation now expressly provides that there shall be no direct contact between the CSAT and parties, with all communication being carried out through the Competition Council.

This Regulation brings more clarity to the proceedings in front of the Romanian Competition Council, aiding the Romanian Competition Council in exercising its powers and to act as an innovative national competition authority.

X  OUTLOOK

After three favourable years, and last year setting new records in terms of number and value of deals, specialists estimate that the Romanian M&A market will continue its positive trend. The record transactions of previous years have opened the gate for similar deals, as Romania appears to be on the radar of big investors. In addition, local entrepreneurs, taking advantage of the constant economic growth and improved financial situations, seem to be waiting for the right moment or offer to make their exit, thus attracting foreign companies and investment funds in the market.

The IT sector has proven to be the star of the M&A market, and is predicted to generate a greater number of high-value transactions. In this regard, recent B series financing of the Romanian start-up UiPath, a transaction standing at over €131 million, is not only the first transaction of its kind, but also the biggest transaction yet seen in Romania.

In the energy sector, the Black Sea is anticipated to be the future ‘hot spot’ of East European offshore gas production. With the imminent launch of a new tender round for onshore perimeters, in the coming years, the Romanian oil and gas sector could be revived in parallel with the international relaunch of the industry.

Furthermore, with one of the highest dividend yields in the world for the past two years, 2017 proved that the Romanian capital market is capable of absorbing significant IPOs (such as Digi Communications, valued at €207 million, and Purcari, valued at approximately €40 million) and has extended to sectors that were not yet represented on the Bucharest
Stock Exchange (i.e., telecommunications, insurance brokerage and food services). As such, it is likely that the Romanian capital market will see an active, potentially record-breaking year as well.

Looking forward, we also expect increased interest in domestic M&A transactions of local companies that will want to consolidate the segments in which they operate. Romania has seen a number of local companies that have successfully become national champions capable of international expansion and strong economic growth, which makes Romanian investments more possible in the region.

Overall, 2018 seems bright for the Romanian M&A market, which has good macroeconomic prospects where companies, whether local or foreign, have more funds available for investment, generating high hopes for increased dynamism.
I OVERVIEW OF M&A ACTIVITY

Singapore overcame a slow start to 2017 and completed the year with a strong showing, registering a healthy volume of 698 deals valued at approximately US$75.4 billion. As in previous years, outbound deals continue to account for the bulk of the deal volume (representing approximately 72 per cent of the total transacted value), with inbound and domestic deals accounting for 15 per cent and 14 per cent of total transacted value respectively. The number of private equity (PE) and venture capital (VC) investments in Singapore in 2017 was also significant, with 125 deals totalling approximately US$22.8 billion.

The Singapore economy delivered a strong performance in 2017, registering growth of 3.5 per cent and thus exceeding the original estimate of 1 to 3 per cent.

II GENERAL INTRODUCTION TO THE LEGAL FRAMEWORK FOR M&A

The Singapore legal system is based on the common law system, in which legislation, regulatory rules and case law exist side by side. In relation to M&A transactions, the key statutes are the Companies Act, which sets out general corporate legislation, including provisions that allow for compulsory acquisitions, schemes of arrangement and amalgamations in relation to incorporated companies; and the Securities and Futures Act, which sets out legislation pertaining to, inter alia, regulations relating to offers of securities, prohibitions against insider dealing, notifications relating to acquisitions of substantial interests and penalties for misrepresentations to investors.

In addition to the above, ownership in certain sectors, such as banking, financial services, telecommunications and broadcasting, may be subject to ownership restrictions set out in specific legislation. Approval from the relevant regulatory bodies may be required in such instances.

The Singapore Code on Takeovers and Mergers (the Takeover Code) sets out the principles and rules governing the conduct of takeovers of public companies incorporated in Singapore or entities that have a primary listing on the Singapore Exchange Securities Trading Limited (SGX). The Takeover Code is administered by the Securities Industry Council (SIC)
of Singapore, and while the Code does not have the force of law, it forms an essential part of the M&A regime in Singapore. Market participants are expected to act in compliance with the Takeover Code.

Entities listed on the SGX are also subject to the listing rules of the SGX, which prescribe, *inter alia*, the thresholds when shareholder approval is required if a listed entity undertakes an M&A transaction.

### III DEVELOPMENTS IN CORPORATE AND TAKEOVER LAW AND THEIR IMPACT

#### i Amendments to the Companies Act

On 31 March 2017, several key amendments to the Companies Act came into effect, with the aim of improving transparency in Singapore registered corporate entities, and in line with the recommendations of the Financial Action Task Force. Unless exempted, the amendments require Singapore registered companies and partnerships to take steps to determine the identity of persons who have significant interest, control, or both, over these entities, and to maintain a register setting out the particulars of those persons. There is also a corresponding duty on those persons to notify the Singapore registered entities concerned and to provide their particulars. Nominee directors of Singapore registered companies and partnerships will also have to provide details of their nominators. The register will not be available to the public, but must be provided, on request, to the relevant authorities or enforcement agencies.

With effect from 23 May 2017, Singapore has introduced new measures under the Companies Act to enhance the existing corporate rescue and debt restructuring framework. Drawing elements from Chapter 11 of the US Bankruptcy Code, the enhanced regime includes:

- *a* power for the court to grant super priority status to rescue financing made to assist with the restructuring of distressed companies;
- *b* power for the court to approve a creditor scheme even if there are objections from a class of creditors; and
- *c* improved judicial management provisions to extend the power to make a judicial management order in respect of foreign companies and to introduce specific criteria setting out when the courts exercise discretion over foreign debtors.

The enhanced regime is expected to create new opportunities for investment in distressed companies.

Singapore has introduced an inward re-domiciliation regime with effect from 11 October 2017 to allow foreign companies to transfer their place of registration to Singapore without needing to establish a new legal entity. This regime is expected to facilitate the restructuring and transfer of foreign companies to Singapore as their domicile.

#### ii Takeover Code

The Takeover Code was last amended in March 2016.

As part of the suite of amendments, the SIC codified an auction procedure that will resolve competitive situations in a takeover offer that exist as at the last day on which each offeror may unilaterally revise its offer. Save for a few modifications, the auction procedure is largely similar to the process imposed for the first time in 2013 in the competing bid for Fraser & Neave.
Under the modified auction procedure, there is a maximum of five rounds of bidding over five consecutive days. Competing offerors can now introduce new forms of consideration (i.e., other than cash) during the auction process. In addition, the SIC will no longer impose a requirement that the final bid to be made by each competing offeror on the last day of the auction must be either an odd or an even price. This key change means that there is now a possibility that there may not be a clear superior bid at the end of the auction. This is in keeping with the rationale that the intent of the auction process is simply to provide an orderly mechanism by which both offerors can reach their final price, and to prevent the offer period from carrying on indefinitely.

As with the previous process, until the conclusion of the auction procedure:

a neither the target nor the offerors, nor any of their respective concert parties, may, without the prior consent of the SIC, make any public statement in relation to, or that could reasonably be expected to affect the orderly operation of, the auction procedure (including in relation to any revised offer announced by an offeror) or in relation to the terms of either offers;

b neither the offeror nor any of their respective concert parties may deal in the relevant securities of the company or take any steps to procure, amend or renew any irrevocable commitment or letter of intent in relation to the respective offers; and

c following the auction procedure, neither the offeror nor any of their respective concert parties may, during the offer period, acquire any interest in the relevant securities of the company on better terms than those of its offer.

To encourage more proactive boards in takeover offers, the amended Takeover Code also clarified that the solicitation of a competing offer or the running of a sale process for a company would not amount to the frustration of an existing offer. In addition, the amendments clarify that an offeree board may consider sharing management projects and forecasts with an independent financial adviser for the purposes of finalising its recommendation.

The other changes to the Takeover Code relate largely to the administrative aspects of an offer or to codifying existing practice, including codifying provisions to align the timetables of offerors in competitive situations, modifying the timeline for the payment of shares tendered in acceptance of an offer to seven business days (from the previous 10-calendar day timeline) and requiring material information occurring during the course of the offer (including any change to information announced previously) to be announced promptly.

With effect from 1 May 2018, the SIC implemented a new exempt status regime that exempts fund managers and principal traders operating within large multi-service financial institutions who may act as financial advisers on a takeover offer from certain restrictions and obligations under the Takeover Code. The new regime will grant qualifying fund managers and principal traders standing exempt status (subject to certain conditions), renewable annually, thereby removing the need for a ruling to be sought for each specific transaction.

IV FOREIGN INVOLVEMENT IN M&A TRANSACTIONS

Government-linked funds continue to play an oversized role in outbound investments originating from Singapore, with GIC Pte Ltd (with its consortium partners) involved in some of the larger value transactions, including the privatisation of Nets A/S and Neustar Inc.
The largest inbound deal to date was announced in 2017, being the privatisation of Global Logistic Properties Limited, a Singapore listed warehouse logistics operator, by a Chinese consortium that included Hillhouse Capital Management and Hopu Investment Management at a deal value of approximately US$15.9 billion. The transaction was completed in January 2018. The logistics sector also attracted Chinese conglomerate HNA Group, which made an offer in 2017 to acquire warehouse and logistics operator CWT Limited, a Singapore listed company, at a transaction value of approximately US$1 billion.4

V SIGNIFICANT TRANSACTIONS, KEY TRENDS AND HOT INDUSTRIES

Apart from the logistics sector, which had a strong showing in 2017, real estate and technology provided the main drivers in terms of both deal volume and deal value both in terms of outbound and inbound deals. Notable transactions include Mapletree Investments’ acquisition of US student housing assets valued at US$1.6 billion and the sale of Jurong Point Mall to Mercatus Cooperative at approximately S$2.2 billion. Real estate is expected to continue to have a strong showing in the first half of 2018, as the first quarter of the year has already realised a slew of en bloc sales of residential land valued collectively at S$5.83 billion.

Singapore continues to be the largest contributor to PE and VC investments in South East Asia. The technology sector remains a key driver of M&A activity, with the ride-hailing app Grab raising another round of funding in 2017 and undertaking a buyout of Uber’s business in South East Asia in the first half of 2018.

VI FINANCING OF M&A: MAIN SOURCES AND DEVELOPMENTS

The financing structures of M&A transactions in Singapore remain fairly traditional, with the majority being funded by internal resources, either alone or in combination with bank financing.

If an offer is made in cash (or has a cash alternative) and that offer is governed under the Takeover Code, the offeror is required to obtain confirmation from a financial institution that it has sufficient cash resources to satisfy full acceptance of the offer. Confirmation is required to be given at the time a firm intention to make an offer is announced. If external financing is used for a takeover, the terms of the financing must satisfy the funds requirements of the financial institution providing the cash confirmation.

VII EMPLOYMENT LAW

An acquisition by way of a transfer of shares, as opposed to a transfer of a business undertaking, does not typically affect the employees of the acquiring company or the target company; an employee of the target company will continue to be employed by the target company. Where the transaction is structured as a transfer of business undertaking, the Employment Act provides that all employees of the target that fall under the Employment Act as at the date of the transfer will automatically become employees of the acquirer under the same terms and conditions as their employment under the target company. Employees who fall under the Employment Act are employees who are not employed in an executive or managerial

4 See footnote 2.
position (excluding seafarers and domestic workers), and executive and managerial employees who earn a basic monthly salary of up to S$4,500. The transfer of employees who do not fall under the Employment Act is a matter to be agreed upon between the acquirer, the vendor and the relevant employees.

Where a collective agreement is in place between a transferor and its unionised employees, the collective agreement will remain in force between the transferee and the employees for a period of not less than 18 months following the transfer or the date on which the collective agreement expires (whichever is the later).

There is no statutory requirement under Singapore law requiring an employer to pay retrenchment benefits.

VIII TAX LAW

Stamp duty is typically borne by the purchaser, unless otherwise agreed. Transfers of interests for restructuring purposes (including transfers of assets between associated companies and upon the reconstruction and amalgamation of companies) may qualify for stamp duty relief, subject to the satisfaction of certain conditions.

Transfers of immovable property are subject to stamp duty, and this is generally borne by the buyer. In addition, sellers of residential or industrial property within the prescribed period of their acquisition will also have to bear a seller stamp duty. Foreign or corporate acquirers of residential properties are also subject to an additional buyer stamp duty.

On 11 March 2017, amendments to the Stamp Duties Act were passed, imposing additional conveyance duties on the acquisition and disposal of certain equity interests in property holding entities that have an interest (directly or indirectly through other entities) in residential properties, as if the acquisition or disposal were a conveyance of the underlying interest in those properties. The changes were introduced to ensure parity of treatment in the stamp duty to be paid when a person acquires or disposes of residential property directly rather than acquiring or disposing the equity interests of the property holding entity that has an interest in the property.

Stamp duty on transfers of scrip shares is payable at a rate of 0.2 per cent on the higher of the consideration paid or the net asset value of the shares. This is in addition to the further conveyancing duties that may be levied when the shares transferred constitute a transfer of equity interests in residential property. The new stamp duty position with regard to entities holding residential property is likely to change the structure of investments in residential property in the future.

Insofar as income tax on realised gains is concerned, there is no capital gains tax in Singapore. Therefore, when the shareholders of a target company dispose of their target shares, the question is whether the gain realised (if any) constitutes capital gains or trading income, the latter of which is subject to income tax. Whether the gain is treated as capital gains or trading income depends on whether the vendors of the target company are regarded by the Inland Revenue Authority of Singapore as share traders.

IX COMPETITION LAW

Section 54 of the Competition Act prohibits mergers, including the creation of full-function joint ventures, that result, or may be expected to result, in a substantial lessening of competition within any market for goods or services in Singapore (Section 54 Prohibition).
Parties to a takeover or merger may apply to the Competition and Consumer Commission of Singapore (CCCS) for a decision on whether the merger, if carried into effect, will infringe the Section 54 Prohibition. The Section 54 Prohibition may apply even when any merger party is located outside Singapore, so long as the merger has an effect on any market in Singapore. Parties to an M&A transaction may apply to the CCCS for a decision on whether a merger, if carried into effect, will infringe the Section 54 Prohibition. A merger clearance filing to the CCCS is voluntary, but is recommended by the CCCS if a merger may potentially result in a substantial lessening of competition in a relevant market.

In this regard, the CCCS requires all merger parties to conduct a self-assessment, in accordance with the methodologies outlined in Guidelines published by the CCCS and read with its decided cases, on whether a merger filing is necessary. For the self-assessment to be accepted by the CCCS, it must be documented in a form that the CCCS would accept as documentary evidence.

Failure to follow the merger control procedures where it would otherwise have been advisable to do so could result in financial penalties of up to 10 per cent of the turnover (for up to three years) of the parties to a transaction, in addition to remedies that may be imposed by the CCCS (acting on its own or upon a complaint by a third party) on parties to the transaction, such as a direction for the merger to be unwound or for divestments to be carried out.

The CCCS has stated that if a merger results in the indicative quantitative notification thresholds (quantitative thresholds) being crossed, the CCCS is likely to give further consideration to the merger before being satisfied that it will not result in a substantial lessening of competition.

The quantitative thresholds are as follows: post-merger, the combined market share of the three largest firms must be at least 70 per cent, and the merged undertaking must have a market share of at least 20 per cent; or a merged undertaking must have a market share of at least 40 per cent.

The test as to the existence of a substantial lessening of competition is qualitative rather than quantitative. The CCCS has stated that a substantial lessening of competition could potentially be established ‘even if the merger falls below the quantitative thresholds’. Qualitative factors that the CCCS would take into consideration include, but are not limited to, the ease and speed of supply-side substitution, countervailing buyer power, market transparency and cost stability in the market.

The CCCS has exercised its powers to issue provisional decisions to prohibit mergers arising from horizontal and non-horizontal (i.e., vertical and conglomerate) effects, the most recent being on 25 May 2018, when the CCCS issued a provisional decision to block Wilhelmsen Maritime Services AS’ proposed acquisition of Drew Marine Group Coöperatief UA and Drew Marine Partners LP’s technical solutions, fire, safety and rescue businesses in the marine chemicals sector in Singapore in view of, inter alia, high combined market shares.

On 1 December 2016, the CCCS Guidelines on the Substantive Assessment of Mergers 2016 (Substantive Assessment Guidelines) came into effect. The inclusion of additional forms of supporting evidence required by the CCCS points towards a materially stricter enforcement stance by the CCCS on mergers consistent with trends regarding remedies and commitments, with an increase in complex reviews of mergers and blocked mergers being
observed. On 1 April 2018, the CCCS had also taken on the consumer protection function, which includes preventing suppliers from engaging in unfair practices, promoting fair trading practices and enforcing the Consumer Protection (Fair Trading) Act.

During the past 18 months, the CCCS has reviewed nine notified mergers, of which one was cleared only pursuant to Singapore-specific behavioural commitments, and at least four have proceeded to an extended Phase I review or Phase II review.

On 13 April 2018, the CCCS issued its first-ever Notice of Interim Measures Directions in relation to the acquisition of Uber Technologies Inc’s (Uber) South East Asian business by Grab Inc (Grab) and Uber’s acquisition of a 27.5 per cent stake in Grab. Interim directions imposed on Grab include the maintenance of pre-transaction pricing, product options and commission rates, holding separate certain operational data, the removal of exclusivity obligations for new drivers and the appointment of a monitoring trustee. The CCCS commenced its investigation and issuance of interim measures notwithstanding the parties’ announced intention to voluntarily lodge a post-completion merger notification to the CCCS. The CCCS also continues to investigate other unnotified mergers on its own initiative.

Unlike the European and UK merger control rules that rely on jurisdictional turnover figures (which are, by their nature, readily identifiable), the quantitative thresholds rely on market shares. The CCCS has emphasised in the Substantive Assessment Guidelines that the calculation of market shares is highly dependent on market definition, and that it will not necessarily accept parties’ identification of the relevant market. Relevant markets must be defined in accordance with the rules set out in the gazetted CCCS Guidelines on Market Definition.

### X OUTLOOK

The growth forecast of Singapore’s economy is positive at between 2.5 and 3.5 per cent.\(^5\) Geopolitical uncertainty continues to contribute to market volatility and potential concerns about higher borrowing costs may dampen market activity. However, we remain cautiously optimistic, as there continues to be significant market activity in the first half of 2018.

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\(^5\) Source: Ministry of Trade and Industry, Singapore.
Chapter 42

SPAIN

Christian Hoedl and Miguel Bolívar Tejedo

I OVERVIEW OF M&A ACTIVITY

In recent years, we have seen an increase in complexity and sophistication in the Spanish M&A market caused by the emergence of new players, as well as new and more varied financing formulas and deal structures. The year 2017 has been another excellent one for the Spanish economy and Spanish M&A, thus confirming the positive expectations anticipated in the last edition of The Mergers & Acquisitions Review.

In 2017 and the first half of 2018, Spain consolidated the recovery it began in mid 2013. The imbalances accumulated over the years have been substantially reduced, creating a more favourable environment and increasing Spanish companies’ (as well as Spain’s) access to capital markets. As a consequence, gross domestic product grew by 3.1 per cent in 2017. High liquidity in the debt and capital markets, increased investment capacity of private equities and funds, the success of fundraising and the strategic push of big corporations compensated the macroeconomic uncertainties. Despite certain unfavourable political conditions, economic growth also remained strong in the first half of 2018 (with forecasts in the region of 2.8 per cent), backed by improved labour market prospects, less stringent financial conditions and renewed confidence, and also aided by favourable external developments. These factors are expected to foster growth in future years, further bolstered by generally positive labour market developments, improved access to credit for both firms and households, and heightened confidence.

The very positive development of the economy has nevertheless been overshadowed by the Catalan crisis (which has resulted in a short-term negative impact on the economy of this region) and by the uncertainties about the future of the public pension system. Other uncertainties affecting M&A activity include concerns about the global economy – especially the economic situations of the emerging economies and, in particular, the situation of South American countries, which are the traditional target of Spanish direct foreign investment – those related to Brexit’s final outcome and its impact on the European project, and the tense trade relations of Europe and China with the United States.

Despite these apprehensions, M&A activity in Spain has so far been very solid. M&A targeting Iberia in 2017 increased considerably in terms of volume from the preceding year (an approximate increase of €78 billion from 2016). In 2017, Spain has been the leading country in the eurozone and the fourth in the world in the ranking measuring the volume of the operations of M&A activity. The number of deals in 2017 was also higher than it was in 2016 (1,214 deals in 2017 versus 1,145 in 2016). Despite the fact that, during the first

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1 Christian Hoedl is a partner and Miguel Bolívar Tejedo is a senior associate at Uría Menéndez.
quarter of 2018, there has been a relative deceleration in M&A activity, with a fall of 19 per cent in the number of transactions and 33.9 per cent in the amount compared to the same period in 2017, Spain’s outlook for 2018 and 2019 remains strong, and we expect this to result in a significant increase in deal announcements throughout the second half of 2018.

The main drivers of M&A activity continue to be the following:

a. Spanish targets have become attractive as a result of the strengthening of their operations and balance sheets, the significant improvement of the macroeconomic environment and the availability of debt financing buttressed by low interest rates.

b. Spanish corporate and financial institutions are completing their deleveraging processes. The financial sector, in particular, has remained very active both in terms of the number and volume of deals, in some cases exceeding pre-crisis levels. Spanish banks and other financial institutions have continued selling non-core assets and branches (such as servicing platforms), divested performing and non-performing loan portfolios, and exited from industrial shareholdings.

c. Real estate, energy, healthcare, tourism, IT and telecommunications have also attracted significant investments due to an increased consolidation in those industries and changes in the regulatory framework. In 2017, real estate was particularly relevant due to the progressive increase of prices over recent years. In this context, a growing number of M&A transactions in Spain have been made by means of auction processes, with important bids on energy and infrastructure assets.

d. Foreign strategic and financial investors remain focused on Spain and interested in both strategic and opportunistic investments. Europe is the main source of those investments, followed by the United States. The remarkable increase of Latin American investment, mainly from Mexico and Chile, also continues.

e. Despite the decrease in private equity activity in 2017 worldwide, Europe (and particularly Spain) has witnessed an increase in private equity transactions in comparison to 2016. Indeed, private equity investments have returned to pre-crisis levels, and exits have also increased as private equity sponsors continue to be under pressure to divest their holdings acquired before the financial crisis.

f. Outbound foreign investment has also increased, focusing Spanish investment mainly on Europe, the United States and Canada, and to a lesser extent on Latin America and Asia.

g. Initial public offerings (IPOs) remained strong in the Spanish market.

II GENERAL INTRODUCTION TO THE LEGAL FRAMEWORK FOR M&A

i. Corporate law

The basic legal framework for corporate acquisitions, mergers and other types of corporate restructuring includes elements of both contract and corporate law.

Contract law is mainly contained in the Civil and Commercial Codes of the 19th century. Seeking to modernise and update this legal framework, the Ministry of Justice worked on a new Commercial Code with the aim of codifying the entire body of law on commercial contracts into a single piece of legislation. The first draft was submitted for public consultation in June 2013 and the government approved the draft Bill in May 2014. However, the draft Bill has not yet been submitted to Parliament.
Corporate law is primarily based on the Companies Law and the Law on Corporate Reorganisation. The Companies Law governs, \textit{inter alia}, joint-stock companies (\textit{sociedades anónimas}) and limited liability companies (\textit{sociedades de responsabilidad limitada}), the most common corporate forms in Spain. It also sets out the basic legal framework for listed companies.

The Law on Corporate Reorganisation regulates mergers, spin-offs, conversions, \textit{en bloc} transfers of assets and liabilities, and international transfers of registered address. It also specifically regulates mergers following a leveraged buyout (LBO) (i.e., mergers between companies where one has incurred debt during the three years preceding the acquisition of control – or the essential assets – of the target company). The Law requires, \textit{inter alia}, that an independent expert determines whether the LBO constitutes financial assistance, a circumstance the Companies Law generally prohibits. It does not, however, establish the effects of an independent expert’s finding of financial assistance: a situation creating uncertainty in LBOs, particularly due to legal interpretations by the Spanish commercial registries.

The rules that must be taken into account in connection with the main regulated markets include the Consolidated Stock Market Law \textsuperscript{3} (framework for the securities market), the Law on Discipline and Intervention of Credit Institutions \textsuperscript{4} (framework for the credit market) and the Private Insurance Supervisory Law \textsuperscript{5} (framework for the insurance market).

ii Insolvency law

The general legal framework on insolvency is primarily contained in the Insolvency Law. The Insolvency Law created a single insolvency procedure applicable to all insolvent debtors (i.e., a debtor who is, or will imminently be, unable to regularly comply in a timely manner with its payment obligations). The single procedure has a joint phase with two potential outcomes: a creditors’ agreement (in which the debtor and creditors reach an agreement on the payment of outstanding claims), or the liquidation of the debtor’s assets to satisfy its debts. It has also clarified the risks associated with the clawback (rescission) of transactions carried out within the two years preceding the declaration of insolvency that are considered detrimental to the debtor’s estate.

The Insolvency Law was generally viewed as a positive development. Nevertheless, the legislation was passed in a completely different economic and financial climate, rendering it necessary to amend it in 2009, 2011, 2013, 2014 and 2015.

The most significant recent developments were Royal Decree-Law 1/2015 of 27 February and Law 9/2015 of 25 May. These reforms generally sought to improve various aspects of the pre-insolvency institutions to ensure the viability of companies in an attempt to avoid insolvency (\textit{inter alia}, to introduce the ‘protective shields’ of refinancing agreements), and align the Insolvency Law with current practices and insolvency regulations in other comparable jurisdictions, as well as to eliminate specific rigidities and improve various technical aspects criticised by judges, legal scholars and lawyers alike.

\textsuperscript{2} Translations (in English and French) of these laws are available on the Spanish Ministry of Justice website: www.mjusticia.gob.es.

\textsuperscript{3} The securities market is supervised by the National Stock Exchange Commission.

\textsuperscript{4} The credit market is supervised by the Bank of Spain, and credit institutions by either the ECB or the Bank of Spain.

\textsuperscript{5} The insurance market is supervised by the General Insurances and Pension Funds Directorate.
According to recent statistics, the number of insolvency proceedings has continued the downward trend observed since 2013. The number of insolvency proceedings reported in 2017 decreased with respect to 2016.

### Other regulations

Other matters relating to, *inter alia*, tax, employment and competition law also form part of the M&A legal framework (see below).

### DEVELOPMENTS IN CORPORATE AND TAKEOVER LAW AND THEIR IMPACT

There has been parliamentary deadlock in recent years because of the difficulty in obtaining majorities in Parliament, resulting in reduced legislative activity in terms of corporate and takeover law.

In October 2017, the government urgently amended Article 285.2 of the Companies Law to make it possible for boards of directors to move their registered offices within Spain without requiring the consent of shareholders. This measure has proved to be instrumental in avoiding the uncertainty produced by Catalonia’s political crisis.

It is also foreseen that, during 2018, a new regulation of the commercial registry will be approved (the current regulation dates from 1996) in order to modernise its mechanisms and organisation, and to adapt this legislation to the current corporate legal regime.

Apart from these legislative developments, the most recent regulations, which were further analysed in previous editions of *The Mergers & Acquisitions Review*, were the following: Royal Legislative Decree 4/2015 of 23 October on the Consolidated Stock Market Law; Law 11/2015 of 18 June on credit institutions’ recovery and resolution; and Royal Decree 877/2015 of 2 October on legislative developments to the Savings Banks and Banking Foundations Law and Circular of the Bank of Spain 6/2015 of 17 November (which further developed the provisions of Royal Decree 877/2015).

Finally, albeit not having an *ad hoc* regulation under Spanish law, during 2017 we have witnessed a progressive increase in the use of formulas aimed at minimising the risks assumed by the parties in M&A deals. From these formulas, note the increasingly important role of warranty and indemnity (W&I) insurance, which covers the losses arising from representations and warranties included in the sale and purchase agreements.

### FOREIGN INVOLVEMENT IN M&A TRANSACTIONS

In 2017, we saw an increase in the interest of international investors in the Spanish real estate, energy, tourism, IT, telecom and healthcare sectors. Although M&A activity by strategic buyers experienced a certain slowdown in the first quarter of 2018, private equity investments continued to grow, and the outlook for 2018 both for inbound and outbound M&A remains strong. The following are some of the most important deals:

- *a* In May 2018, Atlantia and Hochtief announced their agreement to invest in Abertis for €31 billion (combining their initially independent takeover offers launched a year earlier).

- *b* In March 2018, Allianz Capital Partners GmbH and Canada Pension Plan Investment Board agreed to acquire a 20 per cent stake in Gas Natural Fenosa for €1.5 billion.
In January 2018, Inmobiliaria Colonial, through a takeover offer for Axiare’s shares, increased its stake to 87 per cent (it already owned 28.8 per cent) of the shares for €1.03 billion. The two companies are expected to merge during 2018.

In 2017, Siemens concluded the merger of its wind power business with Gamesa Corporación Tecnológica.

In November 2017, IFM acquired OHL Concesiones (a Spain-based company that provides all types of transport infrastructures) for €2.8 billion.

In November 2017, Cerberus acquired an 80 per cent stake in the real estate business of BBVA for €4 billion.

In November 2017, Santander sold Allfunds Bank to Hellman & Friedman and GIC Private Limited for €1.8 billion.

In August 2017, Blackstone acquired 51 per cent of Banco Popular’s real estate portfolio for €5.1 billion.

In July 2017, a consortium consisting of JP Morgan Asset Management, the US-based asset management company, Abu Dhabi Investment Council, the UAE-based investment arm of the government of Abu Dhabi, Swiss Life Asset Management AG, the Switzerland-based asset management company and Covalis Capital LLP, the UK-based investment management firm, acquired Naturgas Energía Distribución, SAU, the Spain-based gas distribution company, from Energías de Portugal SA, the listed Portugal-based company engaged in the generation and distribution of electricity, for an enterprise value of €2.59 billion.

V SIGNIFICANT TRANSACTIONS, KEY TRENDS AND HOT INDUSTRIES

Public M&A

We have seen big deals in public M&A, with increased activity and large deals taking place within the infrastructure and energy sectors such as the Abertis takeover bids, the sale of Empark to Macquarie Infrastructure, and the OHL and Naturgas deals. Spanish M&A activity was dominated by Hochtief and Atlantia’s pursuit of Abertis.

The current environment has attracted the interest of international investors in public M&A deals, and real estate, construction and infrastructure, and energy make up most public mega-deals:

In 2018, the €2.5 billion takeover offer for 83.44 per cent of Spain-based and listed real estate company Hispania Activos Inmobiliarios SOCIMI, SA by Blackstone, the US-based private equity group, as well as the takeover offer received by Saeta Yield (the Spain-based and listed renewable energy company) from TerraForm Power, backed by Brookfield Asset Management, the Canada-based and listed alternative asset manager.

In 2017, the largest public M&A deals were:

- The takeover bids from Atlantia and Spanish ACS (through Hochtief), respectively, for Abertis, which as mentioned above finally ended in 2018 with Atlantia’s and Hochtief’s joint investment for €31 billion.
- The Australia-based fund management firm IFM Investors’ €2.7 billion acquisition of OHL Concesiones, SA from Obrascon Huarte Lain, SA, a listed Spain-based company engaged in concession and construction businesses (the deal closed in 2018); and
Spain

• The €1.2 billion sale of Elektro Redes SA by Iberdrola (a Spain-based listed company engaged in the generation, transmission, distribution and marketing of electricity and natural gas) to Brazilian Neoenergia, SA (a subsidiary of Banco do Brasil, SA, Caixa de Previdencia dos Funcionarios do Banco do Brasil and Iberdrola, SA).

On a separate note, the symbolic purchase price paid for the shares and capital instruments of Banco Popular by Banco Santander was €1. This is the first acquisition under the single resolution mechanism approved by the Single Resolution Board.

ii Real estate

As mentioned in previous editions of The Mergers & Acquisitions Review, real estate has re-emerged as one of the prominent fields after years of market corrections. Attractive prices combined with banks’ need to clear their balance sheets of real estate assets have catalysed the resurgence of real estate transactions in the Spanish market. To foster this resurgence, the government made the tax framework applicable to the Spanish SOCIMIs (similar to real estate investment trusts) more attractive.

Investor appetite made 2017 a good year in quantitative terms, with transactions in the property sector over €10 billion, including the following:

a. The acquisition of an 80 per cent stake in the real estate business of Banco Bilbao Vizcaya Argentaria SA by Cerberus Capital Management, LP for €4 billion.

b. The acquisition by Blackstone of 100 per cent of HI Partners Holdco Value Added from Banco Sabadell.

c. Inmobiliaria Colonial SA’s acquisition of a certain percentage of Axiare’s shares to increase its stake in the company for €1.03 billion, with the intention of merging in 2018.

d. The acquisition by Banco Popular Español, SA of a 51 per cent stake in Aliseda, Servicios de Gestión Inmobiliaria, SL (a Spain-based company engaged in promoting, managing and operating real estate properties) from Kennedy-Wilson and Varde Partners, Inc for €490 million.

iii IPOs

IPOs remained strong in the Spanish market, both on the traditional continuous market and on the Mercado Alternativo Bursátil, a market (with a special set of regulations) for small companies seeking to expand.

The Spanish Stock Exchange became the eurozone leader in numbers of IPOs in 2017. The IPOs of Gestamp (a company engaged in the design, development and manufacture of metal parts for the automotive industry), Prosegur Cash (a leading global provider of cash in transit and cash-processing services to financial institutions, retailers, government agencies and central banks, mints, jewellers and other commercial operations around the world) and Unicaja Banco (a Spain-based bank founded in 2011 as a result of a merger between former savings banks) were among the most important IPOs of the year. Specifically the IPO of Gestamp for a value of almost €1 billion was the third most important in Europe in the first half of the year.

Several Spanish real estate companies have launched successful IPOs in Spanish capital markets this year, including Neinor Homes (a Spain-based company that acquires, develops,
Spain

and sells land for residential use in Spain) and Aedas Homes (a new property developer in Spain). In addition, Metrovacesa has been one of the biggest IPOs in the world in 2018. Most of these newcomers have been incorporated under the recently reformed SOCIMI framework.

iv Private equity

Private equity activity surged by 161.7 per cent in 2017 compared to 2016, showing the highest number to date of buyouts targeting Iberia.

In this context, private equity funds are investing in a wide range of industries that they consider to have significant growth potential, including food and drinks, retail, tourism, leisure, hotels and restaurants, energy, infrastructure, and life sciences and pharma.

The most active sectors for private equity deals by deal count were healthcare and life sciences, followed by tourism, and hotels and restaurants. Some of the most active funds by deal count included Portobello Capital, Cinven, Corpfin Capital, Black Toro, Blackstone, Ardian and KKR.

In 2018, note the following in particular:

a The acquisition by Blackstone of Cirsa Gaming Corporation, leader in the gambling sector with a prominent presence in Spain and Latin America.

b The voluntary tender offer launched by Brookfield Asset Management over the shares representing 100 per cent of the share capital of Saeta Yield, a Spanish listed company that owns, operates and acquires assets for the generation of renewable energy.

c The acquisition by MCH Private Equity of a majority stake in the share capital of Altafit Grupo de Gestión (a group dedicated to the fitness and health industry through Altafit Gym Club).

VI FINANCING OF M&A: MAIN SOURCES AND DEVELOPMENTS

i General overview

In 2017, the acquisition finance market continued its expansion and growth after its recovery from the financial crisis of recent years. Bank liquidity improved, and traditional lenders that were dominant prior to the crisis and that overcame the restructuring of the financial sector (e.g., BBVA, Caixabank, Sabadell, Banco Santander) are once again focused on their lending activity with a positive but prudent approach.

Market estimates suggest that corporate and business loans from Spanish financing entities will increase during the second half of 2018, and that the availability of funds from Spanish banks (also for non-investment grade borrowers) will continue to improve.

Competition between traditional Spanish lenders and direct lending funds was stronger in 2017 than during 2016, since borrowers actively looked for more flexible ways of financing. Debt funds have taken advantage of investment opportunities and continued low prices. Shadow banking has significantly increased its presence in the Spanish market, and traditional private equity players have started new investment activities, including direct lending.

Debt issuance of Spanish companies in the flexible and liquid Anglo-Saxon markets was consolidated during 2017 and the first quarter 2018 (in spite of Brexit), most notably by real estate companies, as real estate used to be a sector financed by traditional lenders. Specific Spanish companies (including financial entities) have also used the Spanish market for their debt issuances, some of a considerable volume.

Competition has forced Spanish banks to offer higher leverage, lower pricing and more flexible structures.
Financing conditions

Apart from these general trends, the following were the main features of acquisition financings in 2017:

a The range of financing products available to borrowers is exceptionally broad: second-lien facilities, ancillary facilities, unitranche, mezzanine, bridge-to-equity facilities, bridge-to-bonds and equity-like facilities are being offered by Spanish banks due to stronger competition. Vendor loans and non-banking loans (e.g., those originating from debt funds) continue to be frequently used to finance acquisitions.

b Banks still refrain from agreeing to the ‘certainty of funds’ provision in commitment letters, whereas the inclusion of material adverse change clauses and ‘diligence out’ provisions continue to be common. Limits to changes in pricing that can be arranged without the borrower’s consent have widened under the ‘market flex’ provisions, and ‘reverse flex’ provisions have not returned. Facility agreements still include broadly drafted ‘market disruption’ clauses.

c Traditional lenders have made efforts to adapt covenants related to the disposal of assets, corporate restructuring transactions and guarantee thresholds provided by the borrower’s group to covenants customarily used in high-yield bonds transactions to offer more flexible financing that does not restrict the borrower’s capacity to take business decisions if the financial ratios are not breached.

Other regulation

The adoption of the Draft Law regulating Real Estate Credit Agreements, of 17 November 2017, aims to transpose Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property. The main goal of this regulation is to improve consumer protection in the field of real estate credit agreements. In this sense, it may not affect contracts concluded between non-consumers, but it will undoubtedly have consequences for the flow of credit and the dynamism of the real estate sector in Spain.

Employment Law

The main legal framework of labour law in Spain is the Statue of Workers, which regulates the rights and obligations of employees and employers within the framework of labour relationships. The most recent relevant legislation in terms of labour law was Law 3/2012 on urgent measures to reform the labour market, which was enacted on 7 July 2012. Law 3/2012 introduced a significant set of measures aimed at improving the Spanish labour market, which was hit hard by the economic crisis and has very high unemployment rates.

Transfers of undertakings (TUPEs) are governed by Article 44 of the Statue of Workers on terms similar to other jurisdictions within the European Union: the transferee company must assume all the transferor’s employees assigned to the transferred business or production unit, maintaining all their previous labour and social security rights (including pension commitments); and the transferor and the transferee companies will be jointly and severally liable for three years after the TUPE takes place in relation to any labour and social security obligations not met before the TUPE.

The legal regime for managing or executive directors is not provided for in the Statute of Workers, as these directors are not considered employees. Their service contract must be approved by the board of directors (without the involvement or vote of the relevant
director). The contract must include all the terms and conditions under which the services are provided, especially all remuneration and compensation, and the director will not be allowed to receive any payment not expressly set out in the contract. On 26 February 2018, the Spanish Supreme Court issued a very controversial judgment declaring that the remuneration of managing and executive directors is subject to the same requirements and formalities as those applicable to any other director. The type of remuneration must therefore be included in the articles of association and an overall limit must be approved by the shareholders’ meeting for all the directors.

VIII TAX LAW

As indicated in the last edition of *The Mergers & Acquisitions Review*, the government approved a significant tax reform that entered into force on 1 January 2015 that included significant amendments to tax regulations through the approval of Law 27/2014 of 27 November on Corporate Income Tax (the New CIT Law) and Law 26/2014 of 27 November, which modified the Personal Income Tax Law and the Non-Resident Income Tax. The most relevant novelties for the M&A practice were the following.

i  Definition of business activity for CIT purposes

According to the wording of the New CIT Law, a business activity exists for CIT purposes when there are sufficient human and material resources to carry out the corresponding business activity at the level of the group of companies to which the corresponding company belongs.

ii  Non-deductibility of impairments

Impairments of company shares due to the depreciation of real estate assets are no longer tax-deductible.

iii  Deductibility of financial expenses

Interest accrued on intragroup profit participating loans (PPLs) are treated as dividends for CIT purposes for the lender and, consequently, expenses derived from PPLs (when granted to related entities) are no longer deductible by the borrower for CIT purposes. This measure affects PPLs signed after 20 July 2014.

Following the OECD recommendations included in the BEPS Actions reports, the New CIT Law modified the treatment of hybrid instruments to tackle hybrid mismatches, stating that the expenses incurred in related-party transactions will not be tax-deductible if, as a result of a different tax classification in the country of residence of the recipient, no income is generated, or income is tax-exempt or subject to a nominal rate lower than 10 per cent.

The New CIT Law maintained the general limitation on the tax-deductibility of net financial expenses (30 per cent of operating profit) with the minimum deductibility threshold of €1 million.

An additional limitation on leveraged acquisitions was introduced: financial expenses derived from the acquisition of companies that join the CIT tax group after its acquisition or are subject to reorganisation transactions in the subsequent four years will be deductible from the buyer’s tax base up to the additional limit of 30 per cent of the operating profit of the acquiring company. This limit does not apply if the portion of the purchase price financed
with debt does not exceed 70 per cent of the total purchase price and, in the following eight tax years, the debt is reduced annually by one-eighth of the principal amount until the principal amount is reduced to 30 per cent of the initial purchase price.

iv  Transfer pricing rules

The New CIT Law modified the definition of a related party between parent and subsidiary entities as the relevant shareholder’s stake needing to be at least 25 per cent or where decision-making power is, or can be, exercised (before, the threshold was 5 per cent).

v  Participation exemption framework

The New CIT Law extended the application of the participation exemption regime to dividends and capital gains from Spanish resident companies, which previously was only applicable to non-resident companies. This essentially implied that, subject to further analysis on a case-by-case basis, capital gains realised on the sale of a Spanish company by its Spanish parent company may be exempt, provided that minimum ownership of 5 per cent or a cost of acquisition of at least €20 million is held during the year preceding the date on which the transfer is completed or, in the case of dividends, it has been maintained for the time required to complete that period; additionally, if a foreign subsidiary is involved, the subsidiary must be subject to a minimum level of nominal taxation of 10 per cent in its home country. Although it is not expressly established in the New CIT Law, the Spanish tax authorities also require the holding company to be incorporated for valid economic reasons, and not merely as a conduit company with the main objective of avoiding taxation on the capital gains realised on the transfer of its subsidiary. Therefore, the holding company should be a ‘real’ company that carries out a business activity for tax purposes and not a mere inactive income company.

The amendments to the participation exemption framework have also been introduced for the branch participation exemption. A minimum level of nominal taxation of 10 per cent under a foreign corporate tax system similar to the Spanish CIT is required. This requirement is considered to be met if a branch is resident in a country with which Spain has ratified a tax treaty for the avoidance of double taxation.

vi  Capitalisation reserve

The New CIT Law replaced most of the tax credits currently in force (such as the reinvestment tax credit and the environmental investment credit) with a tax-deductible capitalisation reserve under which Spanish entities may, under certain circumstances, reduce their taxable base by 10 per cent of the increase in its net equity during the year. This is done by comparing the net equity at year-end (excluding the current year’s profits) with the net equity at the beginning of the year (excluding the previous year’s profits) and excluding any shareholder contributions and other items.

To be eligible to benefit from this tax relief, the amount of the net equity increase must be maintained for five years following the application of the tax deduction (except for accounting losses), and the company must report an accounting reserve in its annual accounts for the amount of the deduction. The capitalisation reserve cannot be distributed during the following five years, except in certain situations.
vii Carry forward losses
According to the New CIT Law, from 2017 onwards, offsetting accumulated tax losses is limited to 70 per cent of taxable income.

This limitation does not apply in the tax year in which a company is dissolved (except if derived from a restructuring transaction), or to specific types of income such as that derived from debt cancellations without consideration when the creditor is not a related entity.

Despite introducing this limit to the offsetting of carry forward losses, the New CIT Law removed the applicable 18-year limitation, allowing tax losses to be offset indefinitely.

The New CIT Law also incorporated additional limitations to the use of tax losses for medium and large companies. Thus, in the event that a company’s turnover in the preceding year is between €20 million and €60 million, offsetting the accumulated tax losses is limited to 50 per cent of the positive CIT base; and if the turnover is above €60 million, the use of losses is limited to 25 per cent of the taxable base of the company.

viii Tax rate reduction
The New CIT Law gradually reduced the CIT rate from 30 to 25 per cent. Moreover, a reduced 15 per cent tax rate was established for newly created companies that carry out business activities. The rate applies during the first profitable tax year and the following year.

ix CIT group framework
Based on the ruling of the European Court of Justice of 12 June 2014, the New CIT Law, which came into force for tax years commencing on or after 1 January 2015, broadened the scope of companies eligible for the CIT group framework. Under the new framework applicable to CIT groups, all Spanish companies resident in Spain and permanent establishments of foreign-resident entities in Spain that have a direct or indirect common non-resident shareholder (insofar as the common shareholder meets specific requirements) may form a tax group for Spanish CIT purposes. In that circumstance, the common non-resident shareholder is considered the parent company of the CIT group, although it must appoint one of its subsidiaries as the group’s tax representative in relation to the Spanish tax authorities.

x Tax neutrality framework for mergers and demergers
The main amendments introduced by this framework were the following.

Unlike the previous regulation, the tax neutrality framework is now considered the framework applicable to mergers and demergers by default. A decision to disapply the tax neutrality framework must be communicated to the Spanish tax authorities.

The New CIT Law extended the scope of the definition of partial demergers entitled to benefit from tax neutrality given that maintaining another business unit in the transferring entity is no longer required (i.e., the New CIT Law allows the application of tax neutrality when the transferring entity merely retains a controlling stake in a subsidiary).

In addition, the New CIT Law allows carry-forward losses to be transferred to the acquiring entity simultaneously with the going concern being transferred to the acquiring entity even if the transferring entity is not wound up.

6 Cases C-39/13, C-40/13 and C-41/13.
Merger goodwill and other intangibles arising as a consequence of a merger are not recognised for tax purposes and will therefore no longer be deductible.

According to the current wording of the New CIT Law, the tax authorities are only able to partly regularise a tax advantage unduly applied. The tax authorities are not able to claim taxes on unrealised gains by the transferring entity.

xi  Non-resident income tax

Law 26/2014 reduced the tax rates on income obtained by non-residents in Spain. The general tax rate is 24 per cent; the rate for EU residents is 19 per cent. Moreover, dividends, interest and capital gains are taxable at a rate of 19 per cent. The tax rate for permanent establishments was reduced to 25 per cent.

The most important development in relation to the EU Parent–Subsidiary Directive is that no Spanish withholding taxes are levied on dividends distributed by a Spanish subsidiary to its EU parent company when the EU parent company maintains a direct holding of at least a 5 per cent stake or €20 million in the Spanish subsidiary. The holding must have been held uninterruptedly for the year preceding the date on which the distributed profit is due or, failing that, for the time required to complete that period. The anti-avoidance rule was also amended, and applies when the majority of the parent company’s voting rights are directly or indirectly held by non-EU residents, unless it can be evidenced that the EU parent company has been incorporated and operated for valid economic purposes and substantial business reasons.

IX  COMPETITION LAW

Under Law 15/2007 of 3 July on competition, transactions leading to a concentration that fulfil the following thresholds are subject to mandatory notification to the National Markets and Competition Commission (NMCC):

a as a consequence of a transaction, the undertakings obtain a market share of at least 30 per cent in a national market or a substantial part of it regarding a certain product or service. The market-share threshold increases to 50 per cent if the target’s aggregate turnover in Spain was less than €10 million in the previous financial year; and

b the turnover of the undertakings in Spain in the previous financial year was at least €240 million, provided that at least two of the undertakings concerned had a minimum turnover of €60 million in Spain during the same period.

The Competition Law also includes a suspension obligation, requiring that the completion of a transaction meeting any of the thresholds be suspended until clearance is granted.

In 2017, the number of notifications filed was slightly lower (94) than in 2016 (104). Most of the notifications filed were cleared in the first phase without commitments, and only three of them were approved in the first phase with commitments. The most prolific area was the manufacturing sector, with a significant upturn of the mergers assessed during the past three years, where the number of notifications in the sector doubled. Other relevant sectors are the commercial distribution, chemical and energy industries, while the financial and the medical industries have seen a decrease in the number of concentrations notified to the NMCC during the past year.
In terms of antitrust enforcement policy, in 2017 the NMCC continued to closely monitor companies’ compliance with its decisions through a specialised division within the Competition Directorate to conduct such investigations. Within these proceedings, information requests are usually submitted to third parties enquiring about companies’ compliance with the conditions imposed.

As regards merger control, during 2016 and 2017 the NMCC maintained a good track record on enforcement in this field and investigated eight potential gun-jumping cases. In 2017, the NMCC imposed a fine of €20,000 on a company for gun-jumping.

X OUTLOOK

Despite the political uncertainties, M&A prospects in Spain for the second half of 2018 and for 2019 are optimistic. The sustained improvement of the Spanish economy, continued deleveraging process, consolidation of key industries (tourism, telecommunications, energy, financial services), and increased access to credit and other financing for Spanish corporations and private equity, strengthen the belief that the volume and number of M&A transactions will be maintained in the short and medium term. On the negative side, high unemployment, despite undeniable improvements in recent years, still dampens consumer spending (although domestic demand has inched up), the government continues to struggle with a large deficit and political instability may delay the upward trend.

The growing appetite of foreign investors for the Spanish economy, as well the global improvement of the economy and the high activity of M&A transactions worldwide, will continue to affect the high number of transactions involving foreign investors in Spain. European and US investors will continue to be the main players.

The new complexity of private M&A deals in Spain has led to multiple structures and formulas to determine the price of the transaction, such as earn-outs and escrow mechanisms. W&I insurance has also become more prevalent, not only in private equity-sponsored transactions.

Finally, foreign private equity funds will continue investing in a wide range of industries, including food and drinks, retail, tourism, leisure, energy, infrastructure, real estate, and life sciences and pharma. Healthcare and pharmaceutical industries have potential, as public and private spending increases in response to an ageing population. Renewables and technology have attracted investors’ interest in recent years. These investments now take a wider range of forms and vehicles.
Chapter 43

SWITZERLAND


I OVERVIEW OF M&A ACTIVITY

A thirst for innovation has continued to drive M&A in Switzerland, with a particular interest in pharma, medtech and biotech. According to Mergermarket, four of Switzerland’s top 10 deals in 2017 targeted that sector. Other active sectors included industrials and chemicals, business services and technology. In total, Mergermarket counted 203 deals in 2017 (compared with 211 in 2016) with a total deal volume of €37.7 billion.

In Q1 of 2018, M&A activity continued at a similar pace in terms of the number of deals (42). As in previous years, the majority of deals and value came from foreign investors. According to Mergermarket, inbound activity in Q1 (€7.9 billion; 26 deals) accounted for 96 per cent and 62 per cent of the Swiss deal value and count, respectively.

These numbers show that relative to the size of its population, Switzerland plays a disproportionately important role in M&A in the DACH (Germany, Austria, Switzerland) region and offers interesting investment opportunities to foreign investors.

Some of the most notable deals in 2017 and Q1 2018 include:

- US$30 billion public takeover of Swiss-listed biotech giant Actelion combined with the spin-off and listing of Idorsia (Actelion’s portfolio of new drug candidates);
- discontinued merger between SIX-listed Clariant and Huntsman (combined estimated enterprise value of US$20 billion) announced in May 2017;
- 2.75 billion Swiss franc acquisition of SIX Payment Services by Paris-listed Worldline announced in May 2018;
- the 2.3 billion Swiss franc disposal of Landis+Gyr by Toshiba and Innovation Network Corporation of Japan by way of an initial public offering (IPO) (dual-track);
- first-of-its-kind acquisition of a portfolio of 2,239 Swiss telecom towers from Sunrise Communications by a consortium led by Spanish-listed Cellnex Telecom; and
- acquisition of Swiss-headquartered Symetis SA, a leading European developer of innovative heart valve replacement devices, by Boston Scientific Corporation, US.

1 Manuel Werder, Till Spillmann, Thomas Brönnimann, Philippe Weber, Ulysses von Salis and Nicolas Birkhäuser are partners and Elga Reana Tozzi is a counsel at Niederer Kraft Frey Ltd.

2 Swiss Infrastructure and Exchange.
II GENERAL INTRODUCTION TO THE LEGAL FRAMEWORK FOR M&A

M&A transactions are mainly governed by:

a the Swiss Code of Obligations, which provides the statutory framework for the acquisition and sale of companies (share deals) or of their assets and liabilities (asset deals);
b the Federal Act on Merger, Demerger, Transformation and Transfer of Assets, which regulates mergers, demergers, conversions and transfer of assets and liabilities; and

The FMIA applies to public cash and share exchange offers to holders of equity securities of companies whose equity securities are listed on a Swiss exchange (in the case of non-Swiss domiciled companies, the FMIA applies only to those companies with a primary, full or partial listing on a Swiss exchange). The rules and procedures applicable to public tender offers laid down in the FMIA and its implementing ordinances are designed to ensure fairness, equal treatment and transparency in voluntary and mandatory public tender offers. The obligation to launch a mandatory tender offer arises whenever a person or a group of persons acting in concert, directly or indirectly, acquires equity securities of a Swiss company listed in Switzerland, or a foreign company with a primary listing in Switzerland, and thereby exceeds the threshold of one-third of the voting rights (whether exercisable or not). In the case of a mandatory tender offer (including offers that would result in the triggering threshold being exceeded), the offer price per share may not be lower than the volume-weighted average stock price on the relevant Swiss exchange of 60 trading days prior to the formal announcement or the publication of the offer or the highest price paid by the bidder (or persons acting in concert with the bidder) for equity securities (including options) of the target during the preceding 12 months.

The articles of association of listed companies may provide for a higher threshold of up to 49 per cent of the voting rights (opting up) or may declare the mandatory tender offer obligations to be not applicable (opting out). The Takeover Board (TOB) and its supervisory authority, the Swiss Financial Market Supervisory Authority (FINMA), monitor public tender offers. The TOB can issue binding orders against parties, which can be appealed to FINMA. FINMA’s decisions can be appealed to the Federal Administrative Court. The relevant decisions are published online.3

Various other rules may also be relevant for the acquisition and sale of corporate entities and of their assets and liabilities, including, among others:

a the listing rules of the respective stock exchange if the transaction results in the listing of new shares on a stock exchange;
b employment law (automatic transfer of employment relationships and information and consultation rights of employees);
c the Federal Act on the Acquisition of Real Estate by Persons Abroad, which contains regulations on the acquisition by foreign persons, or foreign-controlled companies, of residential property or land in Switzerland;

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3 At www.takeover.ch.
the Federal Act on Cartels and other Restraints of Competition, which, in combination with the Ordinance of Merger Control, regulates merger control; and

industry specific laws and regulations, such as financial services, telecommunications, insurance, and energy laws and regulations.

III DEVELOPMENTS IN CORPORATE AND TAKEOVER LAW AND THEIR IMPACT

i Private M&A

Corporate law is currently under revision in several aspects and with multiple aims. On 23 November 2016, the Swiss Federal Council issued a report on its amendment proposal. First, the Ordinance against excessive remuneration in listed stock corporations, which entered into force on 1 January 2014 as transitional regulations, is to be adopted into federal law. Second, the rules on the incorporation of companies and the capital structure are to become more flexible. Third, the draft legislation contains a proposal for transparency rules for economically significant companies that are active in the extractive industries. Finally, guidelines on gender representation at board and senior executive level in major listed companies have been proposed.

The proposed new legal provisions that originate in the Ordinance against excessive remuneration in listed stock corporations foresee the following:

a sign-on bonuses that do not offset any demonstrable financial disadvantage are to be prohibited or limited;

b compensation for non-compete clauses that are not commercially justified are to be prohibited or limited;

c shareholders may vote in advance or ex post on the remuneration for top managers. If shareholders vote in advance on the variable remuneration for top managers, they must also be presented with the annual compensation report for a subsequent consultative vote; and

d more effective ways shall be introduced for claiming the reimbursement of unlawful payments.

Furthermore, the Federal Council’s report provides for increased flexibility and simplification in a number of areas. Share capital may henceforth be denominated in a foreign currency. The new law introduces the possibility for a shareholders’ meeting to foresee a new capital band, which authorises the board of directors to freely increase (authorised capital increases) and reduce the share capital (authorised capital reductions) within the capital band without any need for further shareholder resolutions. In addition, the need for public certification by a notary for the incorporation of stock corporations, limited liability companies and cooperatives, and their dissolution and cancellation from the commercial register, will now be both possible and straightforward.

The Federal Council is further proposing reforms to other specific areas. For example, by revising the provisions on corporate restructuring, it aims to create incentives for companies to take the necessary action at an early stage and thus avoid insolvency. In addition, arbitral tribunals will be able to rule on disputes under company law in addition to the public courts, as is the case at present.
Furthermore, in an effort to make financial flows in the commodities sector more transparent, the Federal Council has proposed, in an electronic report, the imposition of a requirement on significant companies that are active in the extractive sector to disclose payments to state bodies in excess of 100,000 Swiss francs per financial year.

Finally, the Federal Council proposed the introduction of gender guidelines for the boards of directors and executive boards of major listed companies, namely that women should account for at least 30 per cent of a board of directors and at least 20 per cent of an executive board. The law provides for a ‘comply-or-explain’ approach, that is to say if these thresholds are not met, the stock corporation will be required to state the reasons, and the action that is being taken to improve the situation, in its remuneration report. The new law provides for transitory periods of five years for boards of directors and 10 years for executive boards.

The proposal has not yet been discussed in the Swiss Parliament. Only the legal commission of the national chamber has initiated discussions; it issued a report on 18 May 2018 and made a number of requests. It appears that the discussions may be extensive and time-consuming and that the deliberations will result in changes to the proposed Bill. It cannot therefore be anticipated when the new legislation will enter into force and in what exact form.

ii Public M&A

No major amendments were made to takeover legislation in 2017. The only notable change relates to the Swiss Takeover Board’s Circular No. 3 on the Review of Public Takeover Offers (TOB Circular No. 3), which was revised by the Swiss Takeover Board with effect from 1 January 2017. The revised TOB Circular No. 3 refers to the new Swiss auditing standard (PS 880) for the review of public takeover offers, which was adopted by the Certified Accountants and Tax Consultants and approved by the Federal Audit Supervision Authority on 28 November 2016. This auditing standard lays down the principles that review bodies must follow when reviewing public takeover offers and the form and content of the reports. While PS 880 is binding on government-supervised audit firms by operation of law, the Swiss Takeover Board, by adopting the revised TOB Circular No. 3, declared PS 880 to be binding on securities dealers acting as review bodies in the sense of Swiss takeover legislation as well.

Furthermore, the Swiss Takeover Board issued a number of decisions in connection with public takeover transactions. In its decision 670/01 dated 28 August 2017 in the matter of ImmoMentum Ltd, it further developed its practice on the best price rule in the context of investment and shareholder agreements. While it confirmed an earlier decision that typical arrangements in such agreements, such as provisions on transfers and provisions on minority protections, must not be considered as monetary benefits for the purpose of compliance with the best price rule, it further specified that this is not correct if the monetary benefits are of significant value.

IV FOREIGN INVOLVEMENT IN M&A TRANSACTIONS

There are very few restrictions applying to M&A transactions involving Swiss target enterprises. Restrictions apply to specific sectors, such as banking, finance, insurance, transportation and energy. For the acquisition by a foreign investor of a bank or financial institution that is prudentially supervised, an approval from FINMA is required, whereas different tests apply to the acquisition of a controlling stake (i.e., when foreigners holding qualified participations directly or indirectly hold more than half the voting rights or exert a controlling influence in any other way) and the acquisition of a minority interest. The approval of an acquisition
of a controlling stake will depend, among other things, on the granting of reciprocal rights by the country in which the qualified participant is resident or domiciled. Furthermore, the Federal Law on the acquisition of real estate in Switzerland by non-residents (known as Lex Koller) restricts the direct or indirect acquisition of non-commercial real estate in Switzerland by foreigners. These rules may also apply to a target entity that has a commercial purpose and pursues commercial activities, if it owns residential real estate in its portfolio or if it has significant unused land reserve.

V SIGNIFICANT TRANSACTIONS, KEY TRENDS AND HOT INDUSTRIES

One of the most innovative and notable M&A transactions in Switzerland in recent years has been completed in 2018: the takeover of Actelion Ltd, the Swiss-listed biotech company, by Johnson & Johnson. The purchase price of US$30 billion in cash makes this the largest biotech transaction in Europe. Johnson & Johnson agreed on 26 January 2017 to launch a public cash offer for all shares in Actelion, which is listed on the SIX. As part of the agreed transaction, Actelion made a spin-off of its promising drug discovery operations and early-stage clinical development assets into a newly created Swiss biopharmaceutical company, Idorsia Ltd. Before closing, the shares in Idorsia were by way of an extraordinary dividend in kind distributed to Actelion’s shareholders, and at closing the shares in Idorsia were listed on the SIX, thereby starting a biotech start-up with more than 600 employees, more than 1 billion Swiss francs in cash and an initial public offering at its first business day. This transaction structure allowed the shareholders of Actelion to keep the potential profits of the research that Actelion had been nurturing for decades with its outstanding research team and bridging the problem that it would have been very difficult to agree with Johnson & Johnson on a reasonable valuation of this high-risk early-stage research business. Also, it allowed a large number of the management team at Actelion, including chief executive officer Paul Clozel, to continue to work in an independent company with a very entrepreneurial spirit. Johnson & Johnson bolstered its product portfolio with Actelion’s blockbuster drugs while also receiving an on option on Idorsia’s ACT-132577, a compound for resistant hypertension that is in development.

As part of the transaction, Actelion had to be split by spinning off its drug discovery operations and early-stage clinical development assets into a new entity. This complex undertaking had to be fully implemented within less than six months, including splitting the intellectual property portfolio and finding solutions for business functions that both business units had been sharing. As part of the transaction, Johnson & Johnson also acquired a significant shareholding in Idorsia, whereby a well-designed governance structure had to be developed to address concerns from the competent merger control authorities. Finally, Johnson & Johnson also provides a credit facility to Idorsia.

VI FINANCING OF M&A: MAIN SOURCES AND DEVELOPMENTS

In general, low interest rates and high cash levels at companies and sponsors continued to underpin the strong M&A activity in 2017. Large Swiss leveraged acquisition finance transactions are usually arranged by international banks through the UK or US market and placed with banks and institutional investors using Luxembourg or Netherlands acquisition vehicle structures. In most cases, funding is made through both loans and bonds. The domestic acquisition finance market is mainly driven by the large Swiss banks and some smaller ones,
such as cantonal banks and other smaller financial institutions. Because of the particularities of Swiss tax laws, bonds issued by Swiss issuers are less attractive, in particular in the context of leveraged acquisition finance transactions. In addition, because of the negative interest rates, the trend of institutional investors (in particular, insurance companies and pension funds) and other non-bank lenders providing lending has also continued. Such investors are particularly interested in real estate, infrastructure and energy investments offering relatively secure long-term and resilient cash flow and return profiles.

VII EMPLOYMENT LAW

No major amendments were made to Swiss employment law in 2017. In the context of M&A transactions, the relevant rules are those governing the transfer of employees in the event of a transfer of an enterprise by way of asset transfer, merger or demerger. These rules do not apply to share transfers. In the event of a transfer of an enterprise, the employment agreements with the employees transfer by operation of law unless an employee refuses the transfer, in which case the employment agreements will transfer to the acquiring party but be terminated within the statutory periods (i.e., one to three months, depending on the number of years the employee has been employed).

The employee representative body or, if there is none, the employees themselves, must be informed in due time prior to the anticipated transfer about the reasons for the transfer and the legal, economic and social consequences. If measures affecting employees are contemplated as an outcome of the transfer, the employee representative body or, if there is none, the employees themselves, must be consulted prior to any decision on these measures being made. This may conflict with stock exchange rules, which require that transactions are kept confidential until they are executed and that only a confined circle of persons are involved in the transaction process on a need-to-know basis.

VIII TAX LAW

Under the Federal Direct Tax Act (FDTA),4 capital gains arising from the sale of privately held shares of a Swiss tax-resident person are tax free. However, the tax law states some exemptions whereby a capital gain would be subject to income tax and withholding tax in the following two basic cases:

a. An indirect partial liquidation,5 (i.e., capital gains arising from the sale of at least 20 per cent of the capital of a company if the purchaser were a company or an individual person holding those shares as a business asset). It is a well-known practice that the seller asks for tax warranties and representations in the sale and purchase agreement, whereas the purchaser cannot merge the target with the acquisition company or declare a dividend from distributable non-business-related reserves (available at the date of the purchase) during a five-year blocking period.

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4 Article 1b, Paragraph 3 of the Federal Direct Tax Act (FDTA).
5 Article 20a, Paragraph 1(a) FDTA.
A transposition,\(^6\) that is to say a realisation of a nominal value gain if a shareholding of at least 5 per cent were contributed by an individual shareholder to a company in exchange for shares, with the result that the individual shareholder would own at least 50 per cent. This should not only be considered for family-owned businesses but also in the case of an IPO. In practice, shareholder agreements and the execution of call options could also trigger a transposition and requalify a nominal value gain into taxable income.

In recent years, the Swiss Federal Tax Administration (SFTA) has developed a new practice for cases of ‘substitutional liquidation’, that is to say when a non-Swiss holding company would sell its Swiss subsidiary to a company that is tax resident in a third country and the Swiss subsidiary would be merged with the non-Swiss tax resident acquisition company, which would result in the distributable reserves of the Swiss subsidiary being transferred to a non-Swiss tax resident company and, accordingly, no longer being subject to Swiss withholding tax. The SFTA could in such a case levy a withholding tax at a rate that is the difference between the residual tax rate applicable pursuant the applicable double tax treaty between the seller state and Switzerland and the applicable double tax treaty between the state of the acquisition company and Switzerland.

The SFTA could in some cases also refuse the refunding of withholding tax if it is deemed that there has been an ‘international transposition’, that is to say if surplus were to be returned to the shareholder through the repayment of loans or by distributing capital contribution reserves instead of a dividend distribution that would be subject to Swiss withholding tax.

Attention should also be given if a target company has an employee share option plan (ESOP) in place. The relevant practice is very strict in respect of the requalification of a capital gain into salary income. In particular, if an employee buys shares (cash settlement of the purchase, i.e., not when shares are issued as a bonus compensation) at a value that is calculated based on an agreed formula and those shares would be sold to a third party based on a different fair market value calculation, the surplus gain (i.e., the difference between the actual formula value and the effective fair market value) would be requalified as salary income and be subject to income tax, and to social security and eventually to pension funds (or even source taxes), which might be a liability of the company. It should be noted that these ESOP tax rules do not apply to founder shareholders or members of a board of directors who are not employees of the company.

Furthermore, the facts and circumstances of purchase price payments related to certain earn-out clauses need to be analysed carefully given that such payments could also be requalified as a salary income.

Switzerland still levies stamp duty of 1 per cent on the issue of shares, but restructuring exemptions are available. Based on a recent federal supreme court case, stamp duty would be due in the case of a quasi-merger if no new shares were issued (i.e., shares in one company would be contributed to another company). In practice, until now it has been possible to contribute to another company without issuing new shares (i.e., in cases of internal reorganisations) but going forward, it is mandatory to issue at least one share.

\(^6\) Article 20a, Paragraph 1(b) FDTA.
IX COMPETITION LAW

Under the current merger control legislation, the following transactions are deemed to be a concentration of undertakings subject to merger control:

a. a statutory merger of two or more previously independent undertakings;

b. the acquisition of control over one or more previously independent undertakings or parts of undertakings through any transaction, in particular the acquisition of an equity interest or the conclusion of an agreement; and

c. the acquisition of joint control over an undertaking (joint venture).

Control is assumed if an undertaking can exercise a decisive influence over the activities of the other undertaking by the acquisition of rights over shares or by any other means. The means of obtaining control may, in particular, involve the acquisition of the following:

a. ownership rights or rights to use all or parts of the assets of an undertaking (if those assets constitute the whole or part of an undertaking, which is a business with a market presence to which a market turnover can be attributed; or

b. rights or agreements that confer a decisive influence on the composition, deliberations or decisions of the organs of an undertaking.

Partial interests and minority shareholdings are only covered if they allow an undertaking to exercise a decisive influence over another undertaking (this can also be in combination with contractual agreements between the parties or factual circumstances). There is a risk that the acquisition of a minority interest may qualify as an anticompetitive agreement if the undertakings concerned agree to cooperate.

Planned concentrations of undertakings must be notified to the Competition Commission before their implementation if in the financial year preceding the concentration (cumulatively):

a. the undertakings concerned together reported a worldwide turnover of at least 2 billion Swiss francs or a turnover in Switzerland of at least 500 million Swiss francs; and

b. at least two of the undertakings concerned each reported a turnover in Switzerland of at least 100 million Swiss francs.

In the case of insurance companies, ‘turnover’ is replaced by annual ‘gross insurance premium income’, and in the case of banks and other financial intermediaries by ‘gross income’.

The Secretariat decided that a joint venture is exempted from notification (even if the parent companies meet the thresholds) if the following two conditions are both met:

a. the joint venture does not have activities in Switzerland or does not generate any revenues in Switzerland; and

b. those activities or revenues are not planned in Switzerland and are not expected to take place in the future.

In addition to turnover, notification is mandatory if one of the undertakings concerned in proceedings under the Cartel Act in a final and non-appealable decision was held to be dominant in a market in Switzerland, and if the concentration concerns either that market or an adjacent market or a market upstream or downstream of that market.

There is no applicable triggering event or time limit. However, notification must be made before the concentration is implemented. For public bids for acquisitions of
undertakings, the notification must be made immediately after publication of the offer and before the acquisition is implemented. The Competition Commission should be contacted in advance so that it can coordinate the proceeding with the Swiss Takeover Board.

Under the current merger control legislation, the Competition Commission may prohibit a concentration or authorise it subject to conditions and obligations if the investigation indicates that the concentration both:

a creates or strengthens a dominant position liable to eliminate effective competition; and

b does not improve the conditions of competition in another market such that the harmful effects of the dominant position can be outweighed.

The following is currently being debated in Switzerland. The Federal Council commissioned the Department of Economic Affairs, Education and Research to draw up a consultation proposal for adapting the merger control test. It is proposed that the current market dominance test applicable in Switzerland (under Article 10 of the Cartel Act) should be replaced by the Significant Impediment of Effective Competition (SIEC) test. Arguments in favour of the proposed revision of the merger control legislation are, in particular, that the SIEC test is the current prevailing test in the European Union and that the Swiss market dominance test cannot prevent economically harmful mergers; however, this has not been assessed empirically, let alone established.

X OUTLOOK

There continues to be strong interest in Swiss targets from foreign investors, in particular in the sectors already mentioned, namely industrials and chemicals, business services, technology, pharma, medtech and biotech. In addition, there continue to be movements in the Swiss financial services industry. As a result of the restrictions imposed by Chinese regulatory authorities on China outbound investments in December 2016, it is expected that transactions involving Chinese buyers will be at lower levels than in the preceding years. Also, the political instabilities in various parts of the world may at any time result in rapid changes to the investment environment.
I OVERVIEW OF M&A ACTIVITY

The total number of M&A deals in 2017 was 251.\(^2\) This represents a similar level compared to the 243 deals in 2016. Of the 251 deals, there were 127 with disclosed values totalling US$7.4 billion. There was only one deal exceeding the billion-dollar milestone and, similar to 2016, there were 17 deals over US$100 million during 2017. The total value of the top 10 deals was US$5.2 billion; of these, one was in the public sector and nine in the private sector. The public sector deal accounted for 7 per cent of the total value of the top 10 deals: this was the transfer of operating rights tender of Menzelet and Kılavuzlu HPPs, awarded to Entek Elektrik for US$365 million.

In the private sector, the major deals that accounted for the remaining 93 per cent of the total value of the top 10 deals were the acquisition of OMV Petrol Ofisi by Vitol Investment for US$1.44 billion, the acquisition of a 9.95 per cent stake in Garanti Bank by BBVA for US$917 million and the acquisition of a 40 per cent stake in Mersin Port by IFM Investors for US$869 million.

In 2017, the percentage of the value of top 10 deals to the total value of all transactions increased to 71 because of the higher number of large deals, whereas in 2016 it accounted for 62 per cent of all transactions.

Turkish investors engaged in more transactions (173) as compared to foreign investors (78). However, the total estimated value of transactions in which Turkish investors participated was US$2.8 billion, while the total estimated value of transactions by foreign investors was US$4.6 billion.

II GENERAL INTRODUCTION TO THE LEGAL FRAMEWORK FOR M&A

M&A activities in Turkey are carried out primarily in four ways: mergers, demergers, share transfers and asset sales. However, the requirements and procedures with regard to M&A transactions are not regulated under a single code. The relevant provisions of the new Turkish Commercial Code No. 6102\(^3\) (TCC) apply, for example, to share transfers, mergers

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1. Emre Akin Sait is a consultant at Legal Attorneys & Counselors.
2. Based on E&Y’s ‘Mergers and Acquisitions Report Turkey 2017’. Please note that the information provided by different sources may vary. For instance, Deloitte’s ‘Annual Turkish M&A Review 2017’ provides 298 as the total number of deals in 2017.
3. The new Turkish Commercial Code entered into force on 1 July 2012.
and demergers of companies, whereas the provisions of the Turkish Code of Obligations No. 6098⁴ (TCO) are applicable to sale and purchase agreements, events of default and available remedies.

Depending on the revenues of the companies involved in a given transaction, a notification to the Turkish Competition Authority (TCA) may be required to obtain pre-closing clearance for qualifying transactions, pursuant to Law No. 4054 on the Protection of Competition⁵ (POC).

M&A activity involving a public company is subject to the Capital Markets Law No. 6362 and the relevant communiqués, and to the TCC and TCO, as indicated above.

Based on the industrial sector concerned, there may be additional requirements or approvals to be obtained prior to implementing an M&A transaction, such as the approval required from the Energy Market Regulatory Authority for transactions in the energy sector.

III DEVELOPMENTS IN CORPORATE AND TAKEOVER LAW AND THEIR IMPACT

Mergers and demergers of companies are regulated under the TCC, according to which companies can merge in two different ways: by acquisition, in which the target company is acquired by the acquirer; or through the establishment of a new company. Different types of companies can merge; that is to say, companies with share capital (joint-stock companies, limited liability companies) can merge with any type of company, such as cooperatives, unlimited liability companies and limited partnerships, provided that the latter is the acquired party.

Merger agreements, which must be executed in writing pursuant to the TCC, must be signed by the competent company organ (the board of directors for joint-stock companies or the board of managers for limited liability companies) and approved by the general assembly of the company. The necessary content of merger agreements is prescribed by the TCC. Furthermore, a merger report must be drafted by the merging parties’ boards of directors. The TCC also specifies the necessary content that must be included in the report.

When merging, the parties to the merger may either offer the shareholders shares and the related shareholders’ rights in the target company, or cash payments corresponding to the value of the shares to be received in the target company.

The merger agreements of companies with a share capital must be presented by the board of directors to the shareholders at the general assembly meeting, and the merger agreement must be approved at the general meeting by three-quarters of the members attending. If a partition payment is conducted under the merger agreement, the merger agreement must be approved by 90 per cent of all available votes.

Moreover, 30 days prior to the general assembly meeting, each company that is a party to the merger must present the merger agreement, the merger report, financial tables and activity reports for the previous three years for review by the shareholders, the holders of dividend right certificates, the bearers of securities and any other relevant party.

A merger takes effect and the target company dissolves upon the registration of the decision of the general assembly meeting at the trade registry office.

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⁴ The new Code of Obligations entered into force on 1 July 2012.
⁵ Law No. 4054 on the Protection of Competition entered into force on 13 December 1994.
According to the TCC, companies can demerge completely or partially. In a complete demerger, all assets of the target company are divided and transferred to the acquirer companies. The shareholders of the target company receive the shares and rights of the assignor companies. Upon the registration of the demerger, the target company is dissolved.

In a partial demerger, one or more parts of assets of the target company are transferred to the acquirer companies. The shareholders of the target company receive the shares and rights of the acquirer companies, or the target company forms its own subsidiaries by receiving the shares and rights of the assignor companies against its transferred assets.

The transfer of shares of joint-stock companies and limited liability companies is regulated under the TCC. Registered shares of joint-stock companies can be transferred by assignment or through the endorsement and delivery of the share certificates to the transferee. Moreover, the share transfer must be approved by the board of directors and registered in the share ledger of the company. The shares of a limited liability company can only be transferred by a contract signed before a notary public. Furthermore, the share transfer must be approved by the general assembly and registered in the share ledger of the company.

The sale of assets is subject to the relevant provisions of the TCO regarding organising the ‘sales agreements’. It is not mandatory to execute sales agreements in writing, but in practice parties sign a written agreement, according to which a considerable number of provisions focus on the events of default and available remedies.

IV FOREIGN INVOLVEMENT IN M&A TRANSACTIONS

During 2017, foreign investors contributed US$4.6 billion of the US$7.4 billion total transaction value of the 251 deals in Turkey (including those of which the value was undisclosed). As in 2016, foreign investors outperformed Turkish investors in terms of transaction value – the total estimated value of transactions engaged in by Turkish investors was US$2.8 billion, while the total estimated value of transactions engaged in by foreign investors was US$4.65 billion. However, Turkish investors (173) engaged in a greater number of transactions than foreign investors (78), which has been the case for the past eight years. In terms of value, though, foreign investors have continued to outperform Turkish investors: foreign investors’ involvement in 2017 accounted for 62 per cent of the total transaction value, up from 54 per cent of total transaction value in 2016.

The average size of investments by foreign investors was approximately US$142 million in 2017, marking an increase compared to 2016, when the average was approximately US$68 million.

The largest transactions carried out by foreign investors in 2017 were the acquisitions of OMV Petrol Ofisi-Vitol Investment and Garanti Bank-BBVA, as noted above.

As in previous years, investors from the European Union and the United States continued to dominate foreign investor transactions in terms of the number of deals, followed by Japan, the UAE, South Korea and India. The United States had the highest number of transactions with 14 deals, followed by France with nine deals. Netherlands had the highest transaction volume, with US$1.44 billion, followed by Spain with US$921 million.
V SIGNIFICANT TRANSACTIONS, KEY TRENDS AND HOT INDUSTRIES

As in previous years, the energy sector ranked first in terms of transaction value in 2017. However, in terms of the number of transactions, the energy sector (with 37 deals) came second behind the IT sector (which ranked first with 75 deals). The deals in the energy sector included four of the 10 largest transactions in 2017. The transaction value in the energy sector in 2017 increased by US$1.3 billion compared to 2016, totalling US$2.9 billion.

In 2017, public sector deals constituted 9 per cent of the total transaction value, totalling US$604 million, whereas in 2016 the public deals represented 23 per cent of the total transaction value, at US$1.1 billion.

The financial services sector accounted for 10 transactions in 2017 with a total transaction value of US$998 million, ranking third in terms of transaction value.

VI FINANCING OF M&A: MAIN SOURCES AND DEVELOPMENTS

Investors have commonly used their own sources of funds to finance deals. They seem to prefer funding mechanisms that are structured to include both debt and equity. The demand to structure deals as debt financing convertible into shares of the target still continues.

The costs of local financing are high, which makes it tough for parties to obtain financing from local banks and financial institutions. This also causes M&A deals to be structured in a similar way to project finance deals, in which the main sources of income are assigned to lenders as security against a loan, and the loan is then converted into equity after a certain period, or after the related conditions precedent have been satisfied.

In M&A transactions, it is very common that the shareholders, the board of directors or the parent and affiliated companies provide financial assistance or guaranties to the target company. The TCC sets forth the principles governing the rights and obligations of related persons and companies as follows:

- a shareholder is prohibited from borrowing money from the company unless the shareholder has fully paid his, her or its capital subscription debt to the company, and the company’s profit, including the free reserves, is sufficient to cover the losses from the previous years;
- the TCC prohibits companies from providing loans to non-shareholder members of the board of directors and their relatives. The company cannot provide any warranty, security or guarantee to, or undertake any liability on behalf of, the said persons. Furthermore, the shareholders are not allowed to enter into any transaction with the company without the consent of the general assembly; otherwise, the company may claim that the transaction is invalid; and
- a parent company is prohibited from using its control in a way that will damage an affiliated company. In particular, a parent company cannot force an affiliated company to enter into certain types of transactions, such as:
  - transferring business, assets, funds, personnel, receivables or debt;
  - reducing or transferring its profits;
  - restricting its assets with rights in kind or personal rights;
  - undertaking liabilities, such as providing a guarantee, warranty or surety;
  - making payments; and
  - taking measures to affect the business in a negative way.
VII EMPLOYMENT LAW

There is no specific code within the framework of Turkey’s employment laws that regulates M&A activities. In the absence of this, one must refer to Labour Law No. 4857 and the TCC. The main provisions of these two pieces of legislation that apply to M&A transactions are Section 6 (The assignment of the workplace or a part of it) of the Labour Law and, if share capital companies are involved, Section 178 (Transfer of Labour Relations) of the TCC.

Section 178 of the TCC, which introduced a new provision that did not exist in the previous Turkish Commercial Code, imposed certain specific rules on M&A transactions entered into by companies with share capital (e.g., joint-stock companies and limited liability companies).

Although the aforementioned two provisions of the Labour Law and the TCC would apply to an M&A transaction, there is an apparent conflict between the relevant provisions of the Labour Law and the TCC as to which takes precedence in M&A transactions involving share capital companies. There is no case law addressing this matter yet; therefore, it is important to take into account the perspective of the legislature that led the drafting of Section 178 of the TCC to its current format. During the drafting stage of the TCC, the Justice Commission of the Turkish Grand National Assembly reviewed the position, and concluded that Section 178 of the TCC should be applied for M&A transactions involving companies with a share capital because it is more specific and appropriate for these circumstances, whereas Section 6 of the Labour Law should continue to govern all transactions involving the full or partial transfer of workplaces as a more general provision.

Once the case law starts to develop in this regard, there will be a clearer understanding of which of the two pieces of legislation would prevail. In the absence of this, the provisions of Section 178 of the TCC that would apply in a merger or acquisition transaction of companies with share capital are as follows:

a unless objected to by the employees, all the rights and obligations arising out of the employment contracts signed with the employees, until the day of acquisition, shall be transferred to the new employer on the day of acquisition. In the event of an objection by the employees, the transfer of such rights and obligations shall be deemed to take place at the end of the legal severance period;

b the former and the new employers shall be held jointly and severally liable for all the payables to the employees that would fall due before the acquisition day and until the end of the term of the employment contracts, or until the end of any term that may be applicable should an employee raise an objection; and

c the employees have the right to request security for their receivables that would fall due.

In addition to the above, in an M&A transaction, the new employers will not benefit from the right to terminate employment contracts solely because the transfer of the business, unless there are grounds that would otherwise provide the right to validly terminate employment contracts (e.g., it is necessary for economic or technical reasons, or there is a change in the business organisation). Should the new employer wish to terminate employment contracts, it would have to comply with the termination notice periods set forth in Section 17 of the Labour Law. If the number of employees whose employment contracts are to be terminated
exceeds the thresholds provided in Section 29 of the Labour Law,\(^6\) this would be considered a collective dismissal and would therefore require written notice to be given to the Turkish Labour Authority at least 30 days in advance.

**VIII TAX LAW**

The current Corporate Tax Law of Turkey was enacted in 2006. The corporate tax rate was reduced to 20 per cent in the same year. However, with Law No. 7061 enacted in November 2017 the corporate tax rate for the years 2018, 2019 and 2020 has been temporarily increased to 22 per cent. The Income Tax Law and Corporate Tax Law also stipulate a 15 per cent withholding tax (the amount of this tax is determined by the Cabinet, and the current figure has not been changed since 2009) on dividend distributions, but local corporate shareholders are exempt from such withholding tax. This system effectively creates a 32 per cent tax on distributed corporate earnings (e.g., 1.0 - 0.20 Turkish lira (corporate tax) = 0.80 Turkish lira, followed by 0.80 - 0.12 Turkish lira (withholding tax) = 0.68 Turkish lira). Currently, because of the temporarily implemented 22 per cent corporate tax rate, the effective taxation on distributed corporate earnings is 33.7 per cent. Where there is a treaty regarding the prevention of double taxation between the home country of a non-resident shareholder and Turkey, different taxation rates may apply. Note that a new draft law, which will merge the Income Tax Law and Corporate Tax Law into a single law, is being prepared at the time of writing this chapter.

Last year an amendment was made to the Income Tax Law and a 5 per cent discount has been introduced for taxpayers who pay their taxes on time regularly. Accordingly, any person subject to income tax or corporate tax will receive a 5 per cent discount on the total amount of tax payable if they have, for three consecutive years, delivered their tax statements on time, accurately and made the respective payments on time. However, banks, financial institutions, insurance companies, pension companies and private pension funds are exempt from this discount. Also the discount received this way may not exceed 1 million Turkish lira. Further details regarding this amendment can be found in Communiqué No. 301 on Income Tax, issued on 23 December 2017.

Several tax laws have been enacted in recent years incentivising industrial investments and research and development activities to improve Turkey’s export–import ratio, which, according to 2017 numbers, is around 0.67:1.

Under Turkish law, borrowings from shareholders and related parties in excess of a 3:1 debt-to-equity ratio qualify as thin capitalisation. If the related party is a bank or a financial institution, the applicable ratio is 6:1.

Another important point to note is the application of stamp duty to companies in Turkey. Different percentages and amounts of stamp duty are imposed on different types of documents. The most important stamp duty within the context of M&A transactions is that imposed on contracts (for 2018, this is 0.948 per cent of the transaction value of the relevant contract). With an amendment that was introduced in January 2017, stamp duty will arise only once for each contract regardless of the number of original copies. Before January 2017, every signed original contract was taxed separately; therefore, a 1 million Turkish lira sales

\(^6\) For example, in workplaces that have 20 to 100 employees, the termination of 10 employees’ contracts would qualify as a collective dismissal.
A failure to notify a qualifying transaction is subject to administrative fines, pursuant to Section 16 of the POC. The fines apply to all transaction parties in mergers, and the acquirer party in acquisitions. The amount of the fine is 0.1 per cent of the related transaction party’s annual turnover generated in the financial year preceding the date of the fine. The same amount of fine will also be applicable if a notification is made based on incorrect or misleading information. It should be noted that any such fine imposable until the end of 2018 will not be less than 21,036 Turkish lira pursuant to Communiqué No. 2018/1, and can be considerably higher.

Pursuant to Section 11 of the POC, where the Board learns, in any manner, about a notifiable M&A transaction that has not been notified, it will launch an *ex officio* assessment of the transaction, and if it is determined that the unnotified transaction is in accordance with the POC, the Board will grant an approval. However, the Board will also impose fines as specified above for failure to notify. If the Board decides that the notifiable (but unnotified) transaction should not be granted an approval pursuant to the POC, it will then unwind the transaction by issuing the necessary order to restore the position that existed before closing (i.e., it will stop the relevant M&A transaction, cancel all the actions that have been executed illegally, return all assets to their owners pursuant to the procedures and timing
to be decided by the Board). The Board has the right to issue an administrative fine on the concerned transaction parties of up to 10 per cent of their annual turnovers in the financial year preceding the date of the Board’s decision.

Note also that the Board has the right to impose personal fines on the managers and employees of the parties to the M&A transaction if the Board believes that any such individuals have had an important role in the violation of the provisions of the POC. The level of fines imposable on individuals in this case would be up to 5 per cent of the fine imposed on the parties to the transaction.

With the entry into force of Communiqué No. 2017/2, which made certain amendments to Communiqué No. 2010/4, the scope of transactions that are to be considered as a single transaction for the purposes of calculation of turnover has been expanded. Accordingly, not only two or more transactions carried out between the same persons or parties, but also by the same undertaking in the same related product market within a period of three years (this period was two years before Communiqué No. 2017/2 entered into force), are now considered as a single transaction for the calculation of turnovers. A further amendment made in Communiqué No. 2010/4 with Communiqué No. 2017/2 is that for the transactions that enable control on a company quoted on a stock exchange through serial transactions from different buyers, it is now possible to notify the Board after such transactions are completed, provided that the conditions set forth in Communiqué No. 2010/4 are met.

Ancillary guidelines that supplement the main Communiqué No. 2010/4 are Guidelines On Undertakings Concerned, Turnover and Ancillary Restraints in Mergers and Acquisitions, Guidelines on the Assessment of Horizontal Mergers and Acquisitions, Guidelines on the Assessment of Non-Horizontal Mergers and Acquisitions, Guidelines on Cases Considered as a Merger or an Acquisition and the Concept of Control, and Guidelines on Remedies That are Acceptable by the Turkish Competition Authority in Merger/Acquisition Transactions.

As per the report published by the Competition Authority on mergers and acquisitions realised in 2017, a total of 184 merger and acquisition notifications have been made.

X OUTLOOK

Compared to 2016, M&A activity increased in terms of the volume and number of transactions in 2017, but the average deal size was notably lower as the majority of the transactions were small or medium-sized.

Although a significant increase is not expected in 2018, substantial future M&A activity is expected in the energy, healthcare, manufacturing, retail and IT sectors. Taking into account both potential privatisations and private sector deals, the energy sector is again expected to be among the leaders in terms of M&A activity.

Privatisations have had a significant role in Turkey’s overall M&A activity. The major privatisations that are expected in the public sector in 2018 are the privatisation of Fenerbahçe-Kalamış MarinaTekirdağ Port and the tenders of various electricity generation assets of EÜAŞ.

As for the private sector, small and medium-sized transactions are expected to continue to dominate the market in 2018.
Chapter 45

UKRAINE

Viacheslav Yakymchuk and Olha Demianiuk

I OVERVIEW OF M&A ACTIVITY

Ukraine has been experiencing adverse economic and geopolitical conditions since 2014, which have had a negative effect on overall M&A activity in the country. In 2016, the Ukrainian M&A market continued to be greatly affected by Ukraine’s macroeconomics and the conflict in the east of Ukraine, which reduced Ukraine’s attractiveness for foreign investors. As a result, M&A activity dropped in terms of volume and value of deals, and the majority of transactions that have closed in recent years were mainly of a distressed nature. Following recent economic and political stabilisation, deal activity significantly picked up in 2016. Starting from 2017, the market has shown signs of gradual recovery after having past the worst of the downturn.

A significant portion of recent M&A activity has been concentrated in Ukraine’s agricultural sector, which was the sector most resilient to the crisis. It has been partially driven by large Ukrainian agricultural companies that, after many years, have been able to again access the world’s capital markets through the issuance of eurobonds. These companies have used eurobond proceeds to finance outbound investments and to build up of their land banks though the acquisition of smaller agricultural enterprises. At the same time, the world’s largest agricultural processing companies have been divesting their non-core assets and actively investing in Ukraine ports’ infrastructure by building or acquiring grain terminals for the export of their products. There has been a lot of M&A activity involving land banks, processing and infrastructure facilities.

In 2016 and 2017, the domestic financial market saw a substantial remapping due to the continued clearing up by the National Bank of Ukraine of failing banks that have been hard hit by non-performing loans. As a result, many recent M&A deals in Ukraine involved some element of distress: either Ukrainian banks were required to clear up their balance sheets and sell their assets with great discounts; or foreign investors, in particular in the banking sector, were exiting the Ukrainian market to concentrate on their core markets, and were selling their Ukrainian subsidiaries at discounted prices to local investors.

In the energy sector, DTEK group, owned by the Ukrainian business people, consolidated its stakes in Ukrainian energy companies by buying out the minority stakes from the State Property Fund of Ukraine through an action process in 2017. Foreign investors have also shown increased interest in investing in Ukraine’s oil and gas sector through acquisition of an equity interest in a company awarded the production sharing agreement.

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Another trend that has continued during the past few years is the exit of Russian companies from Ukraine due to Western sanctions imposed on Russia in relation to Ukraine and for political reasons. In most such cases, the buyers are local Ukrainian investors. At the same time Asian investors, in particular from China, are currently actively exploring investing into various Ukrainian industries, mainly in the agricultural and renewable energy sectors.

The renewable energy sector offers opportunities for high-growth investment. To stimulate the operation and development of renewable energy sources in Ukraine, a ‘green’ tariff, or special feed-in tariff as this may be known in other jurisdictions, was introduced in 2009. The feed-in tariff for green projects in Ukraine is one of the highest in the world, which makes investment into this sector very attractive. With numerous green energy projects now launched and operating in Ukraine, there are many opportunities open for high-growth investment into the country’s green energy sector, where the tariff is guaranteed until 2030.

There has also been a rise in M&A activity in technology, media and telecoms. Ukraine is world-renowned for its IT outsourcing industry, and last year there was an increase in acquisitions by foreign investors in this sector.

With healthcare remaining the most active sector in M&A globally, we have seen increasing M&A activity in healthcare due to the consolidation of the local market and large local pharmaceutical companies seeking outbound investments, as well as increased M&A activity and investments in healthcare facilities. The positive outlook on the ongoing healthcare reform in Ukraine has triggered investment into private healthcare hospitals.

A lot of M&A activity is currently ongoing in the retail sector. One of the largest retail supermarket chains in Ukraine has sold its five supermarkets in Ukraine in non-core markets.

Ukraine’s private equity industry has also seen recovery, with several Ukrainian private equity funds announcing new investments from international financial institutions like EBRD, IFC and OPIC. While some private equity funds with a focus on Ukraine have been actively fundraising in order to explore distress opportunities, and to acquire new stakes or build up their stakes in existing portfolio companies, other private equity funds with a focus on other markets have been seeking to exit Ukraine at any cost just because they have stayed in the country for too long and their Ukrainian investments have exceeded their normal investment life cycle.

The government also planned to play an active role in the M&A market by scheduling for 2016 the privatisation of several large state enterprises, including Ukraine’s largest producer of nitrogen fertiliser, the state-owned Odessa Portside Plant, referred by many as the crown jewel of Ukraine’s privatisation. Unfortunately, both attempts to auction off the Plant failed to attract any bids from strategic investors. Many investors were deterred by risks and scandals surrounding the Plant. The government, however, cited bad market conditions to explain the failure. For 2018, the State Property Fund has announced plans to privatise nine regional energy distribution companies and four heat-and-power plants, including Centerenergo. Turboatom, one the world’s biggest manufacturers of steam turbines for power plants, was included in the privatisation plan for 2017 to 2020. Moreover, on 7 March 2018, the new privatisation law became effective, which simplifies and clarifies the procedures applicable to the sale of state and municipal property and improves the privatisation process. If the privatisation programme is implemented, it should boost M&A activity in Ukraine.
II GENERAL INTRODUCTION TO THE LEGAL FRAMEWORK FOR M&A

The Civil Code,2 the Commercial Code,3 the Company Law,4 the Limited and Additional Liability Companies Law (the Law on LLCs),5 the Joint-Stock Company Law (the JSC Law),6 the Law on the Securities Law7 and the Law on State Registration8 constitute the legal framework for M&A in Ukraine. The merger control rules and merger notification thresholds are set out in the Competition Law.9

A corporate merger or an acquisition involving a JSC would also trigger the application of the Depository System Law10 and the Securities Market Law.11 Moreover, there are a number of additional rules and principles that are to be taken into account when preparing or conducting an acquisition of a JSC, such as:

a the rules relating to the disclosure of significant shareholdings in JSCs and ultimate beneficial owners;

b the rules relating to insider dealing;

c the rules relating to the public offer of securities and the admission to trading of these securities on a regulated market; and

d the general rules on the supervision of and control over the financial markets.

The Securities Commission12 supervises compliance with the takeover and JSC-specific regulations.

At the same time, JSCs have become less popular as a vehicle for conducting business activities in Ukraine. As of 1 May 2018, only 14,597 JSCs were registered in Ukraine according to the official statistics. In contrast, the statistics show that there were 590,957 companies in the form of limited liability companies (LLCs) in Ukraine on 1 May 2018, which is the most common vehicle for conducting business activities in Ukraine. Legal entities in Ukraine may also be established in the form of a general partnership, a limited partnership and an additional liability company.

Acquisitions of businesses and companies are usually carried out through the purchase of the participatory interests of an LLC or through the acquisition of the shares of a JSC. The majority of M&A deals are privately negotiated deals, as Ukrainian companies usually have one or several significant shareholders. JSCs may be ‘public’ or ‘private’: the shares of a public JSC may be both privately and publicly placed, whereas the shares of a private JSC are privately placed among its shareholders. Asset acquisitions are also common, but they are technically more burdensome and time-consuming, and involve the imposition of VAT.

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12 The National Securities and Stock Market Commission of Ukraine.
Because of the mandatory provisions of Ukrainian law and an imperfect court system, shareholders and participants in Ukrainian companies have traditionally preferred to set up holding companies in foreign jurisdictions such as Cyprus or the Netherlands, and to choose foreign law (mainly English) as the governing law of the transaction documents. While recent developments in corporate and takeover law are intended to increase the attractiveness of structuring M&A deals in Ukraine and expose them to Ukrainian law, we do not expect a major change in deal structuring in the near future. In those cases where an investment has already been structured as a joint venture on the Ukrainian level, shareholders may choose to benefit from the new legislation and conclude Ukrainian law-governed shareholders’ agreements.

III DEVELOPMENTS IN CORPORATE AND TAKEOVER LAW AND THEIR IMPACT

The corporate and takeover laws in Ukraine have been significantly amended between 2016 and 2018 in the course of the ongoing corporate reform.

i New takeover rules for JSCs and escrow accounts, and other important changes

On 23 March 2017, Parliament approved important amendments to Ukraine’s corporate laws regarding the improvement of corporate governance of JSCs (the Corporate Governance Law), which became effective on 4 June 2017. The new takeover rules, which are based on EU Directive 2004/25/EC of 21 April 2004 on takeover bids, changed the rules for the acquisition of controlling stakes, and introduced the concepts of ‘squeeze-out’ and ‘sell-out’. The amendments also increased the disclosure requirements and thresholds for approval of interested party transactions.

Investors and shareholders should consider the new takeover rules when structuring M&A transactions that may result in the direct or indirect acquisition of shares in Ukrainian JSCs (even if such JSCs are not the direct acquisition targets). From now on, the direct or indirect acquisition of shares in a JSC is subject to stricter regulation, including:

a disclosing information on acquiring different stakes (for public JSCs: 5 per cent and more, 50 per cent and more, 75 per cent and more, 95 per cent and more; for private JSCs: 10 per cent and more, 50 per cent and more, 95 per cent and more);
b disclosing information on the highest acquisition price for controlling stakes (50 per cent plus one share, 75 per cent and more, 95 per cent and more);
c complying with the procedure for submitting other notices on acquisitions of shares;
d complying with the obligation to make a mandatory bid to the remaining shareholders to purchase their shares at a fair price in cases of acquisition of the controlling stakes (50 per cent plus one share, 75 per cent and more), including the timing of the irrevocable mandatory bid and the formula for determining the fair price (i.e., the price to be paid by the majority shareholder for the shares of the minority shareholder);
e squeeze-out: that is, the right of the dominant stakeholder (95 per cent and more) to require the holders of the remaining shares to sell him or her their shares; and
f sell-out: that is, the right of minority shareholders to require the dominant stakeholder to buy their shares at a fair price.

The long-awaited squeeze-out procedure entitles a shareholder that acquired the dominant controlling stake of 95 per cent and more of shares to require the holders of the remaining shares to sell him or her their shares within 90 days following the date of disclosure of the information on the acquisition of the shares. The dominant stakeholder intending to exercise its right to squeeze-out should first comply with the mandatory bid procedure. The price for the mandatory purchase of shares of minority shareholders should be determined according to the formula set out in the Corporate Governance Law. The Corporate Governance Law provides for a two-year transitional period until 4 June 2019 during which the existing dominant stakeholders (stakeholders acting in concert) may exercise their right to squeeze-out according to the terms and conditions set out in the transitional provisions.

An important highlight of the Corporate Governance Law is the introduction of the concept of escrow accounts into Ukrainian law. Escrow accounts are a commonly used instrument for securing payments among parties. Settlement of payment of the purchase price to minority shareholders as a result of the squeeze-out procedure should be made via escrow accounts without engaging a securities broker. This mechanism allows the elimination of ‘dead souls’ (i.e., minority shareholders (often deceased persons)) with whom any connection has been lost. As a result of the introduction of the concepts of squeeze-out and escrow accounts, dominant stakeholders will be able to consolidate 100 per cent of the shares in their hands.

According to information publicly available as of 30 May 2018, 69 JSCs have already launched squeeze-out procedures in Ukraine. Several court and administrative proceedings have also been initiated disputing the squeeze-out price, while the respective court practice is yet to be formed.

Another revolutionary development in Ukrainian corporate law is the introduction of the sell-out procedure. Minority shareholders now have the right to require a dominant stakeholder to buy their shares at a fair price to be determined similarly to the squeeze-out price. According to the transitional provisions, minority shareholders may exercise their sell-out right at any time following the acquisition of at least one additional share of a JSC by the dominant stakeholder after 4 June 2017. The absence of a deadline for the minority shareholders to exercise their sell-out right may serve as an additional ground for the dominant stakeholder to exercise its squeeze-out right before the end of the two-year transitional period (until 4 June 2019).

At the same time, the Corporate Governance Law allows private JSCs to disapply rules or to establish different rules in their charters regarding acquisitions of controlling stakes, squeeze-out and sell-out procedures, subject to having complied with the majority voting requirements set out in law.

Additionally, the materiality thresholds in excess of which interested party transactions should be approved by the respective corporate body of a JSC were changed from 100 minimum wages (320,000 hryvnias as of the date of writing) to 1 per cent of the assets value, based on the latest financial statements of a JSC.

The implementation of the Corporate Governance Law has facilitated changes in the types of JSCs from public to private, and clear the market of ‘quasi-public JSCs’, particularly because the acquisition of shares in private JSCs is subject to less stringent regulation. In addition, private JSCs may disapply rules or establish different rules in their charters regarding the acquisition of controlling stakes, and squeeze-out and sell-out procedures.
**ii New rules for JSCs**

Further to the Corporate Governance Law, the Parliament adopted the Law on Business Simplification on 16 November 2017 aimed at reloading the Ukrainian stock market, mainly through clearing it of ‘quasi-public JSCs’ and aligning the requirements regarding public JSCs to the EU regulations.

According to the Law on Business Simplification, all JSCs in Ukraine are considered to be private JSCs as of 6 January 2018, except for public JSCs whose shares are listed at a stock exchange or who make a public announcement that they shall remain public.

Public JSCs are now required to be more transparent by, *inter alia*, disclosing more extensive information, maintaining a supervisory board with independent members (while the new requirements on such independence were introduced), and establishing supervisory board committees on appointments, remuneration and audit. On the other hand, wholly owned private JSCs are exempt from disclosure requirements, while other private JSCs shall disclose less information in comparison to public JSCs. Moreover, private JSCs may choose whether to elect independent members to the supervisory board or establish supervisory board committees, or both.

Public JSCs and banks must align their charters and by-laws with the Law on Business Simplification by 1 January 2019, while other JSCs shall make the respective changes by 1 January 2020, unless a JSC’s charter is amended earlier.

The Law on Business Simplification also improves corporate governance in JSCs by, *inter alia*, prohibiting general shareholders’ meetings to decide any matter about a company’s activities falling under the exclusive competence of the supervisory board by virtue of law or a JSC’s charter. This rule may be disapplied in a private JSC. The new corporate governance rules are expected to provide foreign investors with more comfort when investing into Ukraine.

The Law on Business Simplification also introduces the possibility for legal entities to provide services of disclosure of information on behalf of the stock market participants, including JSCs, disseminate information on financial instruments and stock market participants, and submit reports or administrative information, or both, to the Securities Commission. The legal entities wishing to provide these services need authorisation from the Securities Commission, enabling them to provide these services from 1 January 2019.

The Law also implements the major requirements of the EU Prospectus Directive into Ukrainian law.

**iii Introduction of corporate agreements into Ukrainian law**

Another recent development in corporate law is that concluding corporate agreements among the shareholders of JSCs and participants in LLCs is now expressly permitted by the Corporate Agreements Law and the Law on LLCs, respectively. The Laws allow the participants (founders) in LLCs and the shareholders of JSCs to conclude corporate (shareholders’) agreements. Corporate agreements may establish, *inter alia*, an obligation for

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parties to vote at general meetings in the manner determined by such agreement, to approve the acquisition or disposal of participatory interests or shares in a company according to the pre-determined price, and to undertake other actions related to the company’s management. The parties may include in the corporate agreements transfer instruments common in other jurisdictions such as tag-along rights, drag-along rights, call options and put options.

While information on the content of a corporate agreement is confidential under both Laws, the JSC Law requires a party to a corporate agreement to notify a JSC on the conclusion of the corporate agreement within three business days of its conclusion, and in the case of a shareholder acquiring voting rights attached to more than 10, 25, 50 or 75 per cent of shares under a corporate agreement. A public JSC must also publicly disclose information on concluding a corporate agreement. If a shareholder concludes an agreement in breach of the terms of a corporate agreement, such agreement will be null and void if the third party knew or ought to know about such breach.

In addition, the creditors of a company shall have the right to conclude a corporate agreement with the participants and shareholders of such companies. The Laws also provide for a possibility to issue an irrevocable power of attorney to ensure the fulfilment of the obligations of participants and shareholders.

The express permission and regulation of corporate agreements is important for Ukrainian M&A deals. The use of this instrument by market participants will greatly depend on subsequent court practice.

iv Increased investor protection rules

The Investor Protection Law, 17 which came into effect on 1 May 2016, introduced important developments, inter alia, as to the liability of corporate officers of companies and the ability of minority shareholders to bring a lawsuit against a corporate officer on behalf of a company. According to the Investor Protection Law, corporate officers are responsible for damage they cause to the company through their actions. Such damage will be compensated if incurred by:

- actions committed by officers in excess of their authority or through an abuse of their powers;
- actions committed by officers in violation of the procedure of their prior approval or other decision-making procedures as established by the constituent instruments of the company;
- actions committed by officers in line with the procedure of their prior approval or other decision-making procedure where such officer has filed false information to obtain such approval or decision;
- omissions of the corporate officer when such officer was obliged to take certain actions in accordance with his or her duties; and
- other abusive actions of corporate officers.

Before these changes, the liability of corporate officers was limited in most cases by the amount of their monthly salary.

Moreover, the notion of a derivative action has been introduced into Ukrainian law. A minority shareholder (participant) holding at least 10 per cent of all shares (participatory interests) in a company may file a claim with a commercial court on behalf of a company

against a corporate officer for recovery of damages caused by such corporate officer to the company. The derivative action may be brought against individuals falling under the definition of a corporate officer. For JSCs, the corporate officers are the head and the members of the supervisory board, executive body, audit commission, auditor of a JSC, and the head and members of other bodies if the creation of such body is envisaged by a company’s charter. In LLCs, the members of the executive body, the supervisory board and any other individuals occupying a post named in the company’s charter are considered to be the corporate officers. If a derivative action was brought against a corporate officer, he or she may neither represent the company in the proceedings nor appoint a representative to participate in the proceedings on behalf of the company.

### v Simplified M&A for banks

Starting from 29 April 2017 and until 1 August 2020, banks in Ukraine may benefit from the simplified procedure for the capitalisation and reorganisation of banks according to the Simplified Bank Reorganisation Law.\(^{18}\) Under the Law, banks may either use the simplified procedure to merge with another bank or withdraw a banking licence without liquidating the company. The second option will enable banks to exit the banking market and continue their operation in the financial or other sector.

The duration of the capitalisation and reorganisation procedures was shortened by way of accelerated terms for regulatory and corporate approvals, as well as a reduction in the paperwork to be submitted to the regulators: the National Bank of Ukraine, the Antimonopoly Committee, the State Fiscal Service and the Securities Commission. The Simplified Bank Reorganisation Law also disapplies the list of rules in cases of the capitalisation and reorganisation of banks under simplified procedures, for example:

- the requirements to notify all creditors of decisions of the general assembly on mergers;
- the satisfaction of creditors’ claims;
- the obligatory purchase of shares upon the request of participants in banks participating in a merger; and
- determining the market price.

### vi The new Law on LLCs

On 17 June 2018, the long-awaited Law on LLCs became effective, changing fundamentally the legislator’s approach to the regulation of LLCs. Previous regulation of LLCs was very restrictive, and mandatory provisions left little room for participants to adjust the rules on LLC operation to their business needs. The Law on LLCs provides participants with wide discretion in establishing the rules on LLC corporate governance and transfers of participatory interests.

The Law on LLCs expressly permits the establishment of a supervisory board for the purpose of controlling and supervising the management of the LLC. This change means that LLCs are now able to follow the two-tier corporate governance model, which has historically been widely used in JSCs in Ukraine. Moreover, LLC participants may appoint independent members to the supervisory board and determine requirements for such independence. The establishment of the audit commission is no longer required.

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The Law introduces a number of changes to the rules on conducting general participants' meetings, including the following developments:

- The new majority vote requirements instead of quorum. The decisions of the participants may be adopted by unanimous vote of all LLC participants, by three-quarters of all LLC participants or by a simple majority of all LLC participants;
- Limitations to decisions, which can be adopted by written polling;
- The ability to conduct meetings through video conference, provided all participants have the ability to see and hear all other participants;
- The introduction of absentee voting (i.e., the ability of an LLC participant to take part in a meeting by providing his or her written decisions on the matters on the meeting’s agenda; and
- Simplified rules for conducting meetings where the LLC is wholly owned. In this case, the sole LLC participant prepares a written decision without complying with the rules on holding the meeting.

The Law on LLCs also establishes new duties and obligations of a corporate officer, namely the duties to declare a conflict of interest and of confidentiality, and non-compete obligations. Breaching any of these obligations is a ground to terminate the respective corporate officer without payment of compensation. In addition to the duties of a corporate officer, the executive body members will also be responsible for monitoring the LLC’s net assets, while the LLC’s obligation to maintain positive net assets no longer exists.

The Law on LLCs provides participants with discretion in establishing the rules for transfers of participatory interests, including the ability to:

- Modify or disapply the pre-emptive right of participants;
- Restrict the disposal of a participatory interest;
- Improve the procedure for the exit and expulsion of participants; and
- Introduce an anti-dilution mechanism in the LLC’s charter.

The Law on LLCs has also introduced the notion of significant and interested party transactions to the regulation of LLCs. LLC participants may modify the default rules on significant transactions in a company’s charter, while the rules on interested party transactions will not apply to an LLC unless such mechanism is expressly established by a company’s charter.

Other important changes introduced by the Law on LLCs include:

- Abolishment of the anti-chaining rule;
- Abolishment of restrictions on the number of LLC participants;
- New restrictions on dividend payments;
- Abolishment of the prohibition on debt-for-equity swaps; and
- Changes to the charter capital increase procedure.

Formally, LLCs are not required to align their charters with the provisions of the Law on LLCs. Current provisions of the LLC charter will remain effective until the earlier of 17 June 2019 or the date when any amendments to the charter are introduced by the participants. After such date, the provisions of the Law will override the conflicting provisions of the LLC charter.

Since an LLC is the most commonly used type of company in Ukraine, many businesses should benefit from the Law on LLCs.

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vii Other changes

Another development in foreign investment regulation in Ukraine is the adoption of the Law on Attraction of Foreign Investments.19 The Law has been submitted to the President for signing, which is expected to occur soon. The Law simplifies the procedure of acquiring and storing securities (including shares of JSCs) by foreign investors by providing an alternative to opening a securities account in Ukrainian depository institutions. Foreign investors may use the services of a global custodian (a ‘nominal holder’), who shall, in turn, open a nominal holder securities account with a Ukrainian depository institution and disclose information on the foreign investor for financial monitoring purposes.

Among other positive developments in corporate M&A regulation aimed at facilitating the conducting of business in Ukraine by both local and foreign investors are the cancellation of the registration of foreign investments in Ukraine, which was previously required for the application of guarantees under Ukrainian law, the final abolishment of the requirement for a legal entity to use a corporate seal and improvements in corporate governance in state-owned companies. We also expect a new law to be adopted governing the establishment, maintenance and liquidation of representative offices in Ukraine.

IV FOREIGN INVOLVEMENT IN M&A TRANSACTIONS

According to a statistical report prepared by the Ministry of Economic Development and Trade of Ukraine,20 in 2017 foreign investments into the Ukrainian economy came mainly from Cyprus, the Netherlands and Russia. Since Cyprus and the Netherlands are popular jurisdictions for setting up holding companies for large Ukrainian groups, investments coming from these countries are most likely to be the return of Ukrainian capital that flowed out of the country at the outset of the crisis in 2014. This is a good sign, proving that Ukrainian investors believe that the economy is past the worst of the downturn. This positive trend has also become possible because of the gradual relaxation by the National Bank of Ukraine of certain temporary capital control and foreign currency restrictions relating to the repatriation of dividends, repayment of cross-border loans, and import and export transactions in foreign currency.

Investment coming from Russia does not represent real new foreign investments, since the money inflow is directed at meeting recapitalisation requirements by banks with Russian capital through increasing their charter capitals in order to offset the effect of non-performing loans as a result of huge losses suffered by the banks. That said, Asian investors, in particular from China, have shown increased interest in the financial, energy, infrastructure and agricultural sectors in Ukraine.

As for outbound investment, Ukrainian companies, leaders in their respective industries, are currently looking at possible acquisition targets abroad, in particular within the European Union and in Gulf countries.

19 The Draft Law of Ukraine No. 2351-VIII ‘On Amendments to Certain Legislation of Ukraine Regarding Assistance in Attraction of Foreign Investments’.

V SIGNIFICANT TRANSACTIONS, KEY TRENDS AND HOT INDUSTRIES

The hottest industries of 2017 and 2018 have been the financial, agricultural, healthcare, consumer goods and retail, and renewable energy sectors.

As a general trend in the financial sector, foreign banks exiting the Ukrainian market, including banks with Russian capital, are struggling to find buyers for their assets. This trend has been caused primarily by recapitalisation requirements and the general clear-up process launched by the National Bank of Ukraine and, in the case of banks with Russian capital, by the sanctions imposed by the government. The sanctions imposed on five Ukrainian subsidiaries of Russian state-owned banks (Sberbank, VS Bank, Prominvestbank, VTB Bank and BM Bank) have caused these banks to commence the disposal of their Ukrainian subsidiaries. VS Bank has already been sold to TAS Group (owned by a Ukrainian businessman), while several are in various stages of negotiations regarding their sale.

Russian companies have also been actively leaving the industrial sector, in particular, Evraz Plc sold its metals and mining company Evraz DMZ to a Ukraine-based management company, while Severstal sold the metal company Dneprometiz to TAS Group.

In light of Ukraine’s obligations to the IMF and the recent nationalisation of Privatbank, the largest Ukrainian bank, the National Bank of Ukraine has been actively enforcing recapitalisation requirements. This has caused many foreign banks that are reluctant to make new investments into their Ukrainian subsidiaries to consider exiting. Thus, several significant disposals took place in 2017. Greek Eurobank Ergasias sold its Ukrainian subsidiary, Universal Bank, to TAS Group in order to focus on its specific markets and pursue a restructuring plan agreed upon with the European Commission. Cyprus Popular Bank Public Co Ltd has also exited Ukraine by selling PJSC Marfin Bank to Ukrainian investors. On the other hand, several Ukrainian and Kazakh investors are consolidating their stakes in Ukrainian banks.

There have been a number of major M&A developments in the agricultural sector involving land banks, processing and infrastructure facilities. In 2017, Kernel, a leading agricultural company, announced the completion of the acquisition of the farming business of Ukrainian Agrarian Investments Ltd, with more than 190,000 hectares of leasehold farmland and approximately 200,000 tonnes of grain storage capacity. The acquisition price was US$155 million in cash. The world’s largest agricultural processing companies have been divesting their non-core assets and actively investing in Ukraine ports’ infrastructure by building or acquiring grain terminals for the export of their products. There has been a lot of M&A activity involving land banks, processing and infrastructure facilities, with the purchasers being large Ukrainian companies building up their land banks and processing facilities.

Dragon Capital Investments Limited, a private equity fund, has been actively acquiring assets in Ukraine. In 2017, it acquired the remaining 67.27 per cent stake in Dragon-Ukrainian Properties and Development Plc, a company focusing on the development of commercial and residential real estate properties. The fund has also expanded its presence in the media sector by acquiring radio station Radio-Era TRC, and in the e-commerce sector by entering into an agreement to buy the minority stake in ShipNext, an online maritime shipping marketplace.

On 15 March 2017, the President enacted the decision of the Ukrainian National Security and Defence Council ‘On Application of Special Personal Economic and Other Restrictive Measures (Sanctions)’ and on 14 May 2018, the President enacted the decision of the Ukrainian National Security and Defence Council ‘On Application and Cancellation of Special Personal Economic and Other Restrictive Measures (Sanctions)’.

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The headline M&A deal of 2018, highlighting the renewed interest of strategic investors in Ukraine, is the acquisition of a 90 per cent stake in LLC Ergopack by a Greek-based company, Sarantis SA, for US$18 million. LLC Ergopack is engaged in the production and distribution of household goods in Ukraine.

M&A activity in healthcare is picking up due to the consolidation of the local market, with large local pharmaceutical companies seeking outbound investments, as well as increased M&A activity and investments in healthcare facilities.

VI FINANCING OF M&A: MAIN SOURCES AND DEVELOPMENTS

Financial institutions such as the European Bank of Reconstruction and Development, the International Finance Corporation and the Overseas Private Investment Corporation have been actively investing into Ukraine-focused private equity funds.

Other than international financial institutions investing in private equity funds, no foreign commercial banks have been financing acquisitions in Ukraine. Current risks would make the cost of acquisition financing impermissibly high. Furthermore, no bank would lend money over the long term. For example, since 2014, the Ukrainian hryvnia lost more than 60 per cent of its value. This sharp depreciation has significantly inflated all foreign currency-denominated loans. Accordingly, most M&A deals are financed by acquirers from their own funds. In those cases where big multinational companies with access to cheap financing abroad acquire a company in Ukraine, they may use foreign financing to refinance expensive Ukrainian debt upon completion. This financing is not available to most Ukrainian investors.

VII EMPLOYMENT LAW

The Code of Laws on Labour of Ukraine, dated 10 December 1971, remains the principal legislative act governing employment relationships in Ukraine. Despite numerous amendments to the Code of Laws, the document retains its extremely pro-employee approach and does not correspond to current business needs. For this reason, developments in employment legislation are not usually seen as the hottest topic in an M&A context in Ukraine.

On 27 September 2017, a law simplifying the procedure for obtaining work permits and temporary residence permits came into effect. The law should inevitably lead to more foreign-trained managers and employees being engaged in the process of serving Ukrainian companies by establishing clear, transparent and foreigner-friendly work permit and temporary residence permit procedures. The adopted law contains a number of novelties. In particular, it:

- extends the list of grounds to apply for a temporary residence permit;
- introduces clear rules for parallel employment of foreign employees by two or more Ukrainian companies;
- simplifies the procedure for obtaining a work permit by reducing the number of documents to be submitted to the state authorities;
- extends the term of the work permit from one to three years for certain categories of foreign employees, including highly paid foreign professionals, founders and beneficial owners of Ukrainian companies, and IT professionals;

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establishes the minimum salary that must be paid to certain categories of foreign employees; and

establishes an employer’s obligation to amend a work permit in certain cases.

In addition, in recent years the minimum monthly salary has been increased significantly, from 1,600 hryvnias in December 2016 to 3,723 hryvnias in January 2018. This change may affect the purchase price of target companies with a significant amount of low-paid employees, especially in the agricultural and manufacturing sectors.

A new Labour Code of Ukraine is expected to be adopted to make Ukrainian labour law more ‘investor-friendly’. The Parliament is expected to consider the draft in a second reading and then adopt it by the end of 2018.

VIII TAX LAW

The Tax Code of Ukraine, dated 2 December 2010, as amended, remains a comprehensive legal act regulating tax matters in Ukraine. There have been no significant changes to the Tax Code in recent years that are relevant to M&A transactions.

Ukraine has enlarged its double tax treaty network to 70 jurisdictions, with treaties with Luxembourg and Malta being the most recent. While historically Luxembourg, and in certain cases Malta, were used in multilayer group structures, ratification of these double tax treaties will have a positive effect on the structuring of M&A deals in Ukraine.

The Ukrainian Ministry of Finance has also started to gradually review the existing tax treaty network, specifically targeting those offering the full exemptions from withholding tax (WHT). This issue should be taken into account while structuring M&A deals.

Among the most significant developments, mention should be made of the Ministry:

- signing a Protocol amending the Ukraine–Netherlands Double Tax Treaty with the domestic ratification procedures still in progress;
- signing a Protocol amending the Ukraine–UK Double Tax Treaty with the domestic ratification procedures still in progress;
- commencing negotiations to amend the Ukraine–Switzerland Double Tax Treaty;
- commencing negotiations to amend the Ukraine–Belgium Double Tax Treaty; and
- signing a Protocol amending the Ukraine–Cyprus Double Tax Treaty with the domestic ratification procedures still in progress.

The Ministry of Finance also declared its intention to commence negotiations with France, Germany and the United States to align WHT rates on passive income with those recommended by the OECD Model Tax Convention on Income and Capital.

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As a recent trend, Ukraine has also committed to implementing the de-offshorisation package, which will affect corporate aspects of structuring Ukrainian M&A transactions. More specifically, in April 2016, the President established a working group with a view to transposing anti-BEPS measures into Ukrainian legislation. Its mandate includes, inter alia, introducing controlled foreign company rules, improving transfer pricing rules and adopting rules on combating aggressive tax planning. In addition, the automatic exchange of financial account information will also be introduced as a part of the de-offshorisation package (Ukraine has declared the implementation of the Common Reporting Standard by 2020). Anti-BEPS recommendations have not yet been implemented into Ukrainian domestic legislation.

Additionally, in November 2016, Ukraine became a member of the Inclusive Framework on the OECD/G20 base erosion and profit shifting project, thus committing to implementing four minimum standards of the BEPS package:

- Action 5 (countering harmful tax practices);
- Action 6 (prevention of treaty abuse);
- Action 13 (implementation of country-by-country reporting); and
- Action 14 (enhancing dispute resolution mechanisms).

Note that Action 6, among other things, proposes the introduction of a limitation-on-benefits rule into tax treaties, which is expected to combat treaty-shopping practices.

It is worth mentioning that currently, Ukraine is considering reforming its currency control legislation with an aim to harmonise the Ukrainian rules on the movement of capital with the EU standards (the undertaking prescribed in the EU–Ukraine Association Agreement). This step, which generally should liberalise the Ukrainian currency control rules, is also conditioned on the implementation of the OECD BEPS Actions by Ukraine, namely, Action 3 regarding the controlled foreign company rules, as well as the international standards for automatic exchange of financial information.

IX COMPETITION LAW

Although the economic crisis has slowed down M&A activity, the Antimonopoly Committee of Ukraine (AMCU) has demonstrated its strong desire to adjust merger control rules in line with the best practices of other European countries. As a result, a number of significant and long-awaited reforms to competition law have taken place during the past few years. Following the recommendations of the OECD and the United Nations Conference on Trade and Development, in January 2016, Parliament amended the rules on merger control.25 The changes increased the merger notification thresholds that had been in effect for over 14 years. In particular, since May 2016, transactions are subject to prior approval of the AMCU if:

- the parties’ combined worldwide turnover or assets exceeds the hryvnia equivalent of €30 million, and the domestic turnover or assets of either of the two parties exceeds the hryvnia equivalent of €4 million;
- the target’s domestic assets or turnover exceeds the hryvnia equivalent of €8 million and the buyer’s worldwide turnover exceeds the hryvnia equivalent of €150 million; or

in the case of the establishment of a business entity, the domestic assets or turnover of one of the parties exceeds the hryvnia equivalent of €8 million and the worldwide turnover of the other party exceeds the hryvnia equivalent of €150 million.

All thresholds are to be calculated on a group level.

While initially the increase of thresholds resulted in a significant decrease in the number of applications for merger control, during 2017, the number of merger control applications reviewed by the AMCU increased to 666 (as compared to 547 applications in 2016).26

In addition to amending the rules on merger control, the merger control procedures have been simplified by allowing parties to conduct preliminary consultations with the AMCU. Furthermore, the new merger control procedures have significantly simplified the disclosure requirements for parties during the course of filing preparation, but at the same time they require profound economic analysis for transactions that may impact competition in Ukraine. A further sign of liberalisation has been the introduction of a fast-track procedure for certain cases with decisions to be issued within 25 calendar days instead of 45 calendar days.

As part of the reform in the antitrust sphere, the AMCU’s transparency has been enhanced. Previously, AMCU decisions did not have to be published; however, a law adopted in November 2015 requires the publication of all decisions on the AMCU’s official website within 10 working days from the adoption of the decision.27

In September 2015, the AMCU approved fining guidelines that make its process of calculating fines more predictable and transparent.28

In November 2017, the Parliament adopted changes to the Ukrainian competition and sanctions laws, which allow the AMCU to deny merger clearance of transactions involving entities included in the sanctions list.

The completed reforms represent a broader effort to harmonise Ukrainian competition law with that of the European Union, and generally make Ukraine a more business friendly place. In addition to these initiatives, a number of legal changes are making their way through the legislative process. Several are responses to recommendations cited in reviews carried out by the OECD and the United Nations Conference on Trade and Development. These legislative proposals address, for example, a revision of the concerted actions regulation, the AMCU’s increased discretion in determining which cases to investigate and the establishment of a specialised court chamber for hearing antitrust-related disputes.

X OUTLOOK

The Ukrainian M&A market is certainly showing signs of recovery, and we expect positive developments in future years. While the majority of purchasers on the M&A market are domestic investors, foreign investors are once again showing interest in the Ukrainian M&A market and considering Ukraine as a prospective investment opportunity.

26 Report of the Antimonopoly Committee of Ukraine for 2017, approved by Order No. 5-rp of the Antimonopoly Committee of Ukraine, dated 28 February 2018.
28 Recommendation No. 16-pp approved by the Antimonopoly Committee of Ukraine on 15 September 2015.
Chapter 46

UNITED ARAB EMIRATES

James Bowden, Danielle Lobo and Abdus Samad

I OVERVIEW OF M&A ACTIVITY

Global reported mergers and acquisitions have demonstrated a steady incline, reaching a record high in the first quarter of 2018. Reports vary on the exact value of these transactions; however, some claim that aggregate deal values are as high as US$1.2 trillion. Despite variations on the exact value, this headline mirrors several others, substantiating claims that 2018 appears to demonstrate a healthy upward trend for M&A activity as a whole.

Current events, such as the steady rise in the price of crude oil, US tax reform and economic growth in Europe, are thought to be contributing factors leading to an increased confidence in chief executives facilitating the recent increase, the end of 2017 showing a much-needed shift from the year’s general trend of underperformance. Global M&A in 2017 fell short of previous years, dipping 3.2 per cent by value to US$ 3.15 trillion (18,433 deals) in comparison to 2016 (US$3.26 trillion, 18,592 deals). Some attributed the underperformance during 2017 to political and market uncertainty taking a toll on investments. However, there was a surge in deal making at the end of 2017 that carried into 2018. While the value of M&As was unanimously reported as increasing, the number of M&A transactions appears to be on the decline. This indicates that while transactions may appear fewer in quantity, the transactions taking place tend to be more substantive as the values continue to rise. Some major industries to note include those in the technology sector. Developments in ‘the internet of things’, autonomous vehicles and blockchain technology have sparked interest among investors helping this industry acquire the highest annual deal count since 2001.

1 James Bowden is a partner, Danielle Lobo is a counsel and Abdus Samad is an associate at Afridi & Angell.
4 Ibid.
5 Ibid.
7 Ibid.
In the UAE

As with the global trend demonstrating an increase of M&A activity nearing the end of 2017, the UAE and the wider Middle East are no exception.8 The Middle East (including the UAE) saw significant increases in deal volumes generally outperforming those reported on a global scale in the fourth quarter.9 As a whole, however, 2017 did not see this type of deal activity, with reports claiming that M&A activity fell sharply in 2017 compared to the previous year.10 Some reports state that the upward shift at the end of 2017 did not last for the Middle East, and that, unlike global trends for 2018, the Middle East and North Africa region (MENA) appears to have seen a decline of up to 20 per cent.11 This decline is far from the rally led by the UAE at the end of 2017, with deal volumes rising by eight per cent and aggregate value by 21 per cent at US$6.6 billion compared to the previous quarter.12 Fortunately, this decline is not predicted to remain for 2018, as several sources report upward predictions for the second, third and fourth quarters, repeating what was seen in 2017.

While the decline in outbound transactions appears widespread, one report states that inbound transactions appear to be on the rise, driven by Total SA’s acquisition of 20 per cent of Umm Shaif and the Nasr concession of Emirati state-owned Abu Dhabi National Oil Co for US$1.1 billion. MENA inbound M&A currently stands at an all-time high.13 At the same time, outbound M&A decreased from US$3.3 billion in the first quarter of 2017 to US$779 million so far this year.14 Energy and power deals accounted for 54 per cent of MENA involvement in M&A by value and despite having the same number of transactions as the financial sector, the latter only accounts for 10.7 per cent of the region’s M&A activity.15 Some cite unprecedented economic reforms, openness to foreign investment and future infrastructure requirements in the Middle East as major motivations creating opportunities in the medium and long term as well as sustaining current levels of regional M&A activity. M&A analysts have said that, in the coming months, domestic and interregional M&A activity is expected to get a boost with a new round of mergers and acquisitions in the banking sector in the wake of a move initiated by Kuwait Finance House and Ahli United Bank of Bahrain.16

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9 Ibid.
12 Ibid.
13 Ibid.
14 Ibid.
15 Ibid.
16 See footnote 6.
II GENERAL INTRODUCTION TO THE LEGAL FRAMEWORK FOR M&A

The UAE is a federation of seven Emirates that was formed on 2 December 1971 by Abu Dhabi, Ajman, Dubai, Fujairah, Sharjah and Umm Al Qaiwain following the end of the British protectorate over the Trucial States. The Emirate of Ras Al Khaimah joined the federation the following year.

The currency is the UAE dirham. The exchange rate is pegged at approximately 3.67 dirhams per US dollar since 1997. There are no currency import or export controls.

The UAE Federal Constitution apportions powers between the federal government (based in Abu Dhabi) and the governments of the constituent Emirates. Some fields are regulated only at the federal level (e.g., immigration and labour relations) although local interpretations and practices sometimes differ from one Emirate to another. Other matters are regulated only at the Emirate level (e.g., each Emirate retains sovereignty over its own natural resources, including its petroleum reserves). Still other matters are regulated at both the Emirate and federal levels (e.g., company formation and registration).

Any business operating in the UAE must hold a licence authorising its business activity in the UAE. These licences are issued by the concerned authorities in each Emirate. A licence allows the licensed entity to carry on the business it is licensed to conduct within the Emirate that issues the licence, from the business premises identified in the licence. For example, a Dubai business licence authorises the conduct of business in the Emirate of Dubai. If the licence holder wishes to conduct business in the Emirate of Abu Dhabi (for example), then it must apply for and obtain a business licence in Abu Dhabi.

In addition to the licensing rules that are imposed in each Emirate, there is a separate layer of federal regulation that a business must comply with. Business licences are available to foreign and local businesses, although there are restrictions that vary from Emirate to Emirate on the types of business activities that are available to foreign businesses and to local businesses with partial foreign ownership. A foreign business is required to appoint a UAE national shareholder as part of its application for a licence. Companies that are incorporated in the UAE (outside a free zone) must be at least majority-owned (51 per cent) by a UAE national or wholly GCC owned. Companies established in any of the UAE’s many free zones may be wholly foreign-owned. No corporate or personal income tax is currently imposed anywhere in the UAE, except for the income taxes that are paid by foreign banks and foreign petroleum companies.

A business that wishes to operate in a free zone must obtain a licence from the authority for that free zone. The resulting licence authorises the conduct of the licensed activity within the geographical limits of the free zone. For example, a company licensed to trade certain goods in the free zone can import its goods into the free zone and re-export to destinations outside the free zone (and the wider UAE). However, the free zone licence does not authorise it to engage in any of these commercial activities in the UAE (outside the geographical limits of the free zone). No local ownership requirements are imposed in the free zones. An additional feature of most of the free zones is that they are not part of the customs territory of the UAE. The import of goods into a free zone from overseas does not attract customs duty. Instead customs duty (5 per cent on most items) is paid when goods move from the free zone into the UAE proper. The free zones also observe a simplified process for hiring personnel. Shares in onshore and free zone entities can be freely transferred, but it is important to note that any transfers are subject to approval by the relevant authority of the incoming shareholder.
III DEVELOPMENTS IN CORPORATE AND TAKEOVER LAW AND THEIR IMPACT

The UAE government has recently announced that it is working on changes to the foreign ownership requirements under UAE law for companies that are registered outside a free zone. It is yet to be seen which industries these changes will affect and what conditions (if any) will be attached to any waiver or exemption from the applicable foreign ownership requirements. Depending on the nature and extent of any such changes, a waiver of the foreign ownership requirements could act as a trigger for a fresh wave of inbound M&A activity in the UAE and could also assist in the development of home-grown businesses in the UAE.

IV FOREIGN INVOLVEMENT IN M&A TRANSACTIONS

Inbound M&A transactions appear to be at an all-time high in the Middle East, while outbound transactions continue to decrease.\textsuperscript{17} The UAE is reported to have been the top target country (in the MENA region) for inbound deals by volume in the last quarter, attracting 15 of the 31 deals, valued at US$516 million, while Kuwait was the top target country by value, with US$1.2 billion from three deals.\textsuperscript{18}

Purchasers in the United States were the top bidders both by volume and value during the same quarter, with six deals valued at US$1.2 billion. At this time, it was also recorded that the energy and power sector was the most active in respect of inbound Middle East investment, both by volume and value in the fourth quarter of 2017, registering seven deals amounting to US$1.3 billion.\textsuperscript{19}

The UAE was the top bidder for deals in the MENA region, by both volume and value, comprising more than half the total outbound M&A activity, with 19 of the 37 deals originating from the Middle East amounting to US$1.07 billion. The top target countries for outbound M&A by volume included the United Kingdom, the United States, Spain and Italy with three deals each, while India was the top target country by value, with two deals valued at US$1 billion, including the acquisition of the Indian unit of the National Investment and Infrastructure Fund by the Abu Dhabi Investment Authority.\textsuperscript{20} The industrials sector is the most active both by volume and value of deals originating from the Middle East, with a total of 10 deals valued at US$1.03 billion.

Elsewhere in the region, one major M&A was Kingdom Holding Company's (KHC) US$1.5 billion investment in Banque Saudi Fransi. The deal, signed on 12 September 2017, made KHC the largest shareholder in the French bank. KHC (which is listed on Tadawul, the Saudi stock exchange) agreed to acquire the sizeable 16.2 per cent stake from Crédit Agricole Corporate and Investment Bank, the corporate and investment banking arm of Crédit Agricole SA, which had been the largest shareholder bank before signing the deal, with a 31.11 per cent stake.\textsuperscript{21} According to KHC’s Chief Financial Officer, Mohamed Fahmy, the transaction represents the culmination of management efforts during the past

\textsuperscript{17} See footnote 10.
\textsuperscript{18} Ibid.
\textsuperscript{19} Ibid.
\textsuperscript{20} Ibid.

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three years to increase KHC’s recurring cash flow and profitability. Fahmy believes the solid financial performance of Banque Saudi Fransi will have a positive effect on KHC’s financial forecast once the transaction has been closed. Prince Alwaleed Bin Talal, the Chairman of KHC, contends that the investment is a demonstration of their confidence in the outlook for the Saudi economy underpinned by Saudi Arabia’s Vision 2030 and the National Transformation Plan.

Other notable M&A transactions during 2017–2018 include the 12.1 per cent stake acquired by Oman Telecommunications Company in Mobile Telecommunications Company for US$1.4 billion. One of the worst performing M&A sectors in the MENA region was construction, with deal value falling from US$1.3 billion in 2016 to just US$59 million in 2017, despite a consistent deal count.

V SIGNIFICANT TRANSACTIONS, KEY TRENDS AND HOT INDUSTRIES

As discussed further in Section VIII, the UAE and Saudi Arabia have introduced value added tax to their respective local markets. In a first at least for the UAE, vendors and purchasers must consider, seek advice on and address tax matters in their transaction documentation. Furthermore, the advent of value added tax will no doubt put pressure on the cash flows of many small and medium-sized businesses and it remains to be seen whether this will in turn have an effect on distressed M&A activity.

Furthermore, we have seen the UAE Federal Ministry of Economy (being the regulator in charge of administering the competition regime) become active in accepting and reviewing merger control notifications filed in connection with UAE transactions. Though still a developing area of law, the very fact that merger control notifications are now being submitted and reviewed indicates that the relevant authorities are serious about ensuring that those that are party to transactions that concern the UAE market consider and, where required, notify their transactions. It is also of note that the lack of publicly available decisions concerning such notifications creates a degree of uncertainty for those transactions that are caught by the relevant filing requirements.

VI FINANCING OF M&A: MAIN SOURCES AND DEVELOPMENTS

External financing for acquisitions continues to be less prevalent in the UAE in comparison to other jurisdictions and the large majority of acquisitions continue to be financed in cash.

Where acquisition financing is made available on a transaction, it is usually structured as a long-term loan, which is almost always secured by personal or corporate guarantees, among other securities over target assets. In addition to the primary facility documentation, the borrower may also issue a promissory note, a subordination agreement for any remaining debt and an assignment of certain identified assets depending on the nature of the acquisition.

22 Ibid.
23 Ibid.
Although most acquisitions that are financed are funded through conventional finance, various other Islamic finance structures are used as well, particularly the Murabahah, Musharakah, Mudarabah and Ijarah structures. However, note that the financial covenants of the Islamic structures are often more onerous than those found in conventional facilities.

In terms of the availability of private equity investment, the private equity market continues to feel the effects of global financial uncertainty, including the US and European sovereign debt crises. Regionally, the UAE continues to lead the market in terms of volume and value, partly due to the stability and availability of investable companies. However, gaps are still visible between company valuations and investors’ expectations for returns, which has hindered activity. A move away from traditional sectors, such as oil and gas, was witnessed in 2017, with an uptrend into consumer-driven sectors, such as education, retail, food and beverages and healthcare, where value added opportunities have arisen.

VII EMPLOYMENT LAW

Federal Law No. 8 of 1980 on Regulating Labour Relations (as amended) (the UAE Labour Law) regulates most employment relationships in the UAE. The UAE Labour Law imposes minimum standards on termination of employment, working hours, annual leave and safety standards, among other things, which cannot be contracted out of. In addition to the UAE Labour Law, certain UAE free zones have implemented their own employment regulations, which apply to all companies licensed to operate in that free zone. In general, these employment regulations act as a supplement to the UAE Labour Law, with the exception of the Dubai International Financial Centre free zone, where the DIFC Law No. 4 of 2005 applies, and the Abu Dhabi Global Market, where the ADGM Employment Regulations 2015 apply.

On the sale of a business, there is nothing in the UAE that is akin to the TUPE regulations in the United Kingdom. Consequently, for employees to be transferred to a purchasing entity the employees’ employment contracts with the selling entity must be terminated and new employment contracts entered into with the purchasing entity.

On the termination of employment, transferring employees must be paid their share of service gratuity in accordance with the UAE Labour Law, their salary for any accrued but unused annual leave and any other entitlements as set out in their employment contracts.

The end of service gratuity payment must be paid to any employee who completes one year or more in continuous service. If the employer has terminated the employment contract, the gratuity is (1) 21 days’ basic salary for each of the first five years of employment and (2) 30 days’ basic salary for each additional year over five years. The UAE Labour Law caps the end of service gratuity to an amount equal to an employee’s basic salary for two years. An employee will also be entitled to a gratuity payment for fractions of the year worked provided that the employee has completed one year in continuous service. The selling entity would therefore be required to make payment of the end of service gratuity and all other contractual payments to employees when they are transferred to the purchasing entity. Alternatively, the end of service gratuity and all other contractual payments due to the employees could be paid by the purchasing entity and then deducted from the consideration payable for the business. However, one practical matter to consider with the latter approach is that the transferring employees will, on termination of their employment with the selling entity, be required to sign an undertaking confirming receipt of all amounts due by the employer. An employee
will be reluctant to do so unless this is in fact the case and it is unlikely that a prospective purchaser will want to make any payments in connection with the transferring employees until after the completion of the transfer of the business.

Transferring employees may also raise concerns about the termination of their current employment contracts and the payment of their end of service gratuity as this will result in the end of their period of continuous service and they will therefore require to work for the purchasing entity for a year before being entitled to an end of service gratuity payment. Generally there is no procedure for the transfer of the continuous service period from one employer to another.

As part of the sale of a business in the UAE and the transfer of employees, the amendment or cancellation and reissuance of UAE residence visas for each transferring employee will also need to be considered. Also, as the number of employees that a company can sponsor for visa purposes is dependent on the space that it leases or owns, a purchasing entity will need to ensure that it occupies sufficient space to sponsor all the transferring employees.

In addition, the applicability of Federal Law No. 7 of 1999 concerning Pensions and Social Securities (the UAE Pensions Law) (as amended) will also need to be considered in any transfer of a business in the UAE. The UAE Pensions Law will have implications for any company that employs UAE or GCC nationals.

VIII TAX LAW

The UAE issued a substantive law on value added tax (VAT) in 2017. Pursuant to Federal Decree Law No. 8 of 2017 (the VAT Law), the imposition of VAT in the UAE commenced on 1 January 2018 at a rate of 5 per cent.

Registration for VAT is mandatory for any taxable person or business if the total value of its taxable supplies made within the UAE exceeds the mandatory registration threshold of 375,000 dirhams during the previous 12 months or, if it is anticipated that the taxable supplies will exceed the threshold in the next 30 days.

A taxable supply refers to a supply of goods or services made by a business in the UAE that may be taxed at a rate of either 5 per cent or 0 per cent. Reversed charge supplies and imports are also taken into consideration for this purpose if a supply of such imported goods and services would be taxable if it were made in the UAE.

Entities that are not based in the UAE but provide goods or services in the UAE are also required to apply for registration if they meet the threshold requirements.

The supply by a taxpayer of either exempt or zero-rated goods or services will not attract VAT; however, a supplier of zero-rated goods or services will be able to claim a refund on any VAT paid on their purchases unlike a supplier of exempt goods or services who will be unable to recover any VAT paid on their purchases. The VAT Law sets out a list of zero-rated and exempt supplies.

The VAT Law also permits tax grouping, which allows group companies to be treated as one entity for the purposes of VAT. Each group company will be jointly and severally responsible for each other group company’s VAT liabilities and no VAT will be payable on transactions between entities within the group.

Generally a VAT-registered customer must account for VAT paid in respect of purchases; however, certain transactions between entities within the GCC will be subject to VAT by reverse charge. The concept of reverse-charging VAT allows the simplification of transactions within a single market (i.e., the GCC states). The reverse charge removes the obligation to
account for the VAT on the sale from the supplier and places it on the customer. It should be noted that for the purposes of a single market VAT treatment, only those countries that have implemented VAT at the relevant time will be taken into account; the non-implementing countries would be treated like any foreign country.

Cabinet Decision No. 59 of 2017 specifies all designated zones for the purposes of implementing the designated zone provisions in the VAT Law. A designated zone is required to be a specific fenced area with security measures and customs controls in place to monitor entry and exit of individuals and the movement of goods to and from the area. Concessional VAT treatment may be available for transactions involving the supply of physical goods within designated zones. No VAT concessions are available for transactions involving the supply of services within designated zones. The Cabinet has the authority to amend the list of Designated Zones as required.

With respect to the applicability of the VAT Law to M&A transactions, it provides that ‘the transfer of the whole or independent part of a Business from a Person to a Taxable Person for the purposes of continuing the Business that was transferred’\textsuperscript{25} shall not be considered a supply and therefore will not be subject to VAT. Consequently, in common with other European jurisdictions, the sale and purchase of a business in the UAE should not attract VAT. Note, however, that there is no clear guidance in the law as to what ‘continuing’ the business involves nor is there any detail on what constitutes the ‘whole’ or ‘independent’ part of a business.

Note also that pursuant to Article 42 of Cabinet Decision No. 52 of 2017, the transfer of title to equity securities is exempt from VAT.

\textbf{IX \hspace{1em} COMPETITION LAW}

Federal Law No. 4 of 2012 on the regulation of competition (the Competition Law) was introduced into the United Arab Emirates as a means of regulating anticompetitive practices. The Competition Law deals with three key areas; a restriction on anticompetitive agreements, the regulation of dominant market positions and a requirement that acquisitions over a threshold combined market share obtain merger clearance from the UAE Ministry of Economy (the Ministry).

Although the Competition Law was introduced in 23 February 2013, it initially had minimal impact as a result of it failing to establish the market share thresholds at which its restrictions became applicable. It also failed to define the small and medium establishments that were stated to be outside the purview of the Competition Law.

Then in 2016, two new Cabinet Decisions were introduced, which supplemented the Competition Law and provided guidance on these outstanding aspects: Cabinet Decision No. 13/2016 (the Ratios Decision) in respect of market share thresholds and Cabinet Decision No. 22/2016 (the SME Decision) in respect of small and medium establishments.

As a result of the Competition Law and the two Cabinet Decisions, merger clearance will be required in advance of any proposed merger, acquisition or other consolidation of two or more entities that would result in a market share of 40 per cent or more. The concerned market is broadly defined in the Competition Law to comprise markets in which commodities or services are replaceable or may be substituted to meet specific needs according to price, properties and use. Although it is difficult to define the relevant market in legislation and

\textsuperscript{25} Article 7 of Federal Decree Law No. 8 of 2017.
more often than not markets are only identifiable on a case-by-case basis, on a practical level the application of the Ratios Decision is somewhat difficult as a result of the concerned market not being clearly defined.

In addition, as a result of the SME Decision, the Competition Law does not apply to certain small and medium establishments as detailed in the SME Decision. The definition of a ‘small and medium establishment’ varies according to whether the relevant entity operates in the trade, industry or services sector. Small and medium establishments are also identified in the Ratios Decision according to turnover and number of employees.

Finally, note that the Ministry also has the power to investigate a potential violation of the Competition Law of its own initiative or otherwise following a complaint brought before it. Failure to notify a reportable economic concentration may result in a fine of between 2 and 5 per cent of turnover generated by the relevant undertaking in the UAE in the last financial year or, if data is not available, a fine of between 50,000 and 5 million dirhams.

X OUTLOOK

It is widely anticipated that a new investment law will be enacted by the end of 2018 and it is expected that the new law will permit higher levels of foreign investment in certain sectors. At present, entities incorporated onshore in the UAE must have at least 51 per cent UAE national ownership. The introduction of the new investment law is therefore likely to lead to increased foreign investment in the UAE. It will also allow for the diversification of the UAE’s economy in an attempt to reduce the country’s dependence on oil revenue.
Chapter 47

UNITED KINGDOM

Mark Zerdin

I OVERVIEW OF M&A ACTIVITY

Globally, 2017 was a strong year for high-ticket M&A activity, with annual deal value reaching a post-crisis high in the European market, thanks in part to a number of mega-deals. In Europe, there were 7,439 transactions (up from 6,999 in 2016) with a combined total value of €830.4 billion (up from €729.5 billion in 2016). The UK market for M&A in 2017 was mixed. The value of inbound M&A activity in 2017 saw a significant dip, with foreign investors spending a total of £35.3 billion on UK targets, down from a record high in 2016 of £190 billion, owing to the absence of high-value deals. However, the level of outbound M&A was the highest since 2000, with the United Kingdom seeing an increase from £17.3 billion in 2016 to £76.6 billion in 2017, as a result of the value of two very high-value deals completed during that period.

Although public M&A decreased in 2017, it was still a driver of much of the deal-making. There were 46 firm offers announced for Main Market or AIM companies in 2017, down from 51 in 2016. Despite the overall value of bids decreasing in 2017, there was a significant increase in the number of bids with a value over £1 billion – there were 12 such bids in 2017 (compared to five in 2016).

The spread of deal activity in 2017 was mixed, with some particularly busy periods and some slower periods. The year started slowly, with only four firm offers being announced in January and February, but picked up significantly in Q2 with nearly two-fifths of 2017’s firm offers being announced in that quarter. However, this was followed by a slower Q3 until a flurry of activity at the end of the year, with December alone accounting for 13 per cent of the firm offers in 2017. These figures demonstrate that, as in 2016, the Brexit vote does not appear to have had the immediate adverse impact on M&A that was initially feared.

The largest deal by value in 2017 was Vantiv Inc’s offer for Worldpay Group plc, valued at £8 billion, although it was a long way from the largest deal by value in 2016 (SoftBank Group Corp’s acquisition of ARM Holdings plc for £24.4 billion). Kraft Heinz’s proposal to combine with Unilever would have been one of the largest deals in corporate history

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1 Mark Zerdin is a partner at Slaughter and May.
2 Mergermarket, ‘Deal Drivers EMEA 2017’.
4 Ibid.
5 PLC, ‘Public M&A Trends and Highlights 2017’.
had it been successful, with the deal worth approximately £114.49 billion, but the board of Unilever swiftly rejected Kraft Heinz’s proposal and Kraft Heinz made the decision to withdraw its offer.6

The trend of using a scheme of arrangement as the preferred method in larger, recommended bids continued in 2017; 29 of the firm offers subject to the Takeover Code were structured as a scheme of arrangement, with almost all the offers valued at over £1 billion (11 out of 12) being structured as a scheme of arrangement.7 This is no surprise given the scheme’s advantages over a contractual offer, such as being able to ensure 100 per cent control of the target.

The UK’s macroeconomic performance in 2017 was solid but by no means spectacular. The UK economy grew by approximately 1.8 per cent, which was a slight decrease on the 1.9 per cent growth seen in 2016. It also represented a gap emerging between the United Kingdom and the eurozone, where economic growth was approximately 2.5 per cent in 2017.8 Inflation, which had risen from 0.5 per cent in December 2015 to 1.5 per cent in December 2016, continued to rise, nearly hitting a six-year high in November 2017 before reducing slightly to 2.7 per cent in December 2017.9 This continued increase is in part due to the fall in the value of the pound, following the ‘Leave’ vote in the UK referendum on leaving the European Union.

Moving into 2018, there was a rise in worldwide deal-making at the beginning of the year, with an increase in both deal volume and deal value. In Q1, the United Kingdom was the most targeted country in Europe by volume, receiving 266 deals worth US$59.3 billion, which represents a small decrease in deal volume from the beginning of 2017, which had 283 deals, but a large rise in deal value, with US$59.3 billion in 2018 compared with US$38.3 billion in 2017.10 Although there is still political uncertainty in the United Kingdom, particularly while negotiations to leave the European Union are continuing, the agreement struck between the United Kingdom and the European Union in December 2017 on the terms of the UK’s exit, which has since led to the start of negotiations on a UK–EU trade deal, may have helped to calm the market and made acquirers more comfortable pursuing M&A in the United Kingdom.

II GENERAL INTRODUCTION TO THE LEGAL FRAMEWORK FOR M&A

The Companies Act 2006 provides the fundamental statutory framework and, with the law of contract, forms the legal basis for the purchase and sale of corporate entities. In addition, the City Code on Takeovers and Mergers (Takeover Code) regulates takeovers and mergers of certain companies in the United Kingdom, the Isle of Man and the Channel Islands. The Takeover Code has statutory force and the Takeover Panel (Panel) has statutory powers in respect of the transactions to which the Takeover Code applies. Breach of any of the Takeover Code rules that relate to the consideration offered for a target company could lead to the offending party being ordered to compensate any shareholders who have suffered loss

6 Ibid.
7 Ibid.
9 Consumer Price Inflation times series dataset.
10 Mergermarket, ‘Global and regional M&A activity during Q1 2018’.
as a consequence of the breach. In addition, breach of the content requirements of offer
documents and response documents may constitute a criminal offence. The Panel also has
the authority to issue rulings compelling parties who are in breach of the requirements of
the Takeover Code to comply with its provision, or to remedy the breach. These rulings are
enforceable by the court under Section 955(1) of the Companies Act. The Takeover Code has
a wider scope than the EU Takeovers Directive, and applies if the offeree (or potential offeree)
is a UK public company and, in some instances, if the company is private or dual-listed.

The Financial Services and Markets Act 2000 (FSMA 2000) regulates the financial services
industry and makes provision for the official listing of securities, public offers of securities,
and the communication of invitations or inducements to engage in securities transactions.
Following substantial amendments to the FSMA 2000, brought about on 1 April 2013 when
the Financial Services Act 2012 (the FS Act) came into force, financial regulation is split
between two bodies: the Financial Conduct Authority (FCA), which regulates conduct in the
retail and wholesale markets, and the Prudential Regulation Authority, which is responsible
for the prudential regulation of banks and other systemically important institutions. As a
consequence of the FS Act, more than 1,000 institutions (including banks, building societies,
credit unions and insurers) are now ‘dual-regulated’. The UK Listing Authority Sourcebook
of Rules and Guidance (which includes the Listing Rules, the Prospectus Rules, and the
Disclosure Guidance and Transparency Rules (DTRs)), promulgated by the FCA in its
capacity as the UK Listing Authority (the competent authority for the purposes of Part VI of
the FSMA), includes various obligations applicable to business combinations involving listed
companies, and contains rules governing prospectuses needed for public offers by both listed
and unlisted companies. The Listing Rules, in particular, set out minimum requirements
for the admission of securities to listing, the content requirements of listing particulars and
ongoing obligations of issuers after admission. The Criminal Justice Act 1993 contains the
criminal offence of insider dealing and, from 3 July 2016, the EU Regulation on Market
Abuse (MAR) (with the Listing Rules, the DTRs and the Takeover Code) regulates the civil
regime for insider dealing.

Merger control rules are contained in the Enterprise Act 2002, although they do not
generally apply to mergers in relation to which the European Commission (the Commission)
has exclusive jurisdiction under the EU Merger Regulation. In addition, specific statutory
regimes apply to certain areas, including water supply, newspapers, broadcasting, financial
stability, telecommunications and utilities, and these separate regimes may have practical
implications in merger situations.

III DEVELOPMENTS IN CORPORATE AND TAKEOVER LAW
AND THEIR IMPACT

i Takeover Panel: changes to Takeover Code rules on asset sales and other matters

On 11 December 2017, the Code Committee of the Panel published Response
Statement 2017/1 relating to asset sales and other matters and Response Statement 2017/2
relating to statements of intention and related matters. This section provides an overview of
certain changes introduced by the Response Statements that are effective from January 2018.

Rules on asset sales

Rule 2.8(f) of the Takeover Code now prohibits a person who has made a statement that it
does not intend to make an offer for a company from purchasing, agreeing to purchase or
making any statement that raises or confirms the possibility that it is interested in purchasing assets that are significant in relation to the offeree company. The factors that should be considered when assessing whether assets are significant for the purposes of Rule 2.8(f) are set out in Note 5 to Rule 2.8, which provides, among other things, that relative values of 75 per cent will normally be regarded as significant. Similar restrictions on purchasing significant assets were also added to Rule 12.2, which governs competition reference periods, and Rule 35.1, which prohibits certain transactions within the 12-month period following the date on which an offer is withdrawn or lapses. These changes were introduced with the aim of preventing an offeror from circumventing the Code by purchasing significant assets from a target under circumstances when it would not be permitted under the Code to make a full offer to acquire all the target’s shares.

**Rule 4.7**

The newly introduced Rule 4.7 covers the sale of all or substantially all the offeree company’s assets. It provides that if an offeree company announces that it has agreed terms on which it intends to sell all or substantially all its assets, and that it intends to return to shareholders all or substantially all of its cash balances, then a purchaser of some or all of the offeree’s assets or a person connected to the purchaser is prohibited from acquiring interests in shares in the offeree company during the offer period unless the board of the offeree company has made a statement quantifying the amount per share that is expected to be paid to shareholders and then only to the extent that the price does not exceed the amount stated. Further, if a range is stated, the price paid must not exceed the bottom of the range. Such a statement will be treated as a ‘quantified financial benefits statement’.

**Firm intention announcement**

Rule 2.7 of the Takeover Code, which provides the information that a firm intention announcement must include, now requires that the announcement must also set out the offeror’s intentions with regard to the business, employees and pension schemes of the offeree company. This has the effect of bringing forward the date on which such intentions are required to be made public as the intentions had previously been required to be included in the offer document that follows a firm intention announcement. Rule 24.2(a) has also been amended to require an offeror to make specific statements of intention with regard to the offeree company’s research and development functions, the balance of skills and functions of the offeree company’s employees and management, and the location of the offeree company’s headquarters and headquarter’s functions.

**14-day restriction on publishing offer documents**

Rule 24.1 of the Takeover Code requires the offeror to send the offer document to shareholders of the offeree company within 28 days of a firm intention to make an offer, but prohibits the offeror from publishing an offer document earlier than 14 days following a firm intention announcement, unless prior consent has been obtained from the board of the offeree company. The new 14-day restriction ensures that, in a hostile takeover, the board of the offeree company has more time to formulate the opinion, reasons and views that it is required to publish under Rule 25.2(a).
ii Contractual interpretation

Noteworthy contractual interpretation cases have come before the court in 2017, providing useful lessons for M&A practitioners to consider when drafting transaction documents.

In *Watson v. Watchfinder.co.uk Limited*, the court reviewed an option agreement entered into between the parties, a provision of which gave the defendant company directors discretion over the exercise of the option. The court had to determine whether this was an unconditional right to veto or whether the directors had to act reasonably in withholding their consent. The court applied the public law concept of ‘reasonableness’, finding that the board had a duty not to act capriciously, arbitrarily or unreasonably when exercising its discretion. Allowing consent to be withheld arbitrarily would make the option meaningless, because then ‘the grant of shares is entirely within the gift’ of the directors. Not only does this reveal the court’s willingness to apply public law standards to private M&A contracts, but the court also commented on some wider drafting points. It was noted that the agreement was in part drafted by an operations director, reminding market participants of the need for sound and proper legal drafting. The case also emphasises that boards need to document properly their decision-making processes, as the judge noted that there was insufficient evidence to demonstrate why the board refused its consent. One suggested reason was that the claimant failed to secure the appropriate investment for the defendant, as it had been engaged to do. However, the court noted that if the defendant wanted to make the option conditional on a successful investment being made, then the parties ought to have drafted for that.

The court again noted the imprecise drafting of a share purchase agreement indemnity clause in the Supreme Court case of *Wood v. Capita Insurance Services Limited*. Contributing to the case law on the textual approach to contractual interpretation, the court found that it was more inclined in this case to view the clause in the context of the contract as a whole, as this would assist in making the term’s meaning clear. The court looked to the warranties, which were broad and time-limited, to understand that the parties had drafted a further indemnity, which was not time-limited and was limited in scope. As such, the court dismissed the appeal because the claim was not within the limited scope of the indemnity, nor was it within the two-year warranty period. The extent to which the court will rely on the wider context of a contract to understand a particular provision depends on the contract’s formality, and the nature and quality of the drafting.

In the subsequent case of *Kason Kek-Gardner Ltd v. Process Components Ltd*, the Court of Appeal applied the principles of contractual interpretation discussed in *Wood v. Capita Insurance Services Limited* in the context of the sale of business assets. The Court emphasised the importance of looking at the meaning of the specific language used in an agreement when interpreting it, and highlighted that reliance on commercial common sense and background should not be allowed to devalue that meaning. The Court also pointed out that any background to interpretation that is admissible must be limited to facts known or reasonably available to all parties.

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11 [2017] EWHC 1275 (Comm).
12 [2017] EWHC 1275 (Comm), at [98] per Judge Waksman QC.
14 [2017] EWCA Civ 2132.
16 [2017] Civ 2132, at [16] per Lewison LJ.
The UK’s decision to leave the European Union does not appear to have had an immediate adverse impact on the UK’s attractiveness for foreign direct investment (FDI).

The value of inward M&A deals saw a notable fall in 2017, from £190 billion to £35.3 billion. Unlike 2016, there were no deals in 2017 with a value above £10 billion and the absence of very high-value deals helps to explain the 81.4 per cent (£154.1 billion) fall in the value of inward M&A activity for the year. Despite the fall in overall value, the number of inward M&A deals increased from 226 in 2016 to 254 in 2017.

M&A in the financial services sector remained strong in 2017 as businesses continued to be under pressure to adapt to digitalisation, to comply with increasing regulatory requirements and to find new sources of growth. The development of machine learning, artificial intelligence and the emergence of fintech companies are also challenging the status quo. Forty-eight per cent of respondents to a survey conducted by Mergermarket expected fintech acquisitions to be one of the key drivers of M&A in the financial services sector in 2018.

On 16 January 2018, having fought off competition from rival bidder JPMorgan, Vantiv Inc announced the completion of its £8 billion acquisition of Worldpay Group plc. The merger created a global payments provider processing over 40 billion transactions worth £1.1 trillion in payment volume. The deal, recommended by the boards of both companies, was a response to the rapid evolution in the payments landscape and the need to ‘offer more innovative and flexible technology and payment solutions to merchants in a large and fast-growing market’. Similarly, on 15 March 2018, Experian, a provider of global information services, announced that it will acquire Clear Score Technology Limited, a UK-based three-year-old credit score provider, for £275 million. The Worldpay and Clear Score deals demonstrate how players in the financial services sector are facing increasing competition, and how companies are using M&A to remain competitive in a fast-developing industry where consolidation is likely to continue.

So far in 2018, there has been evidence of M&A being used as a way to carry out company transformations in the financial services sector. The £3.79 billion merger of Standard Life Plc with Aberdeen Asset Management to create Standard Life Aberdeen (SLA), completed on 8 August 2017, formed the UK’s largest active investment management company. The structure of the deal was a recommended all-share deal that was implemented.
by a scheme of arrangement. The rationale behind the deal was to ‘harness Standard Life’s and Aberdeen’s complementary, market-leading investment and savings capabilities’, providing ‘greater ability to invest for growth and innovate’.24

As expected by analysts, Solvency II25 continues to have an effect on deal-making in the insurance sector in 2018, leading to increased consolidation.26 Solvency II applies to insurers in the European Union and requires them to have enough capital to have 99.5 per cent confidence they could cope with the worst expected losses over a year. In February 2018, as the next stage of its transformation, SLA announced its plans to sell the bulk of its insurance business to Phoenix Group. The selling of its capital heavy insurance business is part of SLA’s strategic transformation into an investment company27 and will lead to a reduction in SLA’s Solvency II capital requirements. The £3.2 billion deal, which is subject to approvals and is expected to complete in the second half of 2018, is the latest in Phoenix Group’s numerous acquisitions of legacy insurance businesses in recent years.

ii Consumer and retail

Globally, 2017 was a strong year for M&A in the consumer sector with total deal value reaching US$380.7 billion, an increase of 68.3 per cent on the US$226.3 billion in 2016.28 There were a number of highly publicised deals in the first half of 2017, including the acquisitions of Luxottica and Whole Foods.29 Uncertainty about the post-Brexit environment and consumers’ changing habits continued to place the consumer sector under pressure to adapt. In fact, 156 deals worth £22.1 billion were announced, which is more than three times the value seen in the previous year.30 A notable transaction was the £3.7 billion offer for Booker Group Plc, the UK’s largest grocery wholesaler, by Tesco plc, the UK’s largest grocery retailer, which is yet another example of the consolidation that is taking place in the grocery sector. The merger was cleared by the Competition and Markets Authority (CMA) in December 2017, after a Phase I and Phase II investigation, and is expected to lead to growth opportunities and synergies in areas such as procurement and distribution.31

On 30 April 2018, J Sainsbury plc and Walmart Inc announced that they had agreed terms in relation to a combination of Sainsbury’s and Asda Group Limited to create an enlarged business with revenues in the region of £51 billion.32 The deal that values Asda at approximately £7.8 billion33 is expected to attract scrutiny from the CMA but is a further example of consolidation in the consumer and retail sector.

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29 Ibid.
33 Ibid.
iii Shareholder activism and related decisions

The past two years have seen an increase in shareholder activism and this has affected the course of a number of M&A transactions. This has been particularly notable in transactions structured as schemes of arrangement. As schemes of arrangement allow the bidder to acquire 100 per cent control of the target if the scheme is approved, the statute governing them contains a series of protection for minority shareholders. Activist investors have been making increased use of these statutory provisions in the hope of securing more favourable economic terms in a trend known as ‘bumpitrage’.  

For example, there was notable investor controversy in the run-up to Anheuser-Busch InBev NV’s takeover of SABMiller in late 2016. US activist hedge fund Elliott Management raised concerns that the partial share consideration on offer, which was aimed at major SABMiller shareholders Altria Group Inc and BevCo Limited, was more favourable than the cash offer because of the decline in the value of sterling after the Brexit vote. That pressure is reported to have led Anheuser-Busch InBev to raise its cash offer in July 2016. In addition, Soroban Capital Partners, which in fact supported the scheme, objected to the exclusion of Altria and BevCo from the class of shareholders who were entitled to vote on the transaction. Soroban claimed that the court did not have jurisdiction to convene a meeting with all SABMiller’s shareholders except Altria and BevCo, and further stated that the presence of the two shareholders would mean a much higher chance of dissentient shareholders being outvoted. The court, however, held in Re SABMiller plc that it did have the requisite jurisdiction. The practical consequences of this decision are that a company proposing a scheme may choose to exclude certain supportive shareholders from the scheme meeting to minimise the risk of a legal challenge to the scheme.

Contentious shareholder activity hit the headlines again in early 2017 when the Dee Valley case came before the court. The issue was whether it was valid for a shareholder to split its shareholding by transferring one share each to 445 individuals to defeat the ‘majority in number’ test in a scheme of arrangement used to effect a takeover. The court held that members must use their votes for the purpose of benefiting the class as a whole and not their own individual interests. Accordingly, the relevant dissenting shareholders’ votes were ruled invalid and the scheme was sanctioned. The implications arising from the case are numerous, not least because it was the first in England and Wales to consider the validity of share splitting as a mechanism to vote against a scheme. In reaching its decision, the court noted that the court meeting convened to approve the scheme is a sui generis meeting under the control of the court, unlike a normal general meeting of company shareholders. As such, the chair of the court meeting is given wide powers to reject votes if members are not voting in the interests of the class as a whole (although in practice it is likely that the chair would seek advice from the court or counsel before doing so). Had the case been decided differently, it might have paved the way for activist shareholders to block schemes with share-splitting strategies, which would have been particularly notable given the scheme’s popularity in recent years as a way to implement recommended takeovers (as discussed in Section I). The judgment still leaves

36 Ibid.
37 Re SABMiller plc [2016] EWHC 2153 (Ch).
38 Re Dee Valley Group plc [2017] EWHC 184 (Ch).
some uncertainty regarding what exactly constitutes vote manipulation, keeping open, for example, the question of whether the votes would have been valid if the share splitting had occurred before the court meeting was convened, or if the relevant shareholders had paid for the single share they received as part of the split. It will be interesting to watch the activities of activist investors in the coming year, both to see the approach taken by boards of UK companies when confronted in an M&A situation and whether activists will continue to focus on the intricacies of the scheme structure.

More recent examples of activist shareholder involvement in bids include SNC-Lavalin Group Inc’s offer for WS Atkins plc, in which Elliot Capital Advisors, LP managed to acquire a stake of 6.8 per cent in the target but ultimately failed to drive up the offer price, and AXIS Capital Holding’s Offer for Novae Group plc, in which certain hedge funds converted holdings in Novae and successfully managed to drive up the value of the overall offer by approximately £10 million.39

iv National security implications in the M&A context

In the first quarter of 2018, Melrose Industries’ hostile takeover bid for GKN plc dominated the financial news. On 29 March 2018, despite various stakeholders (including politicians, unions and industry) voicing their concerns about the proposed takeover, and after increasing its offer from £7 billion to £7.9 billion and agreeing to inject £1 billion into GKN’s pension fund, Melrose secured acceptances from 52.43 per cent of GKN’s shareholders. At the time of writing, Melrose has received acceptances from more than 90 per cent of GKN’s shareholders and has started the process of squeezing out those shareholders who have not accepted the offer. The transaction is the largest hostile takeover in nearly a decade (since Kraft’s acquisition of Cadbury in 2009) and is an example of increased government scrutiny over deals that may have public interest implications.40

Given the importance of GKN to the UK’s national security, the CEOs of Melrose and GKN appeared before the Business, Energy and Industrial Strategy (BEIS) Committee and, 48 hours before the GKN shareholder vote, the British government intervened by writing a letter demanding binding commitments from Melrose. The demands, including commitments to continue operating GKN as a UK business and investing in research and development projects, were considered the latest example of the government being increasingly willing to intervene in takeovers.41 In addition to the post-offer undertakings agreed with the Panel, in April 2018, Melrose announced that it had entered into deeds of covenant and undertakings in favour of the Ministry of Defence and the BEIS with respect to the GKN business and, as a result of these commitments, the government decided that statutory intervention was not required.

Under the Enterprise Act 2002, the government has powers to intervene in ‘relevant merger’ situations that are deemed to affect national (or public) security, media plurality or the stability of the financial system. Recently, there have been growing concerns that national

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40 Other examples include, Twenty-First Century Fox Inc’s offer for Sky PLC and Hytera Communications Corporations Limited’s offer for Sepura. See further, PLC, ‘Public M&A Trends 2017’.
security is insufficiently protected under the current regime as, for example, the CMA can only assess a proposed merger referred to it by the government if (1) two or more enterprises have ceased to be distinct enterprises and (2) one of two tests is satisfied:

\[ a \] the acquired company's annual turnover exceeds £70 million; or

\[ b \] the merged entity would have a minimum 25 per cent share of sales or purchases in the United Kingdom of goods or services of a particular description.\(^{42}\)

Against this background, the government made both short-term and long-term proposals that address the national security concerns, and on 15 March 2018, the Department for Business, Energy and Industrial Strategy published the government’s response to its consultation on short-term proposals, which amend the merger control jurisdictional thresholds.\(^{43}\)

In accordance with its short-term proposals, the government confirmed its decision to lower the turnover threshold from £70 million to £1 million in the dual use and military use sector, and in parts of the advanced technology sector. Lowering the threshold to £1 million means that the turnover threshold will be easier to meet, and a higher number of deals will be open to review by the CMA. Second, the government decided to introduce a new share of supply test in the two sectors set out above. The new test, instead of only looking at the share of sales that the merged entity has, will also look at the share of sales of the target business before the merger. If the pre-merger share of sale of the target is 25 per cent or more, then the new share of supply test will be met, and the transaction will be subject to CMA scrutiny.

The two changes discussed above will not replace the existing turnover and share of supply tests, but will exist alongside the existing CMA referral regime. The proposals will be brought into effect by the Enterprise Act 2002 (Share of Supply Test) Amendment Order 2018 (which has been laid before Parliament) and the Enterprise Act 2002 (Turnover Test) (Amendment) Order 2018.\(^{44}\) These amendments, in addition to its involvement in recent bids, signals that the government is likely to take a more interventionist approach to future deals.

VI \hspace{1em} \textbf{FINANCING OF M&A: MAIN SOURCES AND DEVELOPMENTS}

In 2017, 46 firm offers were announced for AIM or Main Market companies that were subject to the Takeover Code.\(^{45}\) Cash continues to be the main form of consideration (or cash in combination with shares or loan notes). The use of debt financing to fund or part fund offers has continued to drop since 2015, with 15 offers involving a debt portion (compared to 27 in 2016 and 33 in 2015). The use of short-term bridge facilities remains popular, particularly for larger deals; the facilities are typically refinanced in the bond markets or with longer-term loan refinancings.

\(^{42}\) Enterprise Act 2002, Section 23.


Rule 24.3(f) of the Takeover Code requires that the offer document must contain a description of how the offer is to be financed and the source or sources of the finance. In particular, the offer document must provide details of the key terms of the debt, including the interest rates and any ‘step up’ or variation provided for (which would include market flex rights). Following the publication of the announcement of a firm intention to make an offer, any documents relating to the financing of the offer must be published on a website no later than 12 noon on the following business day (Rule 26.2(b)). The disclosure of any market flex provisions included in the financing arrangements can therefore be a contentious issue. Disclosure of negotiated flex rights pursuant to Rule 26.2 may lead to higher funding costs, as it can put potential syndicate members on notice of the arrangers’ ability to increase the interest payable (within the agreed parameters).

Rules 24.3(f) and 26.2 were introduced in 2011; in its 2012 review of the 2011 amendments to the Takeover Code, the Panel noted that as a result of the concerns outlined above, dispensation had been granted from the Rule 26.2 requirement in relation to disclosure of flex rights. This gives the parties a period of up to 28 days to complete syndication before publication of the offer document, which must then include details of the flex in accordance with Rule 24.3(f). Whether this 28-day concession will be long enough to complete syndication will depend upon the proposed timetable.

VII PENSIONS AND EMPLOYMENT LAW

i TUPE risk in M&A transactions

Although a pure share transfer typically does not engage the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE), two key cases in 2017 highlighted the risk of employees successfully arguing that the TUPE applies in relation to intra-group integration activities following completion of an M&A deal.

In ICAP Management Services Limited v. Dean Berry and BGC Services (Holdings) LLP,46 the court considered application of the TUPE in the context of a share sale of a parent company. The court held that the TUPE argument failed on the basis that there was no transfer of the business in which employees were employed, as opposed to control of that business. The mere fact of control is insufficient to show that a transfer has taken place from the target subsidiary to the new parent company. The critical test is whether the new party has become responsible for carrying on the business, has incurred the obligations of the employer, and has taken over the day-to-day running of the business. The relevant test can be summarised as whether the new party has ‘stepped into the shoes of the employer’.

This test was expounded by the Employment Appeal Tribunal (EAT) in Guvera Ltd v. Ms C Butler and others,47 in which the EAT rejected the idea that it is a necessary condition of a TUPE transfer that the transferee has assumed the obligations of employer towards the employees of the undertaking (for example, by paying the employees’ wages). Rather, the factors outlined in ICAP Management were said to be important, but not necessary, aspects of a multifactorial test to find a TUPE transfer has taken place. In Guvera, the parent company

47 UKEAT/0265/16/DM.
went beyond exercising ordinary supervision of the subsidiary, including making and directly implementing key business decisions and directly handling a redundancy process. The EAT therefore found this gave rise to a TUPE transfer.

From a practical perspective, it is important to analyse the TUPE risk at the level of the day-to-day management of the business. While the purchaser may have a clear commercial interest in integrating the target’s business into its own, integration affecting day-to-day management (such as hirings and firings) will lead to a greater risk of a TUPE transfer occurring. In contrast, the kind of global strategic oversight that is inevitable in group companies with shared ownership will not be sufficient. Having group-wide policies on HR and remuneration matters, for example, should be seen as low risk, provided that implementation of those policies is a matter for each individual company.

Businesses should therefore be aware of this potential TUPE risk when structuring the transaction and planning post-completion integration steps.

ii Employment status

Employment status remains a hot topic, particularly in those sectors (such as the gig economy) in which workers have traditionally been classified as self-employed but are now claiming to be entitled to certain employment rights. The government commissioned Matthew Taylor, the chief executive of the Royal Society of Arts, to conduct a review of modern employment practices; the result report was published in July 2017. The Taylor Review recommended significant reforms to the current categorisation of workers and self-employed individuals, and the rights attaching to each status.

The government issued its response in February 2018, in which it generally agreed with the Taylor Review, but has chosen to consult on many of the recommendations before setting firm policy changes. It therefore launched a number of consultations in conjunction with its response, including regarding employment status.

The employment status consultation contemplates new legislation that would set out the test to be met for an individual to be categorised as an employee, either using existing case law criteria or on the basis of new criteria. The paper also considers the possibility of aligning the definitions of employed and self-employed under the employment rights system and the tax system. However, the consultation makes clear that no decisions have been made about whether or how to reform employment status, so imminent legislative change appears unlikely for the moment. The consultation closed on 1 June 2018.

For now, businesses should remain alive to the risk that the individuals within their workforce may be incorrectly classified, and that the rights and responsibilities attaching to those individuals may be subject to change. This could have significant financial and reputational implications for the business, particularly in the current political climate. Purchasers should therefore conduct thorough due diligence on the employment status of the target’s workforce and seek appropriate indemnity protection where necessary.

iii Postponement of minimum contribution rate increases under auto-enrolment

There is mandatory auto-enrolment in the United Kingdom. This means that companies are required to offer (most) workers at least a defined contribution tax-registered pension plan providing a minimum level of contributions. These requirements are being introduced on a ‘staged’ basis: they currently amount to a minimum total contribution of 5 per cent of an employee’s ‘qualifying earnings’ (of which the employer must contribute at least 2 per cent), rising to 8 per cent from 6 April 2019 (of which the employer must contribute at least 3 per cent). The increasing cost of auto-enrolment will need to be taken into account by purchasers as part of a target’s continuing employment costs.

However, employers may not currently be able to automatically postpone the starting dates of the minimum contribution rate increases if, for example, they have been specifically written into the scheme rules. The position will need to be checked by the purchaser.

iv Abolition of contracting out for defined benefit schemes

On 6 April 2016, contracting out of the state pension in defined benefit schemes was abolished as part of the introduction of the reformed UK state pension system. Employers have therefore lost the national insurance rebate to which they were previously entitled as a result of contracting out of the state pension.

The abolition of contracting out could be a relevant consideration for those purchasers considering taking on a target’s (now formerly contracted out) defined benefit scheme that is still open to future accrual (although such schemes are now rare), as the employer would be required to pay a higher level of national insurance contributions.

However, a statutory modification power has been introduced that allows employers unilaterally to amend scheme rules governing accrual rates and member contribution levels so far as is necessary to compensate the employer for the loss of its national insurance rebate. This power is subject to certain restrictions and would require consultation with employees. The power is available for five years after the abolition of contracting out.

v Transfers of previous service benefits

A seller may require the purchaser to continue to offer a target’s employees membership of a defined benefit pension scheme, including accepting a transfer of the employees’ (and possibly former employees’) previous service benefits into that scheme, although this is now relatively unusual.

If a transfer is to be carried out on a ‘without consent’ basis, certain requirements must be met. Prior to 6 April 2018, it was not possible to transfer contracted-out rights without consent to a scheme that had never been contracted out. The abolition of contracting out on 6 April 2016 meant that newly established schemes could not therefore receive a without-consent transfer of contracted-out rights. Since 6 April 2018, such transfers are permissible but only if certain conditions are met. On acquisitions, transfers would usually be made with members’ consent, but they could be made on a without-consent basis, particularly if it is intended also to transfer the benefits of any former employees.

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52 The contribution rates do not apply to all of an employee’s pay, but only to the amount falling within the ‘qualifying earnings band’. For the 2018–2019 tax year, qualifying earnings are gross annual earnings between £6,032 and £46,350.

53 That is, without the consent of the members whose benefits are to be transferred.
Further scrutiny planned of corporate activity impact on pensions

The government is planning to intensify the Pensions Regulator’s scrutiny of how corporate activity may affect pension provision. A White Paper (Protecting Defined Benefit Pension Schemes, published on 19 March 2018 has announced a number of changes to be introduced in 2019–2020 ‘at the earliest’.

One change will introduce a requirement for employers or parent companies to make a statement of intent, in consultation with the pension scheme trustees, ahead of any relevant business transaction posing ‘the highest potential risk’ to the defined benefit scheme, such as the sale or takeover of a sponsoring employer, stating how the employer proposes to mitigate any detrimental impact on the pension scheme.

There will also be new ‘highly punitive’ fines to penalise the targets of a contribution notice, including individual directors, possibly applied retroactively to acts or omissions after the date the White Paper was published, imposed by the Pensions Regulator. The penalty is expected to be linked to the Regulator’s power to issue contribution notices, but it is unclear how this would operate and what the amount would be.

In addition, a new criminal offence will be introduced to punish the ‘wilful or grossly reckless behaviour’ of directors and any connected persons. The terminology used implies that well-run schemes with responsible employers should not be concerned by this, however.

VIII TAX LAW

To achieve greater fiscal stability, the autumn statement and spring budget have now been replaced by an autumn budget and spring statement. As part of the Budget in November 2017, the government announced that it remains committed to a ‘low tax economy’. That commitment was reiterated as part of the Spring Statement in March 2018.

i Investing in equity, debt or real estate

There have been some positive developments, in particular for equity investors. In contrast, those investing in UK real estate may face additional tax charges.

For disposals made on or after 1 April 2017, the scope of the substantial shareholding exemption (SSE) has been broadened, bringing it more into line with ‘participation exemptions’ in other jurisdictions. The investor trading condition has been removed, the period over which the substantial shareholding requirement can be satisfied has been extended and the post-disposal investee (target) trading condition has been relaxed. A new subsidiary exemption for ‘qualifying institutional investors’ has been introduced.

A new exemption from the 20 per cent withholding tax on interest has been introduced with effect from April 2018. It applies to interest on securities that are admitted to trading on a multilateral trading facility.

In November 2017, it was announced that the government intends to bring all gains accruing on disposals of interests in UK real estate within the scope of UK tax, regardless of the residence of the person making the disposal. It is further intended that non-residents would, in certain circumstances, be subject to UK tax on the disposal of shares in a property-rich company. The relevant consultation closed on 16 February 2018 and draft legislation is expected to be published in summer 2018, with a view to bringing the measure into effect from April 2019.
The United Kingdom as domicile of choice

Despite Brexit and US tax reform, the United Kingdom remains an attractive holding jurisdiction. As recently as March 2018, Dana Inc announced that it would re-establish itself in the United Kingdom as part of a proposed offer for part of GKN plc’s business. However, that offer was thwarted by the takeover of GKN plc by Melrose Industries plc.

After the Republic of Ireland, the United Kingdom has the lowest corporation tax rate in Western Europe; currently, it is 19 per cent and is due to decrease to 17 per cent by 1 April 2020. The United Kingdom has a broad network of double tax treaties (DTTs), generally exempts from tax any dividends (both domestic and foreign) received by UK companies and does not operate any withholding tax on dividends paid by UK companies (other than real estate investment trusts).

However, Brexit may mean that UK companies are no longer able to avail themselves of certain tax-related benefits of the UK’s membership of the European Union, notably benefits under the Parent–Subsidiary Directive. If UK parent companies can no longer rely on this Directive (which abolishes withholding taxes on payments of dividends between associated companies of different Member States), dividends would be received subject to withholding tax at the relevant DTT rate, and this is not necessarily zero (for instance, in respect of dividends from German and Italian subsidiaries, it would be 5 per cent). Intra-group payment flows should therefore be reviewed and holding structures for future acquisitions designed with this in mind.

If a takeover was structured as a cross-border merger involving a UK company, the Tax Mergers Directive may no longer operate to ensure that the merger is tax neutral; it is unclear how the UK’s implementing legislation would continue to apply after Brexit. In practice, though, it is extremely rare to use this method in a UK context anyway.

Using tax losses

Supposedly to align the United Kingdom with other G7 countries, losses incurred after 1 April 2017 can now be carried forward and set off against profits from other income streams or group companies. However, this set-off is limited to 50 per cent of a group’s profits above £5 million (with stricter restrictions for banks).

From 1 April 2017, the rules against ‘loss buying’ have been extended. Under the new rules, if there is a major change in the nature or conduct of the target’s trade (or investment business) within five years of the acquisition, pre-acquisition losses may be lost.

The use of tax losses through surrenders as group or consortium relief may be affected by the recent Farnborough case, in particular, in the context of joint ventures. The case calls into question whether, for the purposes of the grouping rules, a shareholders’ agreement is a constitutional document and its provisions can be taken into account to determine an entity’s controller. Despite the pending appeal, joint venture partners may wish to consider relocating the provisions on voting rights to the joint venture entity’s articles of association.

56 Farnborough Airport Properties Ltd and others v HMRC [2017] UKUT 394.
Anti-avoidance

Purchasers may want to focus due diligence on, and seek robust warranties in respect of, remuneration structures for UK employees. Following the Rangers case, it is likely that the UK’s tax authorities will seek to apply the principle that employment income paid by an employer to a third party (rather than to the employee) is taxable as employment income to a wide range of disguised remuneration schemes, including those involving employee benefit trusts and a range of contract loan schemes.

The diverted profits tax also remains a hot topic. The tax authorities appear to be approaching it hand-in-hand with enquiries into a group’s transfer pricing position. Purchasers want to make sure that they are appraised of any risks in this area, whereas sellers should ensure that they have sufficient conduct rights – in particular, where transactions between retained companies and the target may be subject to challenge.

Those considering investments in small businesses should note that, at the time of writing, the government is consulting on rules broadly equivalent to a diverted profits tax for small businesses which is intended to come into effect in April 2019.

For periods beginning on or after 1 April 2017, groups with interest expenses exceeding £2 million are subject to a restriction on interest deductibility. Broadly, deductions in excess of 30 per cent of the group’s UK ‘tax-EBITDA’ or, if higher, the ratio of net interest to EBITDA for the worldwide group, are disallowed. Where entities are sold out of a group, both seller and purchaser should consider to what extent the seller should be permitted to allocate disallowances to the target.

According to a position paper published in November 2017 and updated in March 2018, the government considers that current international tax rules do not adequately address the tax challenges posed by the digital economy. While the preferred solution is the reform of the international corporate tax framework through the OECD, the UK government considers that, in the absence of such a reform, an interim solution would have to be considered in cooperation with the European Union and other international partners.

Stamp duty

In July 2017, the Office of Tax Simplification (OTS) published its proposals for the reform of stamp duty. At the time of writing, we are awaiting a detailed response to these proposals by the government. The OTS shied away from recommending the abolition of stamp duty or a merger of stamp duty and stamp duty reserve tax (SDRT). Its recommendations include aligning the scope of stamp duty and SDRT, making stamp duty assessable so that it is no longer ‘voluntary’, and speeding up the stamping process through digitalisation.

As part of the Budget in November 2017, the government confirmed that the 1.5 per cent stamp duty and SDRT charge on the issue of shares (and transfers integral to capital raising) into overseas clearance services and depositary receipt systems will not be reintroduced following Brexit.

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58 Earnings before interest, taxes, depreciation and amortisation.
VAT and customs

While the UK’s VAT rules are unlikely to be altered significantly as a result of Brexit, it remains unclear how cross-border transactions will be taxed. The Cross-Border Trade Bill, published in November 2017, provides a framework on which the regimes for charging import duty, excise duty and VAT on cross-border transactions post-Brexit would be based. The framework is adaptable to a hard Brexit as well as a range of soft versions. Sweeping powers are granted to the government to amend or supplement the legislation. As a consequence, the Bill offers no real clarity on what the system would look like.

The government has published a summary of the responses to the consultation on changes to the VAT grouping rules. The immediate outcome is that the treatment of certain types of partnerships will be clarified through a policy paper and guidance. Otherwise, the government will continue to review the scope of the grouping rules; future changes will be considered in the context of the Brexit negotiations to avoid multiple changes.

In the *Ryanair* case, the Irish Supreme Court has referred the question to the European Court of Justice whether VAT on deal fees can be recovered if a takeover has been unsuccessful but the hopeful acquirer intended to provide management services to the target if the takeover had been successful. Whether or not the decision of the European Court of Justice in this case will bind the United Kingdom will depend on the Brexit deal and may depend on the date of the decision relative to the date of Brexit.

Intangibles and the royalties withholding tax

The tax treatment of intangibles is currently bifurcated. Broadly, depending on the date of their creation or acquisition, intangibles are either treated as capital assets (CGT regime) or their tax treatment follows their accounting treatment (IFA regime). Moreover, since 2015, purchasers have been denied relief for the acquisition of goodwill – even though the seller would have to bring income from the sale of such goodwill into account for its own tax purposes.

At the time of writing, the government is consulting on a proposal to bring all intangibles into the IFA regime. The consultation document also invites representations as to whether the denial of relief for the acquisition of goodwill affects the UK’s competitiveness. Purchasers would clearly benefit from the reintroduction of the relief.

In an M&A context, de-grouping charges in respect of intangibles are another key concern. Under current law, if a trade is hived into a newly incorporated company and that company is sold, a de-grouping charge would arise under the IFA regime, but not the CGT regime. Although the consultation document invites representation on this issue, it indicates that a proposal would have to be affordable and allow the clawback of deductions in excess of economic cost.

When investing in UK technology companies, investors may wish to consider the extent to which the target’s profits could be affected by the extension of the UK’s royalties withholding tax that was proposed in November 2017; draft legislation is expected in summer 2018.

59 *Ryanair Ltd v. The Revenue Commissioners* (Case C249/17).
Oil and gas

In November 2017, the government announced two measures to facilitate the transfer of late-life oil and gas assets.

Currently, pure mature field specialists with little prior activity in the North Sea are unable to obtain effective corporation tax relief for decommissioning costs. This is because the resulting losses sit in the specialist buyer whereas the capacity to use those losses (by way of carry-back against tax previously paid) is locked away in the seller. To resolve this issue, the government announced that, from 1 November 2018, a seller will be allowed to transfer all or part of its tax history to the buyer. At the time of writing, we are awaiting draft legislation.

As regards petroleum revenue tax (PRT), the government is to launch a technical consultation on allowing PRT relief for decommissioning costs incurred by a previous licence holder. The intention is to support the transfer of assets where the seller retains the decommissioning liability. At the time of writing, we are awaiting publication of that consultation.

IX  COMPETITION LAW

i  The UK merger regime

The CMA has the power to carry out an initial Phase I review and has a duty to refer any qualifying transaction for a detailed Phase II investigation if it believes that it is or may be the case that the merger could give rise to a substantial lessening of competition. Phase I decision-making is undertaken by the Senior Director of Mergers (or another senior CMA official). Phase II decision-making is undertaken by an independent panel of experts drawn from a pool of senior experts in a variety of fields.

Notification is ‘voluntary’ in the sense that there is no obligation to apply for CMA clearance before completing a transaction. The CMA may, however, become aware of the transaction through its market intelligence functions (including through the receipt of complaints) and impose interim orders preventing further integration of the two enterprises pending its review. There is a risk that it may then refer the transaction for a Phase II investigation, which could result in an order for divestment.

The CMA strongly encourages parties to enter into discussions in advance of formal notifications to seek advice on their submission, to ensure that a notification is complete and to lessen the risk of burdensome information requests post-notification. The CMA aims to start the statutory clock within 20 working days (on average across all cases) of submission of a substantially complete draft merger notice.60 The average length of the total pre-notification period was 28 working days in the 2017–2018 financial year.61 Some cases, however, still do require long pre-notification periods. Once a transaction is formally notified, Phase I begins, and the CMA has a statutory time limit of 40 working days to reach a decision. It may, however, extend this period in certain exceptional circumstances, such as if it is waiting for

60 Mergers updates, Law Society Competition Section seminar, 13 March 2018. This figure is accurate as at 28 February 2018.
61 Ibid. This figure is accurate as at 28 February 2018.
information from the merging parties. The CMA can obtain information at Phase I through formal information-gathering powers with penalties for non-compliance. The CMA formally paused the statutory timetable in seven Phase I cases during the 2017–2018 financial year.62

The average length of Phase I was 34 days.63 If the CMA’s duty to refer a transaction to a Phase II investigation is engaged, the parties have five working days from the substantial lessening of competition decision (SLC decision) to offer undertakings in lieu of a reference to the CMA (although they may offer them in advance should they wish to do so). If the parties offer undertakings, the CMA has until the 10th working day after the parties received the SLC decision to decide whether the offer might be acceptable, in principle, as a suitable remedy to the substantial lessening of competition. If the CMA decides the offer might be acceptable, in principle, a period of negotiation and third-party consultation follows. The CMA is required to decide formally whether to accept the offered undertakings, or a modified form of them, within 50 working days of providing the parties with the SLC decision, subject to an extension of up to 40 working days if there are special reasons for an extension.

At Phase II, the CMA must issue its decision within a statutory maximum of 24 weeks; this period is extendable in special cases by up to eight weeks. If remedies are required, the CMA has a statutory period of 12 weeks (which may be extended by up to six weeks) following the Phase II review within which to make a decision on any remedies offered by the parties.

The CMA has significant powers to impose interim measures to suspend or reverse all integration steps and prevent pre-emptive action in relation to both completed and anticipated mergers. This ensures that, although notification is voluntary in the United Kingdom, the CMA is able to prevent action being taken that would result in irreversible damage to competition. Severe financial penalties may be imposed for breaches of any interim orders or undertakings (capped at 5 per cent of the aggregate group worldwide turnover).

The CMA levies substantial filing fees in respect of the mergers it reviews (of between £40,000 and £160,000), depending on the turnover of the target business.

ii Treatment of mergers by the CMA

The number of Phase I merger decisions made by the CMA in the 2017–2018 financial year (62) was slightly up from the 57 taken in the preceding financial year, and significantly down from the peak of 210 merger decisions made by the Office of Fair Trading in the 2005–2006 financial year. Since 2005–2006, 57 is the lowest annual figure for Phase I decisions, the average being 98 decisions per year.

Of the 62 cases decided during 2017–2018, 41 were cleared unconditionally, representing around 66 per cent of cases, down from around 74 per cent in the preceding year (including cases cleared under the de minimis exception). Nine cases were referred for Phase II review (around 15 per cent), up from 9 per cent in the preceding year. Undertakings in lieu of a reference were accepted in 12 cases, up from nine in the preceding year.

At the time of writing, three of the nine transactions referred to Phase II have been cleared unconditionally, two have been cleared with remedies, one was cancelled (as the merger in question was abandoned) and three are still under review.

62 Ibid. This figure is accurate as at 28 February 2018. The CMA has indicated that the statutory clock was only stopped in cases that had been referred to it from the Commission under Article 4(4) of the EU Merger Regulation, not in mergers that were originally notified to the CMA.

63 Ibid. This figure is accurate as at 28 February 2018.
Six Phase II decisions were published by the CMA in the 2017–2018 financial year, down from seven in the previous year. Four were unconditional clearances and two were granted clearance subject to divestiture remedies. The CMA did not prohibit any mergers during the 2017–2018 financial year, whereas it prohibited one in the preceding year.

Overall, the CMA intervened (i.e., prohibited or accepted remedies) in around 23 per cent of cases in the 2017–2018 financial year, which is around four times the rate of intervention from the Commission over a similar period. The higher intervention rate may be explained by the voluntary nature of the UK merger control regime, which means that parties may elect not to notify transactions that do not give rise to significant competition issues.

iii Recently published statements and consultations relevant to mergers

In its Annual Plan 2018–2019, the CMA states that it will continue to build on the recent changes it has made to ensure an efficient, effective and targeted merger control regime. In 2017–2018, the CMA updated the merger notice and issued guidance around initial enforcement orders and mergers intelligence guidance. In addition, the CMA will conclude its review of remedies guidance across Phase I and Phase II mergers, including consulting on any improvements.

The CMA also announced three targets for its assessment of mergers in its Annual Plan 2018–2019: to clear at least 70 per cent of merger cases that are less complex within 35 working days; to complete 70 per cent of Phase II merger cases without an extension to the statutory deadline; and to implement Phase II merger remedies without the need for an extension to the statutory deadline in at least 80 per cent of cases.

iv Brexit, merger control and industrial strategy

At the time of writing, it is expected that the United Kingdom will withdraw from both the European Union and the European Economic Area, which could cause significant changes to merger control regulation. It is likely – and indeed the CMA as stated in its 2018–2019 Annual Plan is proceeding on this assumption that businesses may need to submit parallel notifications in the United Kingdom and European Union to obtain clearance for a deal, as the ‘one-stop-shop’ principle may no longer apply (that is, the principle that if a merger has an ‘EU dimension’ (as defined in the EU Merger Regulation), it falls under the exclusive jurisdiction of the Commission and, conversely, the CMA is in principle competent to investigate mergers that do not have an EU dimension but qualify for review under the UK rules). This could lead to a number of challenges for merging businesses, including increased regulatory burden. The CMA has indicated that, from its perspective, the removal of the one-stop-shop principle would lead to an increased workload (estimated at an additional 30 to 50 Phase I cases and six Phase II cases per year)\(^{64}\) and consequently have an effect on resources. In addition, the CMA expects its role in global mergers to change, with more extensive engagement with international regulators on both substance and potential remedies anticipated.\(^{65}\) The CMA has repeatedly underlined the necessity and desirability of ensuring that transitional arrangements are put in place as soon as possible to clarify how cases currently in train would be handled.\(^{66}\)

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\(^{64}\) Mergers updates, Law Society Competition Section seminar, 13 March 2018.

\(^{65}\) Ibid.


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As set out in Section V.iv, the government has confirmed its decision to introduce an alternative turnover threshold and share-of-supply test in certain national security-sensitive areas of the economy.

**X OUTLOOK**

The year 2017 was a strong one for European M&A, with a notable increase in deal volume and deal value compared to 2016. For the United Kingdom, deal activity got off to a slow start in the first quarter of 2017 but picked up in the last quarter. While 2017 did not reach the same highs as 2016 or 2015, markets were not as plagued by the political uncertainty of the Brexit negotiations as may have been expected. As noted in the Eleventh Edition of *The Mergers & Acquisitions Review*, a weaker pound and cheap financing meant that foreign investors continued to see the United Kingdom as an attractive investment centre and responded accordingly.

In Q1 2018, there were 284 deals worth a combined £46.8 billion, representing a 38.4 per cent increase by value on Q1 2017.\(^{67}\) If deal activity continues at this pace in the next three quarters, 2018 is set to be a year of good deal-making. That said, political uncertainty while Brexit negotiations continue may push UK companies towards defensive consolidation. For Q1 2018, domestic M&A accounted for 61.4 per cent of total M&A value, the highest percentage seen since 2009.\(^{68}\)

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67 Mergermarket, 'UK Trend Report Q1 2018'.
68 Ibid.
Chapter 48

UNITED STATES

Richard Hall and Mark Greene

I  OVERVIEW OF M&A ACTIVITY

After a record year in 2015, followed by substantial declines in 2016, US M&A activity continued its downward trajectory in 2017 in terms of deal value, while reversing the trend in terms of the number of transactions. With US$1.37 trillion in M&A activity during 2017, deals for US targets declined by 15.6 per cent compared to 2016. However, the number of deals for US targets increased by 13.6 per cent, from 11,027 in 2016 to 13,069 in 2017. These figures demonstrate the continuation in 2017 of 2016’s trend towards more, but less valuable, deals. Narrowing in on acquisitions of US public reporting companies valued at US$100 million or more, 172 such deals were announced in 2017, a decrease of 8 per cent from 2016 (187 deals). However, looking historically beyond 2016 and 2015, as tracked by What’s Market, the 172 deals signed in 2017 constitute an increase of 14 per cent (151 deals), 23 per cent (140 deals) and 19 per cent (144 deals) over 2014, 2013 and 2012, respectively. As such, US M&A activity in 2017, as in 2016, still compares relatively well to other recent years.

Consistent with the trend in overall US M&A value versus volume, there was a marked decline in large-cap US M&A in 2017. As tracked by What’s Market, only 26 deals valued over US$5 billion were announced in 2017 and 56 valued between US$1 billion and US$5 billion, compared to 34 and 68, respectively, in 2016. In contrast, 2017 saw an increase in announced US public M&A deals valued between US$100 million and US$500 million, from 50 in 2016 to 57 in 2017. M&A activity in 2017 varied substantially throughout the year, with a particularly active second quarter followed by a quieter second half of the year. There were 55 announced deals for public US companies valued over US$100 million in the second quarter of 2017, compared to 40, 38 and 39 in the first, third and fourth quarters, respectively.

1 Richard Hall and Mark Greene are corporate partners at Cravath, Swaine & Moore LLP. The authors would like to acknowledge the contributions of fellow partners Eric Hilfers, Len Teti, Christine Varney and Margaret D’Amico, and associates Eliza Marshall, Alison Beskin, Andrew Davis and Maya Khan.
4 Id.
5 Id.
7 Id.
8 ‘What’s Market: 2017 Year-End Public M&A Wrap-up’ (see footnote 3).
Like US M&A overall, US cross-border activity declined in value but increased in volume in 2017. There was a 27 per cent decline in the value of US cross-border M&A from 2016, largely attributable to a 46 per cent decline in the value of US-inbound transactions year over year.9 In contrast to deal value, 2017 saw a 10-year high for the number of US cross-border deals.10 As a percentage of all US M&A, US inbound cross-border deals had a relatively smaller presence in 2017. As tracked by What’s Market, compared to total deals, only 33, or 19.2 per cent, were reached with foreign buyers, compared to 44, or 23.5 per cent, in 2016.11 A key factor in the decline in US cross-border M&A in 2017 was US foreign policy, including national security concerns, particularly with regard to China (see Sections II and IV, for further discussion of relevant US foreign policy tied to national security).

US public M&A was dominated by strategic, rather than financial, acquirers in 2017, as was the case in 2016. Approximately 141 US public M&A deals valued over US$100 million, or 81 per cent, involved strategic acquirers.12 This represents a slight increase compared to 2016, in which there were 149 deals involving strategic acquirers, constituting 80 per cent of US public M&A deals valued over US$100 million.13 However, financial sponsors, including private equity buyers, have become well-established players in the US M&A landscape with relatively stable participation for the last several years. For example, the percentage of US public M&A transactions valued over US$100 million that involved private equity buyers has ranged between 9 per cent and 14 per cent over the last four years.14 These numbers remain stable, among other reasons, because private equity activity is constrained by a cycle of low supply of quality targets, increasing levels of ‘dry powder’, and resultant competition among private equity buyers that contributes to high prices. Meanwhile, robust debt financing and stable equity markets have offered viable financing options to strategic buyers. Strategic buyers are even more dominant among large-cap deals. Of the 26 large-cap deals for US public targets entered into in 2017 (valued at US$5 billion or more), 22 were strategic (85 per cent), in line with 2016 (91 per cent).15

US antitrust regulators entered the first year of a new administration and made headlines with high-profile challenges to major private and public M&A deals in 2017. For example, the Department of Justice (DOJ) sued to block the US$86 billion deal between AT&T Inc (AT&T) and Time Warner Inc (Time Warner), leading to what has been called ‘one of the most important antitrust trials in years’ in March 2018.16

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9 ‘Public M&A Year in Review: Trends and Highlights from 2017’ (see footnote 6).
10 Id.
12 Percentage excludes deals involving collaboration between strategic and financial buyers. ‘Public M&A Year in Review: Trends and Highlights from 2017’ (see footnote 6).
US$30 billion acquisition of Baker Hughes Inc (Baker Hughes). When GE was unable to meet its divestitures requirements on time, it further agreed to daily incentive payments and a fine to the DOJ for the cost of ongoing regulatory oversight. In another prominent deal, a divided Federal Trade Commission (FTC) declined to pursue an investigation into the acquisition by Walgreens Boots Alliance Inc (Walgreens) of a number of Rite Aid Corporation (Rite Aid) stores, allowing the deal to move forward after two years and several changes to the structure of the transaction (see Section IX for further discussion of AT&T/Time Warner, GE/Baker Hughes, Walgreens/Rite Aid and other recent antitrust cases).


To date, 2018 has seen a decrease in both the volume and the value of announced US M&A from the fourth quarter of 2017. There were 2,784 deals announced in the first quarter of 2018, a slight decrease of 4.7 per cent from the 2,922 deals announced in the fourth quarter of 2017. Deals announced in the first quarter of 2018 had a value of US$503.5 billion, a decrease of 9.6 per cent from US$557 billion in the fourth quarter of 2018. US M&A activity in the first quarter of 2018 fares better against the first quarter of 2017 than against the fourth, with a 52.3 per cent increase in value from US$330.5 billion to US$503.5 billion, though transaction numbers fell by 13.8 per cent from 3,231 to 2,784. Meanwhile, global M&A activity reached a record high of US$1.2 trillion in value during the first quarter of 2018, though transaction numbers decreased 10 per cent relative to the first quarter of 2017. While 2017 brought increased certainty on the tax reform front, 2018 has seen new uncertainty related to US policies regarding trade tariffs on Chinese imports, national security (including President Trump’s executive order blocking the US$128.5 billion proposed acquisition of Qualcomm Inc (Qualcomm) by Singapore-based Broadcom Ltd


‘Public M&A Year in Review: Trends and Highlights from 2017’ (see footnote 6).


(Broadcom) in March), and antitrust (including the impending outcome of the AT&T/Time Warner trial). It remains to be seen how M&A activity, globally and in the United States, will progress for the remainder of 2018.

II GENERAL INTRODUCTION TO THE LEGAL FRAMEWORK FOR M&A

US M&A is governed by a dual regulatory regime, consisting of state corporation laws (e.g., the Delaware General Corporation Law (DGCL)) and federal securities laws (primarily, the Securities Act of 1933 (the Securities Act) and the Securities Exchange Act of 1934). The Securities and Exchange Commission (SEC) is the regulatory agency responsible for administering the federal securities laws. Federal securities laws apply in the context of a merger, including federal proxy rules governing solicitation of target shareholder approval and federal securities laws relating to tender offers in the context of an offer to purchase shares of a publicly held target company. Furthermore, an acquisition or merger will imply fiduciary duties, as developed and applied in the target company’s state of incorporation.

Unlike most other jurisdictions, the US patchwork of federal and state acquisition regulation is not focused on substantively regulating changes of control of target companies. Rather, US regulation focuses on disclosure, ensuring that target company shareholders have the time and information required to make a fully informed decision as to whether to accept a tender offer or vote in favour of a merger.

Under the Hart–Scott–Rodino Antitrust Improvements Act of 1976 (the HSR Act), an acquirer is normally required to make a filing with US antitrust authorities prior to completing an acquisition if the transaction size exceeds US$84.4 million (adjusted annually for inflation); the requirement was increased in early 2018 from US$80.8 million in 2017. There is no general statutory review process governing foreign investment in the United States. Under the Exon-Florio Amendment to the Defense Production Act of 1950, however, the President, through the Committee on Foreign Investment in the United States (CFIUS), has the power to review, investigate, prohibit or unwind transactions involving investments by non-US entities that threaten to impair national security. The 1992 Byrd Amendment requires the CFIUS to conduct a full Exon-Florio investigation whenever the CFIUS receives notice of a foreign government-led takeover of a US business that may affect national security. CFIUS review is formally a three-step process. The initial informal review step has evolved over time to give both transaction parties and the CFIUS additional time to resolve any national security concerns without the time constraints imposed by the formal review process. Historically, parties would file a draft notice, address any initial comments and questions from the CFIUS, and then formally file their notice approximately one week later. However, the CFIUS now regularly conducts detailed pre-filing reviews.

asking extensive questions that must be answered before the formal filing is made, which often takes several weeks.\textsuperscript{33} The formal review process is usually (although not exclusively) initiated based on voluntary notice filings, with an initial 30-day period during which the CFIUS reviews the transaction to consider its effects on US national security. If the CFIUS still has national security concerns after the initial period, a second 45-day investigation is launched. Few transactions have ever progressed to the third step: presidential review and final determination, which determination is not subject to judicial review.\textsuperscript{34} Filing a notice to the CFIUS is a voluntary measure, but the CFIUS may review a transaction at its discretion, even after it is completed, which may affect the parties to an M&A transaction's anticipated benefits, and the rise in CFIUS reviews is pushing parties to address this possibility early on in the transaction process.

In November 2017, Congress proposed the Foreign Investment Risk Review Modernization Act of 2017 (FIRRMA) to ‘modernize and strengthen’ [CFIUS].\textsuperscript{35} If passed, the legislation will expand both the scope of activities subject to CFIUS review and the level of scrutiny directed towards transactions involving certain ‘countries of special concern’.\textsuperscript{36} In a presidential memorandum on 22 March 2018, President Trump asked Treasury Secretary Mnuchin to recommend, within 60 days, executive actions to address concerns about US inbound investment from China in certain sensitive industries and technologies, which suggests that President Trump may step in with an executive order to try to exert pressure on Congress to pass some version of FIRRMA.\textsuperscript{37} After playing an active role in 2017 and early 2018, it seems likely that the CFIUS will continue to be a substantial player in the US M&A landscape moving forward (see Section IV for discussion of recent executive action and CFIUS review).

There are also additional industry-specific statutes that may require advance notification of an acquisition to a governmental authority. Examples of regulated industries include airlines, broadcasters and electric and gas utilities.

\section*{III DEVELOPMENTS IN CORPORATE AND TAKEOVER LAW AND THEIR IMPACT}

\subsection*{i Fair value in appraisal actions}

In the wake of the 2013 Dole Food Company, Inc management buyout, hedge funds added the battle for appraisal rights to their activist repertoires.\textsuperscript{38} As hedge funds sit on large reserves...
of cash, they continue to seek ways to earn returns. In today’s low-interest-rate environment, shareholders seeking appraisal rights can obtain a meaningful return, as they are generally entitled to the fair value of their shares plus statutory interest compounded quarterly from the effectiveness of the merger until the appraisal judgment is paid.³⁹ Delaware’s statutory interest rate is generally the Federal Reserve discount rate plus 5 per cent and is higher than any rate available in the market.⁴⁰ While appraisal rights are generally not a lucrative pursuit for the average shareholder, activist funds have the resources to make it worth their while and the values involved in so-called appraisal arbitrage rose substantially in recent years. Appraisal arbitrage claims were valued at US$1.5 billion in 2013.⁴¹ Claims continued to rise through 2016, with 77 petitions challenging 48 deals.⁴² However, after years of steady increases, there were only 62 petitions challenging 34 deals in 2017, representing decreases of 19 per cent and 29 per cent, respectively.⁴³

Developments in the law governing appraisal actions in recent years, both legislative and judicial, have had a substantial impact on the upside of appraisal and therefore on the incentive to bring appraisal actions in Delaware. In 2016, the Delaware legislature passed two amendments to Section 262 of the DGCL aimed at curbing appraisal arbitrage. The first imposed a de minimis exception for certain appraisal claims, requiring that more than 1 per cent of the outstanding shares entitled to appraisal perfect their appraisal rights or that the merger consideration for shares with perfected appraisal rights exceed US$1 million.⁴⁴ The second allows a corporation to prepay the claimant any portion of the transaction price, limiting the principal on which interest accrues while the claim is disputed.⁴⁵

Delaware judicial decisions have also significantly undermined appraisal arbitrage. In several 2015 decisions, the Delaware Court of Chancery relied entirely upon, or gave substantial weight to, the merger price in determining fair value in shareholder appraisal actions where there was a robust, conflicts-free sales process. In Merlin Partners LP v. AutoInfo, Inc, the Delaware Court of Chancery criticised the proffered discounted cash flow (DCF) analysis, since the underlying cash flows were a first attempt and aimed at painting the rosiest possible picture, and relied instead on the merger price, which resulted from a competitive and fair auction process.⁴⁶ In In re LongPath Capital, LLC v. Ramtron International Corporation, the Delaware Court of Chancery again rejected the DCF analysis put forth, this time because it relied on management projections prepared out of the ordinary course of business, by newer employees and using a new methodology, and the Court found fair value to be the merger

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⁴⁰ Id.
⁴³ Id.
⁴⁵ Id.
price minus the merger’s net synergies.\footnote{LongPath Capital, LLC v. Ramtron Int’l Corp, CA No. 8094-VCP (Del. Ch. 30 Jun 2015); ‘Delaware Corporate Law and Litigation’ (see footnote 46).} Finally, in Merion Capital LP v. BMC Software, Inc, the Delaware Court of Chancery cited a competitive sales process and again found the merger price to be the best evidence of fair value.\footnote{Merion Capital LP v. BMC Software, Inc, No. 8900VCG (Del. Ch. 21 Oct 2015); ‘M&A Update: Highlights from 2015 and Implications for 2016’, Cadwalader, Wickersham & Taft LLP, 19 January 2016, www.cadwalader.com.}

Subsequently, three important 2016 Delaware Court of Chancery decisions cut back on what had appeared in 2015 to be strong deference to valuations based on per-share merger price minus any merger-related synergies, suggesting that other financial analyses would still be used.\footnote{‘M&A Update: Highlights from 2015 and Implications for 2016’ (see footnote 48).} The Delaware Court of Chancery in In re Appraisal of Dell Inc used a DCF analysis to find the fair value of Dell Inc (Dell) was 28 per cent higher than the deal price, despite a well-run public sale process.\footnote{In re Appraisal of Dell Inc, CA No. 9322-VCL (Del. Ch. 31 May 2016).} The Court cited a limited pre-signing market check, the structure of the post-signing go-shop, pricing anomalies and the fact that the sales process was centred around a private equity group and the company’s founder (Michael Dell), with bids determined partly on a leveraged buyout (LBO) model.\footnote{Id.} Then, in In re ISN Software Corp Appraisal Litigation, the Delaware Court of Chancery used a DCF analysis to find that the fair value of ISN Software Corp (ISN) was approximately 158 per cent higher than the deal price because the buyer was a controlling shareholder whose valuation was unreliable.\footnote{‘Key 2016 Appraisal Decisions that Rejected Merger Price’ (see footnote 44).} Finally, in In re Appraisal of DFC Global Corp, the Delaware Court of Chancery again declined to find the merger price dispositive.\footnote{In re Appraisal of DFC Global Corp, CA No. 10107-CB (Del. Ch. 8 Jul 2016).} Despite arm’s-length negotiations and a robust market check, the Court found that ‘significant company turmoil and regulatory uncertainty’ undermined the deal price and management’s projections and again pointed to the private equity buyer’s focus on internal rates of return and financing constraints.\footnote{‘Key 2016 Appraisal Decisions that Rejected Merger Price’ (see footnote 44).} Ultimately, the Court gave equal weight to a DCF analysis, a comparable company analysis and the deal price, finding fair value to be US$10.21 per share (well below the US$19.50 per share deal price).\footnote{Id.}

In 2017, however, Delaware courts reinvoked 2015’s deference to deal price. First, in May 2017, the Delaware Court of Chancery in In re Appraisal of PetSmart, Inc gave zero weight to the proffered DCF analyses, finding them speculative and that the claimants had not shown they were reliable, whereas the deal price resulted from a robust pre-signing auction with well-informed, appropriately incentivised bidders.\footnote{In re Appraisal of PetSmart, Inc, WL 2303599 (Del. Ch. 26 May 2017).}

In August 2017, the Delaware Supreme Court reversed the Court of Chancery’s decision in DFC, disagreeing that future uncertainty or the private equity buyer undermined the deal price and finding that the Court of Chancery was not justified in giving deal price equal, rather than substantially more, weight relative to the other valuation methods proffered.\footnote{DFC Global Corporation v. Muirfield Value Partners, LP, 172 A.3d 346 (Del. 2017).} With regard to future uncertainty, the Court stated that absent any academic or empirical evidence to the contrary, there was no reason to think market participants would
be incapable of factoring regulatory uncertainty into their analysis, and that the market's collective judgement would more likely be accurate in assessing the related risk than any individual's estimate. The Court also found no logical basis for the notion that the deal price deserves less weight in the context of a private equity buyer, stating that all buyers take the potential return on equity into account to justify the costs and risks of an acquisition and the fact that a private equity buyer may demand a certain rate of return does not mean that the price it is willing to pay is not a meaningful indication of fair value.

Similarly, in December 2017, the Delaware Supreme Court reversed the Court of Chancery's decision in Dell on the basis that the Court of Chancery did not afford the deal price any weight, stating that the deal price need not be shown to be the 'most reliable' indicator of fair value for it to receive any weight at all and that '[t]he issue in an appraisal is not whether a negotiator has extracted the highest possible bid. Rather, the key inquiry is whether the dissenters got fair value and were not exploited'. The Court criticised several components of the trial court's reasoning. First, the Court found that any perceived 'valuation gap' based on investor 'myopia' was contrary to the proffered evidence, which indicated that analysts considered the Company's long-range outlook, and to the efficient market theory, which suggests that for widely traded companies lacking a controlling shareholder, the market is well-informed and able to digest available information to adjust its valuation for a long-range outlook. As in DFC, the Court rejected that the absence of strategic bidders undermined the deal price, seeing no rational connection between status as a financial sponsor and fair price. The Court also rejected that the 'go-shop' was fatally flawed, due to the alleged 'winner's curse' in management buyouts, because bidders had full access to requested data and affirmative steps were taken to remedy the inherent information asymmetry. Furthermore, the Court rejected the proposition that Michael Dell's alignment with one bidder had meaningfully deterred rival bidders absent evidence that he would not participate with the rival bidders.

Further undermining appraisal prospects, when Delaware courts have found flaws in the sale process, they have increasingly found fair value below rather than above the deal price, emphasising the statutory mandate to exclude synergies. In May 2017, the Delaware Court of Chancery in In re Appraisal of SWS Group, Inc found the US$6.92 per share merger price unreliable in light of a number of factors, including that the buyer, Hilltop Holdings, Inc, was a major creditor of the target and informed the target board that it would not waive its credit agreement's merger covenant for any alternative transaction. The Court also found flaws with the proffered company comparables due to substantial differences in size, business lines and performance. The Court instead relied on its own DCF analysis to reach a value of US$6.38 per share. Similarly, in ACP Master, Ltd et al v. Sprint Corp et al, Clearwire Corp was purchased by Sprint Corp (Sprint), its majority shareholder, for US$5 per share, but the
Delaware Court of Chancery came to a valuation of US$2.13 per share. The parties had not argued for use of the transaction price for fair value, and the Court acknowledged that while Sprint had in some ways controlled the sales process, Sprint’s DCF analysis provided a better proxy for fair value than the dissenting shareholders’ because it was prepared by management in the ordinary course of business and pertained to the stand-alone company, without synergies.

Finally, regardless of the soundness of the sales process, early 2018 has seen Delaware courts articulating a preference for unaffected market price over deal price as a means to exclude synergies, at least where the target’s stock is widely traded and absent evidence that the market was not well-informed at the time. In February 2018, the Delaware Court of Chancery in *Verition Partners Master Fund Ltd v. Aruba Networks* found fair value equal to the 30-day unaffected market price of US$17.13 per share, well below the US$24.67 per share deal price. The Court found that the deal price was reliable, even though, unlike *Dell* and *DFC*, there was only one bidder, but, citing the statutory mandate to exclude synergies, instead utilised the 30-day average unaffected market price. Absent expert testimony against the efficient market theory, and given that the company was widely traded and lacked a controlling shareholder, the Court found unaffected market price to be more direct and less speculative than deal price less synergies. The Court’s decision in *Aruba* both undermines appraisal prospects for public targets and encourages expert testimony challenging market efficiency.

Appraisal will continue to be one of the most important areas of Delaware corporate law because the number of appraisal cases remains substantial and courts will continue to address which methods produce the best indication of a company’s fair value, particularly merger price (with the potential subtraction of synergies) and unaffected market price rather than DCF analysis. As courts delineate the circumstances in which different valuation methods should be used, they will alter the appraisal landscape, deterring appraisal actions in circumstances where merger price or unaffected market price appear likely to win the day. Based on Delaware rulings in 2017 and early 2018, the territory in which appraisal remains profitable is shrinking, and may well ultimately be confined to private company transactions and controller squeeze-outs, for which neither unaffected market price nor deal price may be deemed reliable.

### ii Standard of review in fiduciary duty actions

The success of a claim that the members of a board of directors have breached their fiduciary duties, or that a financial adviser has aided and abetted such breach, is largely dependent upon the standard of review applied to the relevant directors’ actions. In recent years, Delaware courts have expanded the territory in which the business judgement rule, requiring gross negligence, applies, thereby drastically increasing deference to boards of directors and discouraging fiduciary duty actions. In 2015, the Delaware Supreme Court in *Corwin v. KKR Financial Holdings LLC* clarified that the voluntary approval of a merger (other than with a controlling shareholder) by fully informed, disinterested shareholders invoked the

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68 Id. at 48 and 49.
70 Id. at 30.
business judgement rule standard of review in post-closing damages actions, even where Revlon-enhanced scrutiny would otherwise apply.\(^72\) According to the Court, Unocal and Revlon were designed as tools of injunctive relief to address important M&A decisions in real time and not as tools for obtaining post-closing money damages.\(^73\)

Subsequently, in 2016 and early 2017, Delaware courts continued to apply Corwin to fiduciary duty cases in a manner that clarified and extended the application of the decision.\(^74\) For example, in Singh v. Attenborough, the Delaware Supreme Court clarified the Corwin ruling by holding that the business judgement rule applies irrebuttablly to any post-closing judicial review of a merger that received the uncoerced, fully informed vote of disinterested shareholders.\(^75\) Then, in In re Volcano Corporation Stockholder Litigation, the Delaware Supreme Court affirmed the Court of Chancery’s holding that if the fully informed, uncoerced and disinterested stockholders tender their shares to approve a merger under Section 251(h) of the DGCL, such approval has the same effect as a vote under Corwin and the business judgement rule applies irrebuttablly to the transaction.\(^76\) In In re Columbia Pipeline Group, Inc Stockholder Litigation, the Delaware Court of Chancery applied Corwin broadly, rejecting claims that the shareholder approval at issue was not adequately informed such that Corwin did not apply.\(^77\)

The plaintiffs claimed that there were material omissions in the proxy soliciting shareholder approval of TransCanada Corporation’s acquisition of Columbia Pipeline Group, Inc because the directors did not explicitly disclose their self-interest in the spin-off’s change of control benefits.\(^78\) The Court held that Corwin requires only disclosure of the underlying facts such that shareholders can reach their own conclusions regarding director self-interest, and not fiduciary ‘self-flagellation’, so applied the business judgement rule.\(^79\)

However, in subsequent 2017 cases, Delaware courts applied Corwin more narrowly, demonstrating the limits of its reach. In In re Saba Software, Inc Stockholder Litigation, the Delaware Court of Chancery found the shareholder vote to be both less than fully informed and coerced. Following the revelation of financial fraud and the de-registration of Saba Software, Inc’s securities, the company failed to restate its financial statements.\(^80\) The Court found the proxy submitted to shareholders to approve the company’s acquisition by Vector Capital Management, LP to be inadequate to inform shareholders for two reasons. First, it did not provide any explanation as to why the company had failed to restate its financial statements so as to enable shareholders to assess the likelihood that management would be able to do so in the near future.\(^81\) Second, given the dramatic impact of deregistration on merger prospects and the likely unfamiliarity of shareholders with deregistered territory,

\(^72\) ‘Delaware Corporate Law and Litigation’ (see footnote 46); Corwin v. KKR Fin Holdings LLC, 125 A.3d 304, 309-11 (Del. 2015).

\(^73\) Corwin v. KKR Fin Holdings LLC at 312 (see footnote 72).

\(^74\) Lisa A Schmidt, ‘Recent Developments in Delaware Corporate Law’, Tulane University Law School 29th Annual Corporate Law Institute, 30 March 2017.

\(^75\) Singh v. Attenborough, 137 A.3d 151 (Del. 2016).

\(^76\) ‘Recent Developments in Delaware Corporate Law’ (see footnote 74).

\(^77\) Order Granting Motion to Dismiss, In Re Columbia Pipeline Group, Inc Stockholder Litigation, C.A. No. 12152-VCL (Del. Ch. 7 Mar 2017).

\(^78\) Id.

\(^79\) Id. at 5.

\(^80\) In re Saba Software, Inc Stockholder Litigation, WL 1201108 (Del. Ch. 11 Apr 2017).

\(^81\) Id. at 12.
the board inadequately informed shareholders of the alternate options available to them.82 Furthermore, the Court found that the shareholder vote approving the transaction was coerced, largely because of the lack of information in the proxy, since the shareholders held illiquid stock at the time and were not provided with any viable alternatives to approving the merger.83 As such, Corwin did not apply, and the Court applied Revlon-enhanced scrutiny.84

Similarly, in Sciabacucchi v. Liberty Broadband Corporation, the Delaware Court of Chancery held that the shareholder vote to approve the merger of Charter Communications, Inc (Charter) with Time Warner Cable Inc was ‘structurally coercive’.85 The plaintiffs challenged the Charter board’s approval of the issuance of additional equity to Liberty Broadband Corporation (Liberty Broadband), Charter’s largest shareholder, and entry into a voting proxy agreement to afford Liberty Broadband additional voting power, alongside the board’s approval of the merger.86 While each transaction was subject to a separate shareholder vote, the board informed shareholders that the merger was expressly conditioned on approving the other two transactions.87 Because shareholders were not able to evaluate the merit of the issuance or voting proxy agreement on their own, and shareholders were forced to accept them in order to get the benefits of the merger, the Court held that the shareholder vote with regard to those two transactions was structurally coerced for reasons unrelated to economic merit, and so the Corwin business judgement rule did not apply.88

Further limiting Corwin’s reach in 2017, in In re Massey Energy Company Securities Litigation, the Delaware Court of Chancery made clear that Corwin’s invocation of the business judgement rule applies only to fiduciary conduct that is closely related to the transaction that shareholders voted to approve.89 In Massey Energy, the plaintiffs alleged Caremark oversight failures related to a deadly mine explosion, which occurred prior to Massey Energy Company’s acquisition by Alpha Natural Resources Inc (Alpha). The director defendants claimed that because shareholders had approved the company’s subsequent acquisition by Alpha, Corwin applied to subject the directors’ pre-merger conduct to mere business judgement review. The Court rejected this argument, claiming that Corwin only applies to conduct ‘proximately related’ to the transaction approved by shareholder vote and does not act as a ‘massive eraser’ to cleanse director conduct prior to an acquisition.90

Finally, the Delaware Court of Chancery clarified that plaintiffs may still pursue DGCL Section 220 books and records demands notwithstanding the application of Corwin and the business judgement rule to the director conduct supporting the demand. Section 220 of the DGCL affords stockholders the right to inspect certain corporate books and records for ‘any proper purpose’.91 A stockholder may utilise a books-and-records demand as a valuable tool to investigate allegations of corporate wrongdoing. However, Delaware courts police use of such demands to avoid ‘fishing expeditions’ without a credible basis to infer there has
been any such wrongdoing, because such demands impose substantial costs and production burdens upon the subject company. 92 After the defendant argued that the application of Corwin to the fiduciary action forming the basis of the plaintiff's Section 220 demand precluded such demand, the Delaware Court of Chancery in Lavin v. West Corporation held that asserting a Corwin defence is not a bar to an otherwise properly asserted Section 220 demand. 93 The Court held that in the context of a summary proceeding for a Section 220 demand, which by definition precedes the fact-gathering essential to assessing such defences, merits-based defences are premature. 94 As such, plaintiffs wishing to challenge a merger that was approved by a fully informed, uncoerced vote of disinterested shareholders may still impose a substantial burden on defendant companies by demanding inspection of books and records, even if they are unlikely to succeed in post-closing litigation for damages on the basis of fiduciary duties claims due to Corwin.

After Delaware courts’ 2015 and 2016 decisions seemed to nearly sound the death knell for post-closing fiduciary duties actions challenging transactions that had been approved by disinterested shareholders, Saba Software, Liberty and Massey Energy suggest at least some continued vitality. One could argue that the facts in Saba Software and Liberty were extreme, with the former involving illiquid stock and financial fraud and the latter involving perhaps at least a whiff of impropriety with regard to side benefits granted to one of the target’s major (albeit non-controlling) shareholders. It remains to be seen how willing Delaware courts will be to find shareholder votes uninformed or coerced in other contexts to preclude the application of Corwin.

iii Shifts in merger litigation to federal courts

Increasing deference towards boards of directors, exemplified by the above-mentioned legal developments in appraisal and post-closing fiduciary duty actions for damages, have in part led to another trend of shifting litigation away from appraisal and fiduciary duty claims in Delaware in favour of challenges in federal courts through federal securities claims alleging proxy fraud under Rule 14a-9 under the Securities Act of 1933. 95 Also fuelling the migration to federal courts has been Delaware’s disdain towards disclosure-only settlements (see Section V.iii for a discussion of Delaware courts’ increasing disdain towards such settlements). In the first 10 months of 2017, only 9 per cent of challenges to US public M&A deals were brought in the Delaware Court of Chancery, as compared to 39 per cent in 2016. Of the cases that settled, in 2009, 0 per cent were settled in federal courts. By 2017, that figure had risen to 44 per cent, comprised entirely of disclosure settlements. 96

The Supreme Court of the United States held in March 2018 that plaintiffs may bring class actions under federal securities laws in state court, even where such lawsuits are comprised entirely of federal securities law claims, and companies may not then remove such

93 Lavin v. West Corporation, WL 6728702 (Del. Ch. 29 Dec 2017).
94 Id.
95 Securities Act of 1933 (see footnote 28); False or Misleading Statements, 17 CFR 240.14a-9 (2000).
96 All percentages are based on a sample comprised of transactions for which (1) the target is a US entity publicly traded on the NYSE, (2) the transaction size is US$100 million or more, (3) the offer price is at least US$5 per share, (4) a merger agreement is signed and disclosed in an SEC filing and (5) the transaction was completed as of 20 October 2017. Matthew D Cain, Jill E Fisch, Steven Davidoff Solomon and Randall S Thomas, ‘The Shifting Tides of Merger Litigation’, University of Pennsylvania Law School, 2018.
claims to federal court. However, companies may circumvent that outcome contractually, at least for now. Supporting the shift towards pursuit of disclosure settlements in federal courts has been companies’ use of forum selection clauses in the companies’ by-laws, selecting federal district courts as the exclusive forum for asserting claims under the Securities Act. While Delaware companies happily subject themselves to state forums for substantive claims such as fiduciary challenges, in light of increasingly deferential outcomes described above, they have looked to federal courts for relief from the harsh scrutiny towards disclosure-only settlements to resolve Securities Act claims. However, in late December 2017, a class action complaint by stockholders of Blue Apron Holdings, Inc, Stitch Fix, Inc, and Roku, Inc (three of several companies that recently included forum selection by-laws requiring that federal securities cases be heard in federal district court), was filed in the Delaware Court of Chancery challenging such provisions under the DGCL. The case is ongoing, but should the plaintiffs prevail, their victory could significantly undermine the shift in litigation from Delaware to federal courts.

IV FOREIGN INVOLVEMENT IN M&A TRANSACTIONS

While 2016 saw US inbound M&A deal value reach an all-time high of US$519.1 billion, there was a marked decline in 2017. US inbound cross-border deal value decreased by 27 per cent in 2017, driven largely by drastic shifts in Chinese-outbound M&A, particularly for US targets. In fact, China’s outbound M&A decreased by 35 per cent in 2017, after it had been a key driver of lively US inbound cross-border M&A in 2016. In 2017, acquisitions of US targets by Chinese buyers fell by 46 per cent. This shift was driven in large part by risks pertaining to deal certainty due to potential failures to receive regulatory approvals from Chinese regulators or the CFIUS, which parties typically address through the use of reverse break-up fees.

i Acquisition inversions and earnings stripping

Acquisition inversions, whereby US corporations reincorporate in low-tax jurisdictions via cross-border M&A (hereinafter, inversions), have in previous years been fundamental to foreign involvement in US M&A. Historically, US tax rates were some of the highest globally, and US-based companies consistently looked for ways to shield their international earnings from those rates. In the past, US-based companies could accomplish this by reincorporating in a foreign jurisdiction, or by moving to a country in which it was already doing a substantial amount of business in order to benefit from that country’s lower tax rate. For this to work,

100 ‘Public M&A Year in Review: Trends and Highlights from 2017’ (see footnote 6).
101 Id.
25 per cent of the company’s sales, assets and employees had to be domiciled in the new jurisdiction.\textsuperscript{104} This was a difficult burden for most companies to meet and, as a result, inversions became popular.\textsuperscript{105} Under the rules governing inversions, a foreign target company and acquirer can be combined under a new holding company formed under the laws of a lower-tax foreign jurisdiction, whether or not it is the target company’s jurisdiction of organisation, if less than 80 per cent of the combined entity’s stock is owned by the former shareholders of the US company.\textsuperscript{106} By 2015, acquisition inversions accounted for 66 per cent of all proposed US outbound deals, up from 1 per cent in 2011.\textsuperscript{107}

Recent statutory and regulatory changes, however, have made inversion transactions substantially less attractive. In April 2016, the US$152 billion merger of Pfizer Inc with Allergan Plc was abandoned after the Internal Revenue Service (IRS) issued regulations that formalised Notices 2014-52 (issued in late 2014) and 2015-79 (issued in late 2015) and targeted serial inverters and post-inversion asset dilution.\textsuperscript{108} Then, in October 2016, the US Treasury finalised regulations to combat an important tax-reduction strategy known as earnings stripping, which involves having a US subsidiary of an inverted company issue intercompany debt to its parent.\textsuperscript{109} The interest payments create deductions for the US subsidiary, thereby shielding its profits from US tax, and transfer cash to the inverted parent in a manner exempt from withholding tax. The new regulations eliminate the benefits associated with earning stripping by reclassifying this intercompany debt as equity.\textsuperscript{110} In January 2017, the IRS issued rules governing inversion transactions that finalised a series of proposed and temporary rules issued in 2015 and 2016 and made it more difficult for transactions to reap the benefits of inversions.

In December 2017, massive US tax reform through the passage of the Tax Cuts and Jobs Act of 2017 (TCJA) further undercut the advantages of inversions and earnings stripping.\textsuperscript{111} On the one hand, the lower corporate tax and the dividend exemption reduced the tax benefits associated with inverting by excluding foreign earnings from US tax or taxing them at a lower rate. On the other hand, the legislation contains a number of provisions that specifically penalise inverters. These include further limitations on the deductibility of interest expense, increased transition taxes and the BEAT tax (as defined below), a minimum tax that is calculated without taking into account certain deductions from related party transactions (such as earnings stripping) (see Section VIII for a detailed discussion of the TCJA and its implications for US M&A).


\textsuperscript{105} Id.


\textsuperscript{109} ‘The U.S. is Cracking Down on Corporate Tax Inversions’, Reuters, 14 October 2016, fortune.com/2016/10/14/tax-inversions-regulations/.

\textsuperscript{110} Id.

**CFIUS review**

The CFIUS plays a key gatekeeping role when it comes to foreign involvement in US M&A. In 2017 and early 2018, CFIUS review has presented an increasingly significant obstacle, as the CFIUS continues to interpret its jurisdiction broadly. Evidence suggests the CFIUS received more than 235 filings in 2017, compared to 172 in 2016 and 143 in 2015.\(^{112}\) The CFIUS has interpreted its jurisdiction to include deals between non-US companies with a US nexus. For example, in 2016, the proposed acquisition of Lumileds by a Chinese consortium from Philips NV (a Dutch company) was abandoned by the parties at the CFIUS’ request. The CFIUS also requested that the parties abandon the acquisition of Aixtron SE (a German company) by a Chinese investor because of national security concerns. The parties refused to abandon the deal and opted to submit the matter to President Obama for review, which led to the first-ever presidential order proactively blocking an acquisition. Additionally, the parties abandoned the sale of Global Communications Semiconductors, LLC to San’an Optoelectronics Co, Ltd (a Chinese semiconductor company) because of CFIUS concerns. In September 2017, President Trump issued an executive order to block the acquisition of Lattice Semiconductor Corporation by Chinese private equity fund Canyon Bridge Capital Partners (Canyon Bridge).\(^{113}\) Finally, on 12 March 2018, President Trump again stepped in with an executive order following CFIUS review, blocking Broadcom’s US$128.6 billion proposed acquisition of Qualcomm on the basis that it threatened US national security.\(^{114}\) Though Broadcom is a Singapore-based company, the order came amid a period of intense technological competition between the United States and China, and the CFIUS expressed concerns that Broadcom would undergo its typical cost-cutting measures to stymie research and development and therefore undermine Qualcomm’s ability to compete with Chinese and other foreign rivals in the domain of wireless technology.\(^{115}\)

The CFIUS’ recent history of enforcement demonstrates a focus on national security concerns, and increasingly general competition concerns, implicated in the context of Chinese buyers. In addition to Canyon Bridge, the Trump administration opposed takeovers of US targets by Hubei Xinyan Equity Investment, Ant Financial Services Group, China Energy Company Limited, Zhongwang USA, NavInfo, HNA Group and TCL Industries, with a total aggregate deal value of approximately US$5.08 billion, between February 2017 and March 2018.\(^{116}\) Failure to obtain regulatory approvals can trigger break-up fees for acquirers, and the rise in CFIUS reviews could push more M&A parties to address it in termination fee

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\(^{113}\) Id.


provisions. In particular, Chinese buyers may have to offer a higher bid to overcome a perceived increased CFIUS risk.117 Parties may also want to consider carving off any sensitive portions of the US businesses, which recently has included, among others, finance and technology.118

V SIGNIFICANT TRANSACTIONS, KEY TRENDS AND HOT INDUSTRIES

In 2017, the leading industry sector in the United States on the basis of announced deal value data provided by Thomson Reuters was the high technology (high-tech) sector.119 Deal value in the high-tech sector reached US$240.2 billion in 2017, which was a 16.9 per cent market share.120 The energy and power sector fell from first to second with US$228.6 billion (16.1 per cent) and healthcare was third with US$211.4 billion (14.9 per cent).121 The top five deals signed in 2017 for a US target were Broadcom’s proposed acquisition of Qualcomm (US$128.6 billion), CVS Health Corporation’s acquisition of Aetna Inc (US$67.8 billion), The Walt Disney Company’s acquisition of Twenty-First Century Fox, Inc (US$67.7 billion), British American Tobacco plc’s acquisition of Reynolds American Inc (US$49.0 billion) and Brookfield Property Partners LP’s acquisition of GGP Inc.122

i High technology

High tech’s leading position among other US industry sectors in 2017 was largely attributable to the announcement of the industry’s largest-ever deal – Broadcom’s US$128.6 billion proposed acquisition of Qualcomm – although the deal was subsequently blocked in 2018 by the Trump administration. Looking beyond that mega-deal, technology has become the number one strategic driver of M&A transactions globally.123 In Deloitte’s 2017 annual survey of global dealmakers, 19 per cent of respondents cited technology acquisition as the principal motivation for pursuing acquisitions, and an additional 16 per cent of respondents cited building out a digital platform.124 One significant trend driving high-tech M&A is the increased use of digital technologies outside the technology sector.125 From 2013 to 2016, this phenomenon, known as ‘convergence’, skyrocketed in terms of deal value from US$13 billion to US$128 billion. In one notable 2017 example, Wal-Mart Stores, Inc acquired the e-commerce business of Bonobos, Inc (Bonobos), in part to capitalise on

120 Id.
121 Id.
124 Id.
Bonobos’ platform rather than develop one in-house.126 Another notable combination of a technology company with a company outside the sector was the acquisition by Amazon.com, Inc (Amazon) of Whole Foods Market Inc (Whole Foods).127

Another key trend driving technology acquisitions is the expansion of technology companies into new operating segments.128 In part due to these trends, many expect that 2018 will see a high level of US technology M&A activity.129 However, the potential for increasing activity should be considered alongside the threat posed by trends in CFIUS review, including the CFIUS’ focus on competition in technological development and on cybersecurity threats, particularly with regard to Chinese buyers.130

ii Shareholder activism and engagement
Like 2016, 2017 was a busy year for shareholder activists in the United States, and shareholder activism is becoming increasingly concentrated among established activist players. In 2017, there were 341 total activist campaigns announced against US companies (excluding campaigns focused other than on value creation, public short (bear raid), pursuit of board seats, and director and officer removal).131 There were 78 proxy fights in 2017, down 26 per cent from 105 in 2016, 71 of which were for board seats, down 30 per cent from 101 in 2016.132 The year 2017 saw a resurgence in activity from frequent activists, which also attracted the most capital, while the formation of new activist funds declined.133 Another notable trend in 2017 was the focus by such activists on large-cap companies such as Proctor & Gamble Co (P&G), GE, General Motors Company, Nestlé SA and Automatic Data Processing, Inc.134 Globally, 21 per cent of all activist campaigns focused on large-cap companies, increasing from approximately 19 per cent in 2016.135 Activists also went after less troubled companies in 2017.136 Nelson Peltz’ fight against P&G was the most expensive contest ever, as low end estimates suggest the two sides spent at least US$60 million and several weeks campaigning, and ended in a draw.137 P&G was the largest-ever target of a proxy fight at the time, with a market value of US$223 billion.138
In connection with US M&A, activists continue to play a key role by arguing for alternatives to proposed mergers or by demanding a higher price, undermining target shareholder approval of a proposed transaction. Activism and M&A often overlap. When activist investors buy up company stock and engage in various campaigns, they produce disruption and uncertainty, which acquirers can leverage to garner support for the transaction, as occurred at Buffalo Wild Wings, Inc, BroadSoft, Inc, Parexel International Corp and Whole Foods. Activists may also advocate in favour of a sale of the target company in order to benefit from short-term increases in value. So-called pro-M&A activism was prominent in 2017. One high-profile example was the role of activist investor Jana Partners LLC in Amazon’s US$13.7 billion acquisition of Whole Foods in April 2017. As institutional investors continue to concentrate ownership, activist investors benefit from having to convince fewer fellow investors to pursue their agenda. BlackRock Inc (BlackRock), State Street Corporation and Vanguard Group (Vanguard) owned approximately 18.6 per cent of the S&P 500 as of March 2018, compared to 14.7 per cent in 2013, whereas retail holders held less than 30 per cent.

With the rise in shareholder activism, companies have increased their level of shareholder engagement with both activists and institutional investors. In 2015, 56 per cent of S&P 500 companies disclosed information regarding their shareholder engagement activities in their SEC filings, compared to only 6 per cent in 2010. According to PricewaterhouseCoopers LLP’s annual survey of US corporate directors, 42 per cent of directors of US companies say someone on their board engaged directly with shareholders in the past year, suggesting that what could be the next chapter in shareholder engagement will occur at the board level rather than through top executives or investor relations teams. Since 2015, a number of large institutional investors have turned their attention to the potential consequences of board reactions to shareholder activism for long-term value. For example, consistent with previous years, in his most recent annual letter to fellow chief executive officers (CEOs), BlackRock’s Larry Fink urged companies to create a strategic framework for long-term value creation to serve as a counterargument to activist demands for actions with short-term benefits. Additionally, Vanguard’s letters often highlight the importance of engaging with long-term investors.

142 ‘Review and Analysis of 2017 U.S. Shareholder Activism’ (see footnote 139).
143 ‘M&A Update: Highlights from 2015 and Implications for 2016’ (see footnote 48).
144 Id.
148 ‘2016 U.S. Shareholder Activism Review and Analysis’ (see footnote 146).
Activist investors have been able to extend their reach this far due to the steady erosion of structural defences. However, while activist investors have enjoyed increased activity and success in resolving their demands, activist fund performance and market reaction have been down in recent years. The Activist Insight Index, compiled from more than 30 activist funds operating in different markets, was on a three-year losing streak against the S&P 500 Index from 2013 to 2015. While 2016 reversed this trend, giving activist investors hope for 2017, the Activist Insight Index returned 10.7 per cent net of fees as of the end of the third quarter of 2017, falling short of the S&P 500 Index by 357 basis points. Moreover, the average annualised return from stock owned by activist shareholders was unimpressive at 13.2 per cent in 2017, compared to the S&P 500 Index, which produced a 21.8 per cent total return. It remains to be seen whether activist funds will again reverse the trend in performance against the S&P 500 in 2018.

iii Disclosure-only settlements

In 2014, 93 per cent of US M&A deals over US$100 million resulted in shareholder litigation, with the first lawsuit in a challenged deal being filed an average of 14 days after announcement of the deal and 59 per cent of all such litigation being resolved before deal closing. Of the litigation resolved before closing, close to 90 per cent settled, with the remainder being withdrawn or dismissed. Of the 78 settlements reached in 2014, only six settlements, or 8 per cent, provided monetary consideration to shareholders, nearly 80 per cent only provided disclosure and 9 per cent included changes to deal protection provisions in the merger agreements. However, after years of building criticism of routine disclosure-only settlements within the Delaware Court of Chancery, the Court was particularly critical in 2015, resulting in the rejection of two such proposed settlements in key cases: Acevedo v. Aeroflex Holding Corporation and In re Aruba Networks, Inc Stockholder Litigation. Similarly, in its January 2016 decision in In re Trulia, Inc Stockholder Litigation, the Delaware Court of Chancery reaffirmed its disfavour of disclosure-only settlements in class action M&A litigation on the basis that such settlements fail to create meaningful value for the class while providing defendants with broad releases.

Such rulings have led to fewer M&A challenges in Delaware and increasing challenges in federal courts under federal securities laws (see Section III.ii for further discussion of trends in litigation away from Delaware courts due in part to Trulia). However, after Trulia, the Seventh Circuit Court of Appeals overturned a lower court order approving a disclosure-only settlement using the same rationale as Trulia. Judge Posner’s endorsement

150 Id.
151 Id.
153 Id.
154 Id.
156 In re Trulia, Inc Stockholder Litig, 129 A.3d 884, 895 (Del. Ch. 22 Jan 2016).
of Trulia is binding on all federal courts in the Seventh Circuit and is likely to convince other federal courts outside the Seventh Circuit to apply Trulia as well.\textsuperscript{158} It remains to be seen whether other federal circuits will follow suit, but this development does not bode well for litigants who wish to use forum shopping to find a court that will rubber stamp a disclosure-only settlement.\textsuperscript{159}

\section*{VI \ Force M&A: MAIN SOURCES AND DEVELOPMENTS}

In US financing markets, 2008, 2009 and 2010 were difficult years, plagued by tumult and recession.\textsuperscript{160} The years from 2011 to 2015 were characterised by recovery and growth, with record-setting financing activity and ever-lower yields.\textsuperscript{161} However, 2016 marked a turning point as interest rates experienced a sustained rise after hitting record lows in the first half of the year.\textsuperscript{162} For the sixth consecutive year, investment-grade corporate bond deal values reached record highs.\textsuperscript{163} In 2017, borrowers continued to fare well, with low corporate debt yields, record highs for gross issuance of syndicated loans and investment grade bonds and a strong year for high-yield bond issuance.\textsuperscript{164} In fact, annual proceeds from US investment grade debt issuance totalled US$1.3 trillion from 1,167 deals in 2017, remaining steady in value but increasing by 4.9 per cent in volume from 2016 and representing the highest volume on record.\textsuperscript{165} US high-yield corporate bond deal values reached US$281.4 billion (up 22.9 per cent from 2016).\textsuperscript{166} US investment grade deal value was driven by several mega-deals, with seven having a principal amount over US$10 billion, down from 10 in 2016.\textsuperscript{167} The largest such deal was AT&T’s US$22.5 billion bond issuance, which was the third-largest corporate bond deal on record.\textsuperscript{168} The bond proceeds were used to fund the proposed acquisition of Time Warner.\textsuperscript{169}

Several other notable deals demonstrated that borrowers were able to achieve successful results at various credit levels in 2017. Permanent financings and major financing commitments included:

- CenturyLink, Inc’s procurement of approximately US$10 billion of acquisition financing, including a US$6 billion term loan B, to acquire Level 3 Communications, Inc;
Abbott Laboratories’ procurement of US$17.2 billion of financing commitments to acquire St Jude Medical, Inc and a US$2 billion term loan A to acquire Alere Inc; United Technology Corporation’s procurement of US$6.5 billion of financing commitments to acquire Rockwell Collins, Inc; Thermo Fisher Scientific Inc’s procurement of US$7.3 billion of financing commitments to acquire Patheon NV; Amazon’s procurement of US$13.7 billion of financing commitments to acquire Whole Foods; and Penn National Gaming, Inc’s procurement of US$2 billion of financing commitments to acquire Pinnacle Entertainment, Inc.\(^{170}\)

In light of strong financial markets, one trend to watch for in 2018 will be potential reliance by investment grade borrowers on revolvers or best-efforts financings to fund acquisitions, relying less on expensive bridge commitments.\(^{171}\)

Overall, US-syndicated lending reached an all-time high of US$2.5 trillion in 2017, fuelled by year-end merger activity and pervasive refinancing.\(^{172}\) Leveraged lending reached US$1.4 trillion, a new high for the market.\(^{173}\) M&A syndicated lending reached US$537 billion in 2017, the second-highest on record behind 2015.\(^{174}\) In 2017, there were 79 leveraged acquisitions of US reporting companies valued at US$100 million or more, compared to 88 in 2016, but the percentages of overall M&A activity were steadier at 46 per cent and 47 per cent in 2017 and 2016, respectively.\(^{175}\) Financing of private equity buyouts reached a 10-year high of US$126 billion.\(^{176}\) Some arrangers do not believe the regulatory framework and leverage-capping have been major deterrents to leveraged M&A financings.\(^{177}\) Average debt to EBITDA multiples for large US LBO transactions increased in 2017, climbing close to six times.\(^{178}\) Of LBOs completed in 2017, 72 per cent were levered six times or more, compared to 62 per cent in 2016.\(^{179}\) Globally, leverage on middle market institutional deals increased to 5.51 times debt to EBITDA, up 10 per cent from 4.95 times in 2016.\(^{180}\)

\(^{170}\) ‘Wachtell Lipton Looks at Acquisition Financing in 2017 and the Year Ahead’ (see footnote 164).

\(^{171}\) Id.

\(^{172}\) ‘U.S. Leveraged Lending Sags, High-Grade Rises In First Quarter’ (see footnote 165).


\(^{174}\) Id.

\(^{175}\) ‘Public M&A Year in Review: Trends and Highlights from 2017’ (see footnote 6).

\(^{176}\) ‘2018 Annual Forward Through the Fog: Volume 24’ (see footnote 173).

\(^{177}\) ‘U.S. Leveraged Lending up 12% to USUS$875bn in 2016; Investment Grade flat at USUS$861bn’, Loan Connector, Thomson Reuters, 29 December 2016.


\(^{179}\) ‘2018 Annual Forward Through the Fog: Volume 24’ (see footnote 173).

Consistent with US M&A overall, US private equity deal activity went up in volume but down in value in 2017. There were 4,053 consummated US private equity transactions in 2017, valued at US$538.2 billion, compared to 3,538 transactions valued at US$649 billion in 2016. The median debt percentage in private equity-led buyouts in 2017 was 53 per cent, up approximately 3 per cent from 2016. The amount of dry powder that private equity firms were able to obtain and accumulate continued to increase, driving high demand. Globally, private equity dry powder climbed to approximately US$1.7 trillion in 2017, up from US$1.5 trillion in 2016. Furthermore, the number of private equity-backed US companies continued to increase, reaching a total of 7,250 in 2017. Increases in the number of private equity-funded companies in the United States has outpaced economic growth over the past few years by a significant margin. As such, private equity firms continue to cite a lack of quality targets, or low supply. This, coupled with high demand resulting from more dry powder and more private equity players, has driven a high-price environment. As a result of competition among financial sponsors, the median EV/EBITDA multiple in private equity transactions was 10.5 times in 2017, holding steady from 2016. Strategic buyers have been able to better compete with private equity buyers because of cheap debt and a willingness to pay a higher premium as a result of longer term strategies and the desire for synergies. In 2017, 81 per cent of acquisitions of US reporting companies valued at over US$100 million involved strategic buyers only and an additional 2 per cent involved a collaboration between financial and strategic buyers, compared to 80 per cent and 0.5 per cent in 2016, respectively.

As discussed below, US tax reform will have a significant impact on M&A financing moving forward. Its limitation on interest deductibility, together with the reduction in the corporate tax rate and changes to the international tax system, will tend to free up cash for acquisitions while reducing the tax benefit of interest deductions (see Section VIII for a detailed discussion of the TCJA and its implications for US M&A). However, it remains to be seen how the TCJA’s various provisions will interact to affect the dynamics of acquisition finance in 2018.

VII EMPLOYMENT LAW

At its best, executive compensation can incentivise corporate performance by aligning the interests of shareholders and management. At its worst, as seen in the bankruptcy of Enron Corporation, executives’ pay can come at the direct expense of a company’s shareholders.

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182 ‘2017 Annual US PE Breakdown’ (see footnote 181).


184 ‘2017 Annual US PE Breakdown’ (see footnote 181).


186 ‘2017 Annual US PE Breakdown’ (see footnote 181).

187 Id.

188 Id.

189 ‘Public M&A Year in Review: Trends and Highlights from 2017’ (see footnote 6).

190 ‘Mergers and Acquisitions: 2018 With a Brief Look Back’ (see footnote 125).
Executive compensation has come under increased scrutiny from all directions – institutional and retail investors, proxy advisers, courts and legislators – in efforts to minimise the agency problem that arises when directors and management are permitted to set their own compensation. As certain management-friendly pay practices are phased out in response to shareholder activism and proxy adviser recommendations, companies are crafting increasingly complex pay-for-performance programmes to better respond to shareholder and institutional investor concerns.

i Shareholder engagement and institutional adviser influence
In 2017, shareholders continued to remain engaged with executive compensation issues through say-on-pay (SOP) advisory votes and the approval of both new and amended equity plans. Although SOP votes are non-binding, public companies are generally concerned with their outcomes given the ability of SOP votes to influence director elections. In 2017, only 35 Russell 3000 companies ‘failed’ SOP votes, which is the lowest number of ‘failed’ SOP votes since 2011. The 2017 failure rate marks a continued decline from the number of ‘failed’ SOP votes in 2016 and a sharp decline from the number of ‘failed’ SOP votes in the three years preceding 2016.

Proxy advisory services such as Institutional Shareholder Services (ISS) and Glass, Lewis & Co continue to play a role in the increasingly complex landscape of executive compensation and equity programmes. However, data suggests that the connection between an ‘against’ recommendation from ISS and the shareholder vote to approve a company’s compensation programme is tenuous. While just 1.5 per cent of companies ‘failed’ SOP votes in 2017, ISS issued ‘against’ recommendations on approximately 12 per cent of SOP votes in 2017, the same percentage of ‘against’ recommendations that ISS issued in 2016 and 2015. Therefore, only 12.5 per cent of companies that received ‘against’ recommendations from ISS failed their SOP vote in 2017. By comparison, 14 per cent of companies that received ‘against’ recommendations from ISS ‘failed’ their SOP vote in 2016.

Although the extent of ISS and other proxy advisers’ influence on the corporate governance landscape is unclear, data shows that ISS recommendations do carry some weight.

195 ‘2017 Say on Pay Results – End of Year Report’ (see footnote 193).
196 Id.

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In 2017, ISS recommended ‘against’ SOP votes at 12 per cent of the companies it assessed; shareholder support was approximately 26 per cent lower at those companies.\textsuperscript{198} However, proxy advisers’ influence is not absolute, and not all US publicly traded companies engage with proxy advisers. Many of the major institutional investors, including BlackRock and Vanguard, maintain in-house proxy analysis and governance groups to inform their own voting decisions in lieu of engaging proxy advisory firms.\textsuperscript{199}

Criticism of proxy advisers has also increased in recent years. Some critics have argued that proxy advisers serve a quasi-governmental role without the necessary regulatory safeguards.\textsuperscript{200} For example, lawmakers have argued that ISS is inherently conflicted because it provides both proxy voting recommendations to shareholders and consulting services to public companies.\textsuperscript{201} As a result, in October 2017, H.R. 4015, the Corporate Governance Reform and Transparency Act of 2017, was introduced with the purpose of regulating proxy advisory firms.\textsuperscript{202} Under H.R. 4015, proxy advisers would be required to register with the Securities and Exchange Commission, disclose any potential or actual conflicts of interest relating to the provision of proxy advisory services and provide an opportunity for companies to comment on draft recommendations. H.R. 4015 passed the House of Representatives and was referred to the Senate on 21 December 2017.\textsuperscript{203}

\section*{Golden parachutes and executive severance developments}

ISS has singled out certain change in control (CIC) benefits historically provided to executives in connection with M&A transactions (such as ‘single-trigger’ acceleration of equity-based awards and gross-ups of the excise tax imposed under Section 280G of the US Internal Revenue Code of 1986 (the Code)) as problematic.\textsuperscript{204} ISS’ published policy guidance states that it is ‘likely’ to render an ‘against’ or ‘withhold’ vote recommendation when single-trigger acceleration or a Section 280G gross-up is included in a new CIC agreement.\textsuperscript{205} In addition, ISS considers whether a company’s plans and agreements that were in place prior to a transaction contain excise tax gross-up and single-trigger equity acceleration provisions in determining its recommendation on ‘say on golden parachute’ (SOGP) proposals.\textsuperscript{206}

Given the range of shareholder responses to SOGP proposals and pressure from proxy advisers to limit excessive compensation package strategies, it is likely that companies

\begin{footnotesize}
\begin{itemize}
\item\textsuperscript{198} Id.
\item\textsuperscript{200} ‘A Long/Short Incentive Scheme for Proxy Advisory Firms, Asaf Eckstein and Sharon Hannes’, \textit{Wake Forest L. Rev.} (forthcoming 2018).
\item\textsuperscript{201} Id.; see also ‘Examining the Market Power and Impact of Proxy Advisory Firms: Hearing Before the Subcommittee on Capital Markets & Government Sponsored Enterprises of the Committee on Financial Services’, 113th Cong. 2 (2013), \url{https://financialservices.house.gov/uploadedfiles/113-27.pdf}.
\item\textsuperscript{203} Id.
\item\textsuperscript{205} Id.
\item\textsuperscript{206} Id.
\end{itemize}
\end{footnotesize}
will continue to review and restructure CIC benefits and may shift increasingly towards a transaction-based gross-up model. 207 Although many companies have eliminated Section 280G gross-ups from their CIC and employment agreements to avoid negative recommendations from proxy advisory firms, recent data suggests that companies are increasingly providing for Section 280G gross-ups in the context of acquisitions. 208 However, regardless of whether golden parachute payments are provided under the terms of companies’ existing benefit plans or are granted in connection with a transaction, shareholder dissatisfaction with outsized golden parachute payments continues to increase. At the same time that the total number of M&A transactions increased in 2017, average CEO golden parachute payments increased by US$3.8 million and average shareholder support for SOGP proposals fell to an all-time low of 79 per cent. 209

iii Pay-ratio rule
The SEC adopted the final rule for Section 953(b) of the Dodd–Frank Wall Street Reform and Consumer Protection Act, referred to as the pay-ratio rule, in 2017. 210 Beginning on 1 January 2018, all public companies are required to disclose in the proxy statement the median annual total compensation of all company employees, the annual total compensation of the CEO and the ratio of the two amounts. Additional disclosure is required about the selection of the median employee, the calculations involved in determining total compensation and narratives discussing the ratio.

As of 11 April 2018, 1,042 public companies have reported their pay ratio. Of those, 647 (62 per cent) have a pay ratio below 100:1. The median ratio of companies in the S&P 500 (154:1) is approximately twice the median ratio of companies in the Russell 3000 (76:1). 211 The total annual compensation of the median employee of companies in the S&P 500 is US$70,000, compared to US$61,000 for companies in the Russell 3000. 212 Large companies and companies with many seasonal or part-time employees are more likely to have high pay ratios. 213 Furthermore, company revenue, a primary determinant of CEO

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207 Id.
209 ‘2017: Proxy Season Review Compensation’, Sydney Carlock et al., 7 September 2017, https://gx.isscorporatesolutions.com/docViewer/ViewDoc/3237. The number of failed SOGP votes totalled 15 per cent in 2017, during which time the median CEO golden parachute payment equalled US$9 million. By comparison, the total number of failed SOGP votes was only 7 per cent in 2016, during which time the median CEO golden parachute payment equalled US$5.2 million. Id.
212 Id.
pay, often has a direct correlation with the pay ratio. As more companies disclose pay ratios for the first time in 2018, the compensation of companies’ CEOs and median employees will continue to be in the spotlight.

iv Director compensation

In recent years, director compensation has come under scrutiny after a series of shareholder lawsuits alleging excessive director pay. Until recently, the Delaware Court of Chancery reasoned that potential conflicts of interest that occur when directors set their own compensation are nonetheless subject to ‘business judgement’ deference whereby stockholders approve a plan that contains ‘meaningful limits’ on director compensation.

However, the Delaware Supreme Court held in In re Investors Bancorp, Inc Stockholder Litigation in December 2017 that certain awards to directors are subject to ‘entire fairness’ review rather than ‘business judgement’ deference. Following Investors Bancorp, the business judgement rule will apply to judicial review of director compensation in Delaware only when (1) directors submit specific compensation decisions for approval by fully informed and disinterested stockholders or (2) the stockholder-approved plan is self-executing and does not permit director discretion. Otherwise, directors must prove that their compensation is ‘entirely fair’ to the company, which may require the support of peer-group data and analysis by independent consultants. However, if a shareholder-approved plan limit is reasonable, and the directors receive board approval to make grants to themselves within that limit, then it is possible that the board’s decision will continue to receive business judgement deference. Therefore, maintaining restrictive plan share limits that minimise director discretion will reduce the threat of shareholder litigation and maximise the chances of receiving business judgement review.

Notably, ISS has recently turned its focus to director compensation and revised its proxy voting guidelines for 2017 and 2018 to specifically address non-employee director compensation. Under its 2017 and 2018 guidelines, ISS will make recommendations on

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214 ‘2018 Say on Pay and Proxy Results’ (see footnote 211).
216 Seinfeld v. Slager, at *40.
218 Id. at 3.
221 Id.
a case-by-case basis and take into consideration qualitative factors, such as the existence of a meaningful limit on director compensation and ownership as well as ownership and holding requirements for equity awards.223

v Code Section 162(m) and Code Section 83(i)

The TCJA made sweeping changes to Section 162(m) of the Code.224 Previously, a public company was limited to a US$1 million annual deduction for compensation paid to each of the CEO and the next three highest-paid executive officers (excluding the chief financial officer (CFO)) (collectively, ‘covered employees’) but was permitted to deduct compensation greater than US$1 million paid to any ‘covered employee’ to the extent that such compensation constituted performance-based compensation. The TCJA expanded the limitation on deductibility by including compensation paid to the CFO and eliminating the performance-based compensation exception. Furthermore, under the TCJA, an individual previously classified as a ‘covered employee’ will forever retain ‘covered employee’ status, meaning that such individual’s compensation will always be subject to the deductibility limits of Section 162(m).

The TCJA provides transitional relief under Section 162(m) for any ‘written binding contract’ that was in existence on 2 November 2017, provided that such arrangement was not ‘modified in any material respect’ after 2 November 2017. Performance-based compensation granted to ‘covered employees’ under such ‘grandfathered’ plans will remain deductible within the applicable US$1 million limit. However, the Department of the Treasury has yet to issue guidance on the meaning of ‘material modification’ under the TCJA. Based on prior guidance under the old Section 162(m), it is likely that a plan will be deemed to be ‘materially modified’ as of the date that it could be unilaterally amended or terminated by the employer, or as of the date of renewal if either the employer or the employee can elect not to renew the contract.

In addition, the new Code Section 83(i) under the TCJA permits certain deferral elections for stock options and restricted stock units exercised or settled after 31 December 2017. Under Section 83(i), a ‘qualified employee’ may elect to defer the recognition of taxable income under Section 83(a) for up to five years.225 A ‘qualified employee’ excludes 1 per cent owners of the corporation granting the equity awards, the CEO, the CFO and the four highest compensated officers for any of the preceding 10 years. The deferral election under Section 83(i) is limited to private companies with a written plan covering at least 80 per cent of full-time employees who are granted stock options or restricted stock units. Section 83(i) is likely to promote broad-based employee stock ownership at private companies and to mitigate the liquidity problem faced by employees of private companies upon the exercise of stock options or settlement of restricted stock units.


224 Tax Cuts and Jobs Act of 2017 (see footnote 111).

Looking ahead

High levels of shareholder and proxy adviser involvement with SOP and SOGP votes indicate that boards of directors are increasingly restricted in their ability to set executives’ compensation. In addition, Delaware directors will now have their own compensation analysed under the more rigorous standard of In re Investors Bancorp, which aims to mitigate the conflicts of interest that arise when directors set their own pay. Companies should continue to review their compensation and equity programmes (including those for directors) and carefully document compensation decisions, particularly in the context of acquisitions, given the continuing impact of the SOP vote and the enhanced focus on director compensation.

Shareholders are also likely to continue exploring other avenues for influencing the pay practices of companies that are unresponsive to SOP votes and SOGP votes. Thus far, director re-election generally has been affected but not swayed by ‘failed’ SOP votes, although shareholders increasingly expressed frustration about compensation practices by voting against the re-election of directors, particularly those involved in compensation decisions.226 The practices identified as most troublesome by ISS and other proxy advisory firms are likely to continue to disappear, and compensation, even with respect to perquisites and other fringe benefits, is expected to continue to shift away from cash-to-equity and performance-based awards under increasingly complex pay-for-performance programmes. It is unclear what effect the migration to equity and performance-based pay, coupled with the elimination of the performance-based compensation exception under Section 162(m) of the Code, will have on future M&A transactions. Given the market uncertainty surrounding recent changes in law and practice, investors should engage with management and boards of directors in the early stages of the acquisition process to maximise both executive retention and shareholder value.

VIII TAX LAW

On 22 December 2017, Congress passed the TCJA, a piece of transformational tax legislation that significantly affects the US and cross-border M&A landscape. Certain aspects of the TCJA, such as the new 21 per cent corporate tax rate and the immediate expensing of investment in tangible property, have rightly received attention as having a clear effect on investment. But many of the TCJA’s changes affect the structuring and negotiation of M&A transactions in unexpected ways. We discuss the critical provisions of the TCJA below, focusing on its changes to the international tax system. We also note the uncertainty surrounding future regulatory guidance and potential tax reform in the coming year.

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i  The expected – lower rates, limits on interest deductibility and other changes

Lower corporate rate

The headline feature of the TCJA is the permanent reduction in the corporate tax rate to 21 per cent (from 35 per cent) for taxable years beginning after 31 December 2017. In instituting the lower rate, described by President Trump as the ‘probably the biggest factor’ in the TCJA, Congress sought to increase the competitiveness of US corporations by easing their tax burden. In terms of M&A, lower taxes means higher liquidity for potential acquirers, and US targets may be more attractive given the lower rate’s effect on after-tax earnings. It also reduces the tax cost associated with divestitures in connection with larger acquisitions (for instance, when an acquirer purchases the stock of a target and thereafter causes it to dispose of unwanted assets). These types of transactions should become more common given the lower corporate tax rate.

Full expensing

Under pre-TCJA law, taxpayers could immediately deduct some of the cost of certain purchased tangible property. The amount of the deduction varied (it was 50 per cent in 2017) but it was generally limited to ‘new’ property in the hands of the taxpayer. The TCJA significantly extends these rules to allow taxpayers to deduct 100 per cent of, or ‘fully expense’, the cost of such purchased tangible property, without regard to whether it is new or used. The 100 per cent deduction is phased out over a five-year period beginning in 2023. These new rules are essentially a matter of timing: relative to pre-TCJA law, taxes will be lower in earlier years and higher in later years.

Nevertheless, full expensing is a powerful incentive for taxpayers to invest in tangible property. M&A transactions, in particular, are more likely to be structured as pure asset deals or as deemed asset sales for tax purposes through an election under Section 338 of the Code. These rules will also enhance the importance of the purchase price allocation in many asset deals. Because full expensing is generally available only for purchases of tangible assets (and not for intangible assets such as goodwill), acquirers have the incentive to allocate as much purchase price to the tangible assets of a transaction as possible. Sellers may or may not have a similar incentive depending on the situation.

Limitation on interest deductibility

The TCJA limits the ability of taxpayers to deduct interest payments when calculating taxable income. The new Section 163(j) of the Code caps the taxpayer’s net interest expense at 30 per cent of the taxpayer’s ‘adjusted taxable income’, which approximates EBITDA for tax years.

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227 Individuals who conduct certain businesses through an entity taxable on a pass-through basis (such as partnership or S corporation) benefit from a lower effective tax rate as well. The Tax Cuts and Jobs Act of 2017 provides these individuals with a 20 per cent deduction against the income of these entities attributable to the conduct of a US trade or business, excluding investment and compensation income. The deduction also applies to qualified dividends from REITs and qualified publicly traded partnership income.


230 Id.
beginning before 1 January 2022, and EBIT thereafter. Disallowed interest deductions can be carried forward indefinitely in a manner comparable to net operating loss (NOL) carryforwards. Certain businesses and taxpayers with annual gross receipts of US$15 million or less are generally exempt from the interest limitation.

The limitation significantly affects the financing of large M&A transactions. Highly levered acquirers are more likely to shift acquisition debt from the United States, where interest deductions may be limited, to other jurisdictions. Acquirers may also limit their debt financing of acquisitions altogether in favour of equity financing (the lower corporate tax rate has this effect as well). And, because the limitation applies even to existing debt, financing for past acquisitions may be compromised.

**Net operating losses**

The TCJA also significantly reduces the value of NOL carryforwards. Some of this reduction relates directly to the lower corporate tax rate. NOLs offset less tax than they did prior to tax reform; for example, a US$100 NOL sheltering income in the current taxable year is worth US$21 post-reform (as compared to US$35 pre-reform). In addition, taxpayers have less flexibility to use NOLs that accrue after tax reform. The TCJA replaces prior law’s two-year carryback/20-year carryforward regime with an indefinite carryforward and no carryback; moreover, NOLs can only be used to offset 80 per cent of taxable income (instead of 100 per cent prior to tax reform). Both of these factors will be important for acquirers valuing targets with significant NOL carryforwards, including NOLs generated as a result of deductions accruing at the closing of an M&A transaction.

**ii The unexpected – the new international tax rules**

**Old law**

Prior to the implementation of the TCJA, the United States subjected domestic companies to tax on income earned both within and outside its borders. This was known as a system of ‘worldwide’ taxation because income was taxed in the United States no matter where in the world it was earned. The effect of the tax on non-US income was mitigated in two ways: first, companies were allowed a credit for foreign taxes paid with respect to that income up to the amount of the US tax liability (to ensure that this income was subject to tax at the US rate, but no higher). And second, to the extent that income was earned by a foreign corporate subsidiary of a US company (a CFC), recognition of the income would generally be deferred until the US company received it in the form of a dividend. The US approach stood in contrast to the vast majority of other countries, which generally do not tax their residents’ income to the extent that income is earned outside the country. This was known as a system of ‘territorial’ taxation because income is taxed only when it is earned in the territory imposing the tax.

Many observers viewed the US ‘worldwide’ system of corporate taxation as broken.231 US-parented companies were at a significant disadvantage to foreign competitors because their entire income base was subject to tax at the high US rate. Moreover, US companies had a significant incentive to delay repatriating foreign earnings because repatriation would

trigger taxation. Indeed, companies chose not to repatriate the money because they wanted to avoid the US tax cost (and the related cost on their financial statements). Over time, trillions of dollars of this ‘trapped cash’ piled up offshore.232

Dividend exemption

The TCJA seeks to address these issues through a dividend-exemption system. The new Section 245A of the Code allows US corporate shareholders that own 10 per cent or more of a CFC a 100 per cent deduction for the foreign-source portion of dividends received from the CFC, if the US shareholder satisfies a one-year holding period. Effectively, this eliminates the US tax cost of accessing the trapped cash of CFCs.

Transition tax

To transition to this dividend-exemption system, the TCJA imposed a one-time tax on 10 per cent US shareholders of CFCs based on the CFCs’ untaxed foreign earnings. The tax is imposed at a rate of 15.5 per cent for cash and liquid assets and 8 per cent for all other earnings, with the aggregate amount of earnings set as of 2 November 2017 or 31 December 2017 (whichever is higher). This tax liability can be offset by foreign tax credits. Although the transition tax is imposed during the last taxable year beginning before 1 January 2018, taxpayers can elect to pay it in instalments over eight years. In essence, the instalment tax payments become a fixed deferred tax liability. Accordingly, transition tax exposure will be a critical area of diligence for acquirers of both US and non-US entities and, in private deals, acquirers should consider how transition-tax liability should be allocated between the parties contractually.

GILTI

Despite the shift towards a territorial system of taxation, the TCJA adopts a number of new taxes that are intended to backstop the dividend exemption. First, the new Section 951A of the Code imposes a minimum tax on 10 per cent US shareholders of CFCs, which is calculated based on their share of the CFCs’ global intangible low-taxed income (GILTI). The definition of GILTI is significantly more expansive than its name suggests; it is equal to the entirety of the CFC’s income, minus a fixed 10 per cent return on its tangible asset basis. As such, in situations where a CFC has little-to-no asset basis, its 10 per cent US shareholders will be current taxed on all of the CFC’s income, regardless of whether it is derived from intangible assets. The tax is imposed at a rate of 10.5 per cent for taxable years prior to 2025 and a rate of 13.125 per cent thereafter, but can be offset by an 80 per cent credit for foreign taxes. Going forward, the GILTI regime will have a subtle impact on acquisition structure; acquirers will, on the margin, have an incentive to structure foreign acquisitions as asset purchases or deemed asset purchases for tax purposes (through a Section 338 election) to increase tax basis and therefore decrease their GILTI inclusions. US sellers may be affected by asset purchases (including deemed asset purchases arising from Section 338 elections), and so contractual negotiations around these points will become increasingly important.

Base Erosion and Anti-Abuse Tax

In addition, the new Section 59A of the Code, commonly referred to as the Base Erosion and Anti-Abuse Tax (BEAT), imposes a separate 10 per cent minimum tax on US corporate taxpayers with more than US$500 million in gross receipts if those taxpayers make significant ‘base-eroding payments’.233 Base-eroding payments are related-party payments to foreign related parties that create a US-source deduction but do not create US-source income; the minimum tax is calculated based on the US taxpayer’s taxable income determined without taking into account the tax benefits associated with these base-eroding payments. Effectively, then, the BEAT targets taxpayers that rely on these arrangements to shift income offshore; the possible impact of the BEAT is a critical diligence issue for potential acquirers of targets in industries where these arrangements are common (e.g., the insurance reinsurance industry).

iiii The uncertain – looming regulatory guidance and tax reform 2.0

Notwithstanding the significance of the TCJA’s changes, the process behind it was rushed and chaotic. Congress voted on some versions of the bill with handwritten changes in the margin.234 Perhaps not surprisingly, the final legislation contains significant ambiguities and glitches, some of which require subsequent legislation to address.235 Although the IRS has announced that it will issue regulations to clarify the application of a number of the rules discussed above (including the transition tax and limitation on interest deductibility), significant uncertainty remains.

There is even the possibility of Congress passing a second tax reform package later in 2018. President Trump and Republican members of Congress have indicated that a second tax reform bill might make the TCJA’s temporary tax cuts for individuals permanent, in addition to addressing the technical glitches within the TCJA.236 Of course, there is no certainty that any new tax legislation could be passed given the current political climate.

IX COMPETITION LAW

In 2017, the Antitrust Division of the DOJ and the FTC (together, the ‘agencies’) continued to carefully examine transactions in a variety of industries, including consumer goods, manufacturing and technology. The agencies entered their first year of a new administration, undergoing personnel changes and indicating a shifting approach to certain areas of merger review. In particular, the DOJ’s enforcement actions and public statements by its officials indicated a new heightened scrutiny for vertical mergers and scepticism of behavioural remedies in consent decrees.

233 The rate is 5 per cent in 2018 and then 12.5 per cent after 2022.
The agencies’ enforcement actions throughout the year have shown a continued emphasis on enforcing divestiture requirements in consent decrees, including a willingness to impose penalties on parties who are unable to meet divestiture requirements by the agreed date.\(^\text{237}\) The agencies have also, as in previous years, shown a willingness to litigate when the merging parties are unable to propose divestitures that satisfactorily restore pre-merger competition.\(^\text{238}\)

In 2017, the FTC concluded 22 merger actions in second request or compulsory process investigations, and the DOJ initiated 10 merger actions in federal court – nine resulted in divestitures or other remedies via consent decrees and one is still pending.\(^\text{239}\) The DOJ has also initiated another merger action in the first half of 2018, which resulted in divestitures.\(^\text{240}\) As in previous years, the FTC increased the filing thresholds under the HSR Act. Under the new thresholds, the ‘size of transaction’ test is satisfied for most transactions valued over US$84.4 million (increased from US$80.8 million).\(^\text{241}\)

The most significant changes at the agencies were to personnel. During 2017 and into 2018, the FTC had only two sitting commissioners, Acting Chairman Maureen Ohlhausen and Commissioner Terrell McSweeny. A full slate of FTC commissioners – including Joseph Simons as chairman and Noah Phillips, Christine Wilson, Rohit Chopra and Rebecca Slaughter as commissioners – were confirmed by the Senate in late April 2018.\(^\text{242}\) At the DOJ, Makan Delrahim was confirmed as head of the Antitrust Division on 27 September 2017.\(^\text{243}\) Soon after his confirmation, Delrahim made several high-profile speeches expressing doubt about using behavioural remedies in consent decrees, particularly in vertical transactions.\(^\text{244}\) He stated that the DOJ will reduce its number of long-term consent decrees, in favour of ‘return[ing] to the preferred focus on structural relief to remedy mergers that violate the law and harm the American consumer’.\(^\text{245}\) Days after Delrahim’s speech, the DOJ sued to block

\(^{237}\) ‘Justice Department Requires General Electric Company to Make Incentive Payments to Encourage Completion of Divestitures Agreed to as a Condition of Baker Hughes Merger’ (see footnote 17).


\(^{240}\) Id.

\(^{241}\) ‘HSR threshold adjustments and reportability for 2018’ (see footnote 29).


\(^{245}\) Id.
the proposed merger between AT&T and Time Warner, a rare challenge to a vertical merger. ²⁴⁶ How this shifting approach to merger enforcement will affect other companies and industries remains to be seen.

There follow some examples of recent significant DOJ and FTC actions.

### DOJ

**Parker-Hannifin/CLARCOR**

In December 2016, Parker-Hannifin Corporation (Parker-Hannifin) and CLARCOR Inc (CLARCOR) announced an agreement for Parker-Hannifin to acquire CLARCOR for approximately US$4.3 billion in cash. ²⁴⁷ The HSR waiting period expired in January 2017 without the DOJ issuing a Second Request, and the parties consummated the deal on 28 February 2017.²⁴⁸ In September 2017, the DOJ filed suit to partially unwind the transaction, alleging that Parker-Hannifin’s acquisition of CLARCOR’s ground aviation fuel filtration systems created a monopoly.²⁴⁹ The DOJ alleged that Parker-Hannifin and CLARCOR were the only two domestic manufacturers of Energy Institute-qualified aviation fuel filtration and filter elements, and the transaction eliminated their previously intense competition.²⁵⁰ Moreover, the DOJ stated that its initial investigation was hampered by Parker-Hannifin’s failure to provide significant document or data productions in response to DOJ requests.²⁵¹ The parties ultimately agreed to a consent decree, which required Parker-Hannifin to divest CLARCOR’s filtration business.²⁵²

**EnergySolutions/Waste Control Specialists**

In late 2015, EnergySolutions, Inc (EnergySolutions) entered into an agreement to acquire Waste Control Specialists LLC (Waste Control Specialists) in a US$367 million combined cash-and-stock deal.²⁵³ The DOJ filed suit to block the merger in November 2016, alleging that the proposed acquisition was a merger to monopoly and would harm competition by combining the two most significant competitors for the commercial disposal of low-level radioactive waste. During trial in the US District Court for the District of Delaware, Waste Control Specialists asserted a ‘failing firm defence’, arguing that its revenues had declined


²⁵⁰ Id.

²⁵¹ Id.


over the past decade and EnergySolutions had been the only buyer to make an offer. The Court rejected this argument, finding that Waste Control Specialists had not shown that it ‘made good faith efforts to elicit reasonable offers that would pose a less severe danger to competition’. Finding for the DOJ, the Court enjoined the merger in July 2017.

General Electric Co/Baker Hughes Inc

In October 2016, Baker Hughes and GE, two of four leading providers of refinery process chemicals, announced an agreement for GE to acquire Baker Hughes in a deal valued at approximately US$30 billion. This announcement came months after Baker Hughes and Halliburton Co (Halliburton) abandoned a planned merger, originally valued at US$34 billion, when the DOJ sued to block the deal and rejected Halliburton’s proposed divestitures. Anticipating similar antitrust scrutiny, GE and Baker Hughes agreed to a consent decree that required GE to divest its Water & Process Technologies unit. The terms of the consent decree required GE to complete its divestitures to SUEZ, SA (Suez) by the end of September 2017. GE and Baker Hughes completed their deal in July 2017.

Though GE divested approximately 90 per cent of its Water & Process Technologies assets, GE notified the DOJ in September 2017 that it had not yet transferred legal title of some assets to Suez in certain international jurisdictions, and that delays caused by administrative challenges would likely push the full divestiture into 2018. As a result of this delay, GE and the DOJ agreed to a modified consent decree that added two provisions, requiring that

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255 Id.
262 ‘Justice Department Requires General Electric Company to Make Incentive Payments to Encourage Completion of Divestitures Agreed to as a Condition of Baker Hughes Merger’ (see footnote 260).
(1) GE make daily incentive payments, starting on 1 January 2018 and continuing until the divestiture is completed and (2) GE reimburse the DOJ for attorney’s fees and costs incurred in reviewing the divestiture and decree conditions for an extended period.263

**AT&T/Time Warner**

As discussed above, in October 2016, AT&T and Time Warner announced an agreement for AT&T to acquire Time Warner in a cash-and-stock deal valued at US$85 billion at the time of the announcement.264 The proposed vertical merger would combine AT&T’s video distribution business, also operated through DirecTV, with Time Warner’s video content properties, which include HBO, CNN, Cartoon Network and Warner Bros Entertainment Inc. After a one-year investigation, the DOJ sued to block the proposed merger on 20 November 2017, alleging that AT&T would have the incentive to withhold Time Warner’s content from AT&T’s video distribution competitors.265

The case went to trial in the District Court for the District of Columbia in March 2018, focusing in part on the popularity of Time Warner’s content, which the DOJ argued AT&T could ‘weaponize’ after the merger by threatening to withhold it from other companies unless they agreed to higher prices.266 The DOJ also contended that the combined deal would raise prices for subscription television.267 AT&T and Time Warner challenged this model, arguing that it relied on unrealistic figures and did not take into account a binding arbitration offer made to all other distributors.268 The offer, modelled on the arbitration mechanism contained in the consent decree used in Comcast Corp/NBC Universal Inc;269 would constrain AT&T’s ability to withhold networks from distributors who invoked arbitration. The trial concluded at the end of April 2018, and in June, the Court ruled in favour of AT&T and Time Warner.270 The merger closed on 14 June 2018.271

263 Id.
267 Id.
268 Id.
In 2015, Walgreens announced its intention to acquire Rite Aid, a chain of pharmacy stores, for US$17.2 billion in an all-cash transaction. Over the course of a two-year investigation, Walgreens and Rite Aid reworked the deal several times, including abandoning the outright acquisition of Rite Aid, to allay the FTC’s concerns that the combination would harm competition. In early 2017, Walgreens offered to divest 865 drugstores. This approach also failed to receive clearance from the FTC. In a third try, Walgreens offered to pay US$5.18 billion to acquire 2,186 Rite Aid stores, allowing Rite Aid to remain as an independent, albeit slimmed down, company. This proposal failed to receive FTC clearance. Ultimately, Walgreens proposed to buy 1,932 Rite Aid stores for US$4.38 billion, leaving Rite Aid with approximately 2,600 stores across the United States. This revised proposal was cleared without further investigation by the FTC.

The effect of the FTC commissioner vacancies was particularly apparent in the Walgreens/Rite Aid transaction, in which the only two sitting FTC commissioners openly disagreed. Commissioner McSweeny issued a statement expressing disappointment in allowing the acquisition to move forward without the agency issuing a Second Request. In response, Acting Chairman Ohlhausen issued a statement that Commissioner McSweeny’s concerns were ‘unfounded’. While unusual, this public disagreement ultimately did not make a difference because the FTC staff did not recommend further investigation, and thus it was not necessary for the commissioners to vote.

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275 Id.


DaVita, Inc/Renal Ventures Management LLC

The FTC also successfully required divestitures in the proposed merger between two outpatient dialysis services. DaVita, Inc (DaVita), the second-largest provider of such services in the United States, sought to acquire Renal Ventures Management, LLC, the seventh-largest provider.\(^{279}\) The FTC issued a complaint alleging that the acquisition would lead to anticompetitive effects in seven markets in New Jersey and the outskirts of Dallas, Texas.\(^{280}\) According to the complaint, ‘the merger would represent either a merger to monopoly or a reduction of competitors from three to two’, resulting in ‘reduced quality and higher prices for dialysis patients’.\(^{281}\) Following a public comment period, the FTC approved a final order for divestitures, requiring DaVita to divest seven of its clinics to PDA-GMF Holdco, LLC.\(^{282}\)

iii Conclusion

Despite personnel changes, the DOJ and the FTC have continued active enforcement and willingness to challenge transactions, with a shifting approach to behavioural remedies and increased scrutiny of vertical mergers. As these changes coalesce, parties seeking mergers in significant and complex deals should be aware of these new approaches to remedies.

X OUTLOOK

In 2017, US M&A activity declined in value but increased in volume, coming down from a record year in 2015. Delaware courts continued to be deferential to corporate boards of directors, finding fair value below that which dissenting shareholders put forth and, at least in post-closing damages actions, by and large, respecting boards’ decisions with regard to acquisitions. In terms of cross-border M&A, CFIUS review and executive action presented increasingly significant obstacles, particularly for Chinese acquirers. High tech was the leading US M&A sector, driven in part by the increasing prevalence of combinations of technology companies with non-technology companies. Shareholder activism continued to exert significant influence, increasingly through attacks on large-cap companies. As in 2016, all-cash transactions by strategic buyers were the norm, supported by robust financing opportunities. Antitrust enforcement, particularly by the DOJ, continued to be aggressive, as all eyes are now on the AT&T/Time Warner trial. Finally, and perhaps most significantly, after much uncertainty in 2016, 2017’s tax reform fundamentally altered the calculus for M&A activity, though it is not yet clear how the TCJA’s various provisions will interplay or what net effects on the M&A landscape will result. In light of the TCJA, and the myriad of other dynamic forces that shape the US M&A landscape, it remains to be seen how M&A activity will progress for the remainder of 2018.


280 Id.

281 Id.

I OVERVIEW OF M&A ACTIVITY

During 2016, M&A activity in Venezuela was not very significant, apart from the very few implementations of international acquisitions between multinational conglomerates.

II GENERAL INTRODUCTION TO THE LEGAL FRAMEWORK FOR M&A

Although the Venezuelan Code of Commerce does not define ‘mergers’, Articles 343 to 346 provide the registration and publication requirements that must be complied with for a merger to become effective; specifically, each entity must notify the respective mercantile registry (attaching the merging entities’ balance sheets) to record the merger agreement. Additionally, the Code states that a merger will not become effective until a waiting period of 90 days has elapsed, counted from the date of publication of the merger resolution and its registration data.

With respect to acquisitions, these can be divided into two kinds.

i Acquisition of shares

As per Article 296 of the Code of Commerce, the transfer of ownership of shares is accomplished by the execution of the respective transfer entry in the company’s share registry book by the transferor and the transferee. Moreover, a review must be conducted of the articles of incorporation of the company whose shares are being transferred, as the company may have preferential rights granted to other shareholders.

In addition to the Code of Commerce, there are certain statutes that are relevant to the acquisition of shares, such as the Security Markets Law and the rules issued by virtue of said Law for shares that are publicly traded. Additionally, the Law to Promote and Protect the Exercise of Free Competition is applicable in cases where, inter alia, the acquisition could produce an economic concentration.

With regard to acquisitions of shares in areas such as telecommunications and banking, previous authorisation or clearance may be needed, depending on the pertinent statute.
ii Acquisition of assets

Depending on the type of assets, different requirements must be met:

Real estate

The provisions of the Venezuela Civil Code and the pertinent statute that establishes and organises the public registry system shall be applicable. Therefore, for a transfer of ownership of real estate to be effective before third parties, registration of the deed of transfer must be made at the public registry office that has jurisdiction over the aforementioned property.

Movable goods or chattel property

Requirements will depend on the type of good or asset.

If the transaction comprises the transfer of ownership of a business by the disposal of chattel property and the transferee wishes to avoid joint liability for the business obligations of the transferor,2 then the provisions of Articles 151 and 152 of the Code of Commerce shall be applicable; these provisions contain the obligation for three notifications to be published in a local newspaper announcing the disposal of the ownership of a business.

If the transaction involves intangible assets such as intellectual or industrial property, then registration must be made at the competent registry office for the transfer to become effective before third parties.

In general, all the aforementioned transactions could have tax consequences, which will be explained in Section VIII.

III FOREIGN INVOLVEMENT IN M&A TRANSACTIONS

According to government sources, investment was the product of strategic alliances between Venezuela and Argentina, Belarus, China, Cuba, Spain, France, Iran, Japan, Portugal and Vietnam. The economic sectors that were recipients of investment include manufacture, telecommunications, automobiles, petroleum and infrastructure (construction). The aforementioned investments were the product of associations between entities from those foreign countries and the Venezuelan government, and between non-governmental entities of the respective foreign country and Venezuela.

Additionally, the world economic crisis – and the country risk factor – continue to have an impact on investment and profitability levels of the multinational entities operating in Venezuela, which have implemented budget cuts and reviewed their investment programmes.

IV SIGNIFICANT TRANSACTIONS, KEY TRENDS AND HOT INDUSTRIES

In developing its policy to become the leader in the food industry and marketing chain, between 2002 and 2012 the government announced the acquisition of almost 1,200 companies. Most of these are still in the process of nationalisation.

2 The conveyance of property or goods must result in the cessation of the business activities of the transferor that were carried out within its premises.
V FINANCING OF M&A: MAIN SOURCES AND DEVELOPMENTS

There have not been any new relevant ways of financing acquisitions made by the state; its primary source has been the revenue from the sale of oil and from the placement of debt instruments.

VI EMPLOYMENT LAW

In connection with the merger of companies in Venezuela and with the acquisition of businesses, it is worth bearing in mind from a labour relations point of view that negotiations of this kind will have several consequences for the company’s employees, as described below. The Organic Labour and Employees Law of 2012 (Organic Labour Law) establishes the following.

i Employer substitution

Article 66 of the Organic Labour Law provides: ‘There will be an employer substitution when the property, ownership or the running operation of a company is transferred for any reason, from a natural or juridical person to another, and the operation of the company continues on.’ In the same manner, Article 68 of the Law provides:

Substitution of the employer will not affect existing work relationships. The substituted employer will be jointly responsible, with the new employer, for obligations derived from the Law or from contracts in effect prior to the substitution and until expiration of the prescription period provided for in Article 61 of this Law.

Upon termination of this period, only the new employer’s responsibility will subsist, unless previous labour suits exist, in which case the final judgment shall be executed indistinctly against the substituted owner or against the substitute. The responsibility of the substituted employer will only subsist, in this case, for five years as of the date on which a definite sentence has been declared.

Article 32 of the Organic Labour Law states:

The transfer or assignment of the worker is verified when the employer agrees or requires the worker to render his services on a permanent basis under the dependency of and on account of another, with the consent of the latter. The worker transfer or assignment shall be subject to the employer substitution regime and will produce the same effects.

On the other hand, by motion of Justice Dr Omar Mora Díaz, in the lawsuit brought by R Cameron against Compañía Occidental de Hidrocarburos, Inc, stated: ‘[T]his Social Court of Appeal before deciding on the appropriateness of the accusation, wishes to make, in the first place, some considerations regarding the form known as employer substitution.’

In fact, Dr Rafael Alfonzo Guzmán, in his book *Estudio Analítico de la Ley del Trabajo Venezolana*, mentions the point in question with the following considerations:

“There is a substitution of employer when the owner or holder of a company, establishment, running operation or work, transfers his rights to another natural or juridical person who continues the same economic activity or, at least, continues it without substantial changes. […]

Mario de la Cueva states that for the employer substitution to take effect, it is not enough to sell the products of the negotiation or part of the machinery, utensils or equipment, but it is necessary to transfer them to the company as an economic-juridical unit or part of the company itself, which in turn constitutes an economic-juridical unit; in the first case, the employer substitution is total, in the second case, it only works in respect to the workers who provide their services in a branch or the transferred premises.

From the transcribed text above, it is evident that there may exist two types of employer substitutions as provided for in the Mexican doctrine, which has been influential on Venezuelan employment law. These are, as stated by Mario de la Cueva, on the one hand total substitution, which materialises when the company itself is transferred as an economic-juridical unit, and on the other, the company itself that in turn constitutes an economic unit.

On applying such criteria to the case under consideration, we may determine that what the defendant showed is that there was an employer substitution, which opinion is shared by the court, since, as can be seen from the records, on being transferred to Venezuela the defendant continued to provide his services to a branch of the company domiciled in the United States, evidencing the continuity of the employment relationship.

By virtue of the foregoing, it is evident that when the transfer of an employee from one company takes place, because the company merges and the business continues to operate, there is what the law, the doctrine and the jurisprudence have defined as an employer substitution.

ii Effects of the employer substitution

The employer substitution is intended to maintain the stability of the workers. Therefore, the existing labour relations are not affected, and thus the workers are entitled to continue receiving all the same legal and contractual benefits.

In fact, when the employer substitution takes effect and the existing employment contracts are not affected, the transferred workers shall enjoy the benefits and conditions they were enjoying when they worked for the former company: that is, all the legal and contractual benefits to which they were entitled. In the same manner, the new employer shall be responsible for all the benefits, fringe benefits and indemnities that may be due to the workers who now provide their services to the substituted employer from the beginning of the employment relationship.

On the other hand, it is important to point out that pursuant to the provisions of Article 70 of the Organic Labour Law, assuming that the workers receive some payment on account of fringe benefits or indemnities due to the employer substitution, and continue to provide their services, the payment received will be considered an advance of the payment to which they are entitled upon the termination of the employment relationship.
Venezuelan tax framework, particularly under the Decree with Rank, Value and Force of the Master Tax Code (MTC) and the Decree with Rank, Value and Force of Partial Reform of the Decree with Rank Value and Force of the Income Tax Law (ITL), in the scenario of a statutory merger, any outstanding benefits (attributes) or liabilities remain with the surviving company regardless of whether the merger is carried out as an incorporation or an absorption merger.

According to Article 24 of the MTC, Article 16 of the ITL for income tax purposes, the subsisting entity will assume all liabilities and benefits of the merged entity, as well as future liabilities and benefits, including income tax credits (ITCs), which may arise after the merger becomes effective, all of which are based on activities carried out prior to the merger.

The surviving company would be in a position to use all the tax attributes that will be used in the absorbed entity, including, but not limited to, ITCs, net operating losses (NOLs) as applicable, other tax losses (i.e., losses resulting from the adjustment per inflation (API) system, where applicable), and other tax credits such as those resulting from excess withholding (i.e., taxes paid in excess in prior fiscal years), input VAT (tax credits) and VAT withholding.

In a merger by absorption, from a fiscal standpoint, the fixed assets and liabilities of the merged company maintain their tax cost basis (including revaluation for inflation where applicable), that is, tax basis carryover. In this regard, the assets and liabilities may be restated for inflation at the first fiscal year-end following the date on which the merger took place. Non-monetary items would be adjusted for inflation from the date of the merger as applicable. As a result, no major effect arises with regard to adjustment for fiscal inflation of fixed assets, as these maintain the same date of acquisition, historical costs and restated values as in the books of the merged company.

A merger by absorption interrupts the current fiscal year and begins a new fiscal year for the combined operations of the merging companies. Therefore, the merged company must file its income tax return for the fiscal year in which it performed individual operations within the three months immediately following the cessation of its activities in accordance with Articles 1466 and 1507 of the ITL. This final year may be shorter than 12 months, and could

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4 Article 24 MTC: ‘In the case of mergers, the company that subsists or that is created from the original one(s), will assume any tax benefit or responsibility that corresponds to the merged company(ies).’
5 Article 16 Paragraph 5 ITL: ‘For tax purposes, any tax benefit or liability corresponding to merged companies shall subsist for the company resulting from the merger, notwithstanding the rights and obligations of the merged companies.’
6 Article 146 ITL Regulations: ‘Definitive income tax return will be presented within the three (3) months following to the completion of the taxable period of the taxpayer without prejudice to the prorogations granted by the Tax Authorities.’
7 Article 150 ITL Regulations: ‘In case of legal entities or communities who ceased their business by sale, exchange, cession of their assets, business or commerce fund, merger or any other cause different from the dissolution, the tax period will be finished on the day of cessation.’
further cut short the carryover term for attributes (i.e., three fiscal years for ITCs and NOLs and one year for losses pursuant to API, as applicable). The surviving entity must notify the Tax Administration of the transaction under Articles 35.48 and 155.6 of the MTC.9

ii Other taxes (stamp tax and real property tax)

The registration of acts and documents with the civil law registry office or the commercial registry office is subject to registration tax.

Real estate transfer taxes are due and payable by the transferring company upon the transfer of assets from the target company to the acquiring company. Normally, upon the registration of purchase–sale documents for real property and any other events, a 1 per cent fee on the value of the property must be paid.

In the case of a sale of real property to a third party, the 1 per cent payment would apply, in addition to a 0.5 per cent withholding prepayment, in either cash or credit, for income tax determined on the sale price. This prepayment shall be credited to the income tax amount resulting from the final income tax return of the year.

iii Value added tax

The VAT Law provides that sales of tangible goods, including any part of their property rights as well as withdrawals or retirements of movable goods by taxpayers, are subject to VAT. However, sales of intangible goods, such as fiscal rights, stocks, bonds, mortgage bonds, mercantile effects, and other securities and personal goods in general that represent money, credit, or rights other than property rights over tangible goods, are not subject to VAT.

As a general rule, under the Venezuelan VAT legal framework, in the case of a merger, the property transferred (i.e., movable property) qualifies as a sale operation and constitutes a taxable event for VAT purposes under Article 3.1 of the VAT Law10 in accordance with Article 10.5 of the VAT Law’s Regulations.11

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8 Article 35 MTC: ‘The Taxpayers have the obligation to inform the Tax Administration, within a period not exceeding one (1) month, the following facts: […] 4 Cessation, suspension or paralysis of the Taxpayer’s regular economic activity.’

9 Article 145 MTC: ‘The Taxpayers, persons in charge and third persons are compelled to fulfil the formal duties related to the control tasks and investigation made by the Tax Authorities and especially, must: […] 6 Communicate any change in the situation that could originate on their tax responsibility, specially when the charge is related to the beginning or ending of activities of the taxpayer.’

10 Article 3 VAT Law: ‘For the purposes hereof, the following activities, legal transactions or operations shall constitute taxable events: Sale of tangible movable property, including aliquot parts on the property right on such property, and the retirement or disincorporation of movable goods by the taxpayer of this tax.’

11 Article 10 VAT Law’s Regulations: ‘For the purposes of this tax, sale is considered, among others, the following acts and contracts that deal with onerous transfers of real personal domain of an aliquot of property rights over them: […] 5 Contributions or acts to transferring rights to assets for the establishment, expansion, modification, merger, takeover or the other similar, with respect of companies or legal entities or economic. In any case, if the new companies emerged continue the same line of activities of the predecessor companies, whether in whole or in part, it should not be deemed that there had been an act, transaction or transfer of ownership of corporate goods attributable to a sale for purposes relating to the application of this tax, unless an increase in the capital take place through contributions of new movable property.’
However, the VAT Law’s Regulations (Article 10.5) state that if the surviving company carries on with the same purpose or activities that the dissolving company pursued, wholly or partially, it should not be deemed that there has been a transfer of ownership of corporate goods attributable to a sale for VAT purposes, and hence no taxes should be applicable.

Finally, the surviving company would be in a position to use all the VAT credits that will be used in the absorbed entity, including those resulting from excess VAT withholding (i.e., taxes paid in excess in prior fiscal years) and input VAT (tax credits) under Article 41 of the VAT Law.12

iv  Municipal tax (tax on industrial, commercial and services activities)

A municipal tax is applicable to all industrial, commercial and service activities (except professional services) performed in the territory of a municipality. The taxable base is the turnover (gross proceeds) received by the taxpayer and arising from the activity performed in the locality. Tax rates vary from locality to locality and range from 0.5 to 5 per cent. It is usually paid and a return filed annually.

Regarding municipal tax on industrial, commercial and services activities, an absorbed company must notify the relevant municipal tax authorities of the suspension (or termination) of its activities in the municipality where it conducted its activities in accordance with Articles 35.4 and 155.6 of the MTC,13 and pay any debt owed to the municipal tax authorities. Municipal tax rates vary depending on the municipality in which the business was conducted.

The surviving company shall request a business licence to incorporate new activities (if any) and to carry out the activities of the absorbed company within the jurisdiction of the municipality in which the surviving company operates.

v  Science and technology contribution

A science and technology contribution is provided for in the recent amendment to the Organic Law of Science and Technology, which applies to entities defined in the law as large ventures (companies with a turnover of 100,000 tax units or more).

The contribution amounts to 2 per cent of turnover (gross proceeds) for entities engaged in the manufacturing or commercialisation of alcohol and spirits, tobacco and tobacco products. Gambling activities are subject to a similar rate. Hydrocarbon and mining activities, when carried out by private parties, are taxed at a rate of 1 per cent on turnover. When these activities are carried out by entities in which capital is considered public capital (i.e., wholly or partially state-owned, but controlled by the state), then the same are taxed at a rate of 0.5 per cent of turnover; any other industry or commercial activity (i.e., general activities) are subject to the latter 0.5 per cent rate on their turnover.

12 Article 41 VAT: ‘The right to deduce the tax credit from the tax debits is individual for each ordinary taxpayer and it not be assigned to third parties, except for the case indicated in Article 43 or when it is a merger or take over of companies, in which case, the resulting partnership of said merger shall enjoy the remaining tax credit that corresponded to the companies that formed part of such fusion.’

13 Article 155 MTC: ‘The taxpayers, person in charge and third persons are compelled to fulfil the formal duties related to the control and investigation made by the Tax Authorities and, especially, they must: […] 6 Communicate any change in the situation that could originate alterations to their tax responsibility, especially when the change is related to the beginning or ending of activities of the taxpayer.’
Regarding the science and technology contribution, an absorbed company must notify the relevant tax authorities of the special science and technology fund, Fonacit, about the suspension (or termination) of its activities in accordance with Article 155.6 of the MTC, and pay any debt owed to Fonacit.

vi  Anti-drug enforcement contribution
A contribution for the purposes of illegal drug enforcement and education is provided for, computed at a rate of 1 per cent on the net earnings of the relevant taxpayers engaged in commercial, industrial or services activities; those taxpayers engaged in manufacturing spirits and liquor, cigarettes and tobacco, a 2 per cent contribution on their net earnings applies. The tax basis is net earnings (accounting income before taxes) as per Venezuelan GAAP, as per the regulations (Provisions 006-2011 and 007-2011 of March and May 2011).

The Organic Law of Drugs of 2010 covers the relevant contributions in Articles 32 and 34. These contributions are paid into the National Fund Against Drugs (FONA), which was created for that purpose, and used for projects identified in the law, which may include reinvestment (up to 40 per cent) in approved activities or projects regarding payers and payers’ employees (Provision 0001-2011).

Regarding the anti-drug enforcement contribution, an absorbed company must notify the relevant tax authorities for the FONA of the suspension (or termination) of its activities in accordance with Article 155.6 of the MTC, and pay any debt owed to the FONA.

vii  Sport contribution
A contribution for the purposes of funding a special fund – the National Fund for the Development of Sport, Physical Activity and Physical Education – was established in the Sports Law passed on August 2011.

The contribution under the Sports Law arises upon the exercise in Venezuela of any commercial, industrial or services activity by any person (inter alia, individuals, companies, partnerships) resulting in net earnings in a given year in excess of 20,000 tax units, and is computed as 1 per cent of the net earnings of the relevant taxpayers.

The tax basis is net earnings (accounting income before taxes) as per Venezuelan GAAP, as identified in Regulation No. 1 of the Law. The contribution may be paid in cash in full, or part of the same may be used for projects identified in the Law and approved by the National Sports Institute, which may include reinvestment (up to 50 per cent) in approved activities or projects for payer and payer employees.14

Regarding the sport contribution, an absorbed company must notify the relevant tax authorities for the National Fund for the Development of Sport, Physical Activity and Physical Education of the suspension (or termination) of its activities in accordance with Article 155.6 of the MTC, and pay any debt owed to the tax authorities.

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14 Provision 0001-2011.
Venezuela

VIII COMPETITION LAW

The Venezuelan legal framework in terms of economic concentrations (mergers and acquisitions) in the field of the analysis of competition is based on Article 113 of the Constitution of the Bolivarian Republic of Venezuela of 1999, which establishes an express prohibition of monopolies. Specifically, any acts, activities, behaviour or agreements between private parties that are intended to establish monopolies are declared unconstitutional.

Rules pertaining to economic concentrations in the field of antitrust laws

From the viewpoint of competition, the following norms contain all the existing regulation in Venezuela, starting with the Free Competition Promotion and Protection Law, published in Official Gazette No. 34,880, dated 13 January 1992, which was derogated by the Decree with Rank, Value and Force of Antitrust Law, published in Gazette Extraordinary No. 6,151, dated 18 November 2014.

To ensure the correct application of the Decree Law, the Superintendency of Antitrust was created as the public institution in charge of applying the law, with functional autonomy in the matters within its jurisdiction and administratively managed by the ministry with jurisdiction over matters of internal commerce. All administrative proceedings culminate in decisions of the Superintendency. They may be appealed through judicial proceedings, at the contentious administrative courts at first instance, and through second instance appeals to the Supreme Court.

Under Chapter II of the Decree Law, the following are prohibited: all economic concentrations that produce or reinforce a dominant position in all or part of the market, that may cause adverse effects to effective competition, or that may cause democratisation in the production, distribution and marketing of goods and services. Nevertheless, small and medium-sized companies, and cooperatives that are covered by the system of communal economy, are exempted. The procedures of evaluation and approval will be established by the regulation of this Decree Law. The Decree Law of Antitrust states that the procedures for the notification, evaluation and approval of economic concentrations shall be established in regulations that have not yet been published.

Furthermore, Instruction No. 3 regarding Economic Concentration Operations, published in Official Gazette No. 36,209, dated 20 May 1997, contains the information required by the Superintendency for the authorisation of an economic concentration operation. Prior notification of an economic concentration operation is not mandatory under the current laws: it is voluntary for those concerned. This does not preclude the Superintendency from opening an investigation once the operation is declared certain to determine whether it could have a negative effect on free competition. The Superintendency of Antitrust has up to one year to conduct an investigation, as of the date on which the economic concentration operation is actually closed.

Moreover, there are no exceptions regarding the economic activity or sector in which the economic agents are involved. Therefore, both profit and non-profit, private and public economic agents engaged in economic activities inside the national territory or in operations with effects on the national market are subject to the regulations governing matters of economic concentrations.

Resolution by Procompetencia (before Superintendency) No. 2451, dated 11 July 1996, published in Official Gazette No. 36,000, dated 15 July 1996, establishes, based on Article 2 of Regulation No. 2 of the Free Competition Promotion and Protection Law (Regulation No. 2), the minimum limits that shall apply to economic concentration operations subject to this law.
to antitrust laws. These include when the overall volume of the business of the companies involved in the economic concentration operation is greater than 120,000 tax units,\textsuperscript{15} and when the merging companies involve divisions from several companies where the overall volume of business of the divisions participating in the operation shall be taken into consideration.

\textbf{ii} Economic concentration modalities according to Regulation No. 2

Mergers among independent companies include:

- the incorporation of a company where the resulting company acts permanently as an independent company;
- operations whereby one or more companies acquire control of one or more companies that were independent, or parts of those companies; and
- acquisitions of production assets, going concerns and any other act or contract whereby companies, divisions or parts of companies are concentrated.

In addition, Chapter II of Regulation No. 2 establishes the procedure for the prior evaluation of an economic concentration operation for its authorisation by the Superintendency. Considering that the prior notification system is voluntary, there are no limitations for making a notification, and there are no penalties in the event of a notification not being made. According to the provisions of Article 6 of Regulation No. 2 to the Law, the process for requesting a prior evaluation does not prevent an economic concentration operation from following its natural course and even taking place before a decision is obtained from the Superintendency, notwithstanding whatever is ultimately indicated.

\textbf{iii} Procedures

Prior authorisation procedures are governed by the provisions of Title III, Chapter I of the Organic Administrative Procedure Law as regards ordinary proceedings.

The penalty procedure is governed by the provisions of Title V, Chapter I, Articles 43 \textit{et seq} of the Decree with Rank, Value and Force of Antitrust Law when, once the economic concentration has taken place, it is presumed that it could have anticompetitive effects or create or strengthen a dominant position on the market.

\textbf{iv} Terms

The ordinary proceeding contained in the Organic Administrative Procedure Law establishes a term of four months from the time that the request for a prior evaluation is formally presented. This term may be extended for another two months if necessary, depending on the complexity of the study.

During this proceeding, the Superintendency receives all the information for its opening (as contained in Instruction No. 3) from each party involved in the proceeding. It may later send questionnaires to independent third parties, whether they are competitors or are located at another level of the chain, to complete the information required to determine the dynamics of the market.

If necessary, the evaluating agency may require additional information or clarification of the information available from the parties for its final decision.

\textsuperscript{15} At the time of writing, the value of the tax unit is 1,200 bolivares.
The term established for the substantiation of the penalty procedure is 15 business days, which is extendible for another 15 business days. The file then enters the decision stage, which lasts 30 business days, with the possibility of being extended for an additional three days (in other words, the minimum term for the penalty procedure is 45 business days).

**v Sectoral regulations**

**Public companies**

Merger operations of capital market companies must be notified to, and gain the prior approval of, the National Exchange Superintendency. Likewise, economic concentration operations among companies participating in the capital markets are also subject to the Decree with Rank, Value and Force of Antitrust Law. Although a request for prior evaluation is voluntary, the Superintendency may investigate an operation when it suspects that it could have restrictive effects on competition or could create or strengthen a dominant position in the market.

**Banking**

Economic concentration operations in the banking sector require the prior approval of the Superintendency of Banks and Other Financial Institutions. Additionally, a request for the prior evaluation of this type of institution is voluntary in the area of antitrust law; once notified, they may be subject to investigation and penalties by the Superintendency.

**Insurance**

Transfers of portfolios, mergers or split operations of insurance and reinsurance companies require the prior approval of the Superintendency of Insurance Activity once it has heard the Antitrust Superintendency’s opinion, which is binding.

**Consequences and penalties**

The Decree Law establishes that those who engage in prohibited practices or acts described in Chapter II shall be punished by the Superintendency with a fine of up to 10 per cent of the value of their gross annual revenue if there are mitigating circumstances. If aggravating circumstances attend the offender’s conduct, that amount may be increased to 20 per cent. In the case of recidivism, the fine will be increased to 40 per cent as a general penalty. Furthermore, the Decree Law states that the notification, evaluation and approval procedures for economic concentrations shall be established in regulations that have not yet been published.

However, under Instruction No. 3 there are no penalties for not requesting the prior authorisation for economic concentration operations, as such a request is voluntary.

In the case of prior evaluations, the Superintendency may recommend that some of the conditions of the economic concentration operation are modified to minimise any anticompetitive effect that could derive from the evaluation, or recommend divestment in part of the market.

If the parties do not accept the observations of the Superintendency, it may open, once the economic operation takes place, a penalty procedure for presumptive anticompetitive effects, which could include the following: full or partial divestment of the economic concentration operation; other orders of lesser magnitude, such as the modification of
territories, exclusive rights in the distribution of products or in the purchase of inputs, or non-compete clauses; or a fine of up to 20 per cent of the aggregate gross sales of the parties involved in the operation.

Finally, the Superintendency of Antitrust has not issued any resolution about economic concentrations under the terms of this Decree Law, and the procedures for evaluation and approval will be established by the regulation of this Decree Law. The regulation has not yet been published.

IX OUTLOOK

In view of the continuing global and national economic crisis, it is expected that, again, the Venezuelan economy will have somewhere between very moderate and no growth during 2018. Moreover, it is expected that if there is foreign private investment, it will be derived from bilateral cooperation agreements and mainly in the construction, oil, gas and mining sectors.
I OVERVIEW OF M&A ACTIVITY

According to the Institute of Mergers, Acquisitions and Alliances (IMAA), an institution that monitors M&A deals globally, the total value of M&A deals in 2017 reached the record-breaking high of US$8.4 billion, a 45 per cent increase compared to 2016. Although the number of M&A deals decreased by 23 per cent compared to 2016, this was offset by several large-value transactions in 2017. These reported figures have delivered encouraging news to investors and the authorities. Foreign investors continue to see an opportunity to acquire attractive projects at good prices given the recent developments in investment regulations and conditions.

According to the Ministry of Industry and Trade, 58.4 per cent of the total registered foreign investment direct capital of US$318.72 billion in 2017 flowed to the processing and manufacturing industries sector, and key M&As were in this sector. Real estate, essential goods and energy sectors were also active in 2017. See Section IV for further discussion on specific deals.

II GENERAL INTRODUCTION TO THE LEGAL FRAMEWORK FOR M&A

M&A activity has developed in Vietnam during the past 11 years following the government’s issuance of a large number of new legal regimes, which was considered the government’s preparation for Vietnam’s official accession to the World Trade Organization (WTO) on 11 January 2007. However, there is no united legal platform for M&A activities, and investors need to consider requirements, guidance and other information as to the interpretation or practice of investment in different pieces of legislation. The principal regulations for M&A activities may be classified under the following main categories:

a international treaties and agreements to which Vietnam is a contracting party include Vietnam’s commitments to the WTO applicable to foreign investment into Vietnam from other state parties’ investors and other mutual agreements of Vietnam and a specific country or countries;

b general regulations include the Civil Code 2015, which is the key general law regulating the ‘legal status and standards for conduct of individuals and legal entities, the rights and
obligations of individuals and legal entities in property and personal relations arising from relations established on the basis of equality, freedom of will, independence of property and self-responsibility' (Article 1 of the Civil Code 2015);

the primary sources for regulating M&A activities are the Law on Enterprises 2014 (which governs the establishment, management, organisation and operation of enterprises) and the Law on Investment 2014 (which mainly focuses on investment activities within Vietnam);

regulations on land include the Law on Land 2013. Ownership of all land lies with the entire population, with the state acting as the representative owner. Therefore, no enterprise, whether domestic private enterprise, state-owned enterprise or foreign private enterprise, is the actual owner of land. Investors may use land through a land use right;

regulations on specialised business areas, which specifically govern the relevant investment businesses of investors; for instance, the areas of finance, education, distribution or restaurant services;

regulations applicable to public companies, including the Law on Securities 2006 (as amended in 2010) and its implementation decrees and circulars. In 2015, total foreign investment in a public company was relaxed by the government (see Section III.iii). According to Article 25 of the Law on Securities 2006, a public company is a joint-stock company that has already conducted the public offering of its shares, has its shares listed at the Stock Exchange or the Securities Trading Centre, or has its shares owned by at least 100 investors, excluding professional securities investors, and has a contributed charter capital of 10 billion dong or more;

regulations on competition, including the Law on Competition 2004 and its implementation decrees and circulars (Section IX on the Law on Competition); and

regulations on other relevant matters, including foreign exchange management and labour.

Some parts of the above regulations are not well enough developed, such as the overlapping and inconsistent regulations between the Law on Enterprises and the Law on Investment, as well as regulations on securities and on competition. In addition, similar to other new market economies, foreign restrictions still play an important part, and foreign investors should look at both domestic laws and international treaties, including bilateral and multilateral, to understand the differences and decide the most appropriate M&A arrangement. In addition, if state-owned enterprises (SOEs) are involved in contemplated transactions, investors should also pay attention to the regulations applying to those SOEs, which sometimes prolong the closing of an M&A deal.

III DEVELOPMENTS IN CORPORATE AND TAKEOVER LAW AND THEIR IMPACT

According to the old regime (before 1 July 2015), upon establishment, all companies, including domestic companies, had to be issued with a business registration certificate (or, after 1 June 2010, an enterprise registration certificate), except in cases where foreign investors invested in Vietnam for the first time and were issued with investment certificates that concurrently acted as their business registration certificates.
For instance, foreign investors (i.e., foreign individuals or foreign organisations incorporated under foreign laws) that want to set up a new entity in Vietnam will first need to apply for investment approval from the investment licensing authorities (under the form of an investment registration certificate) for their investment projects in Vietnam. Upon issuance of the investment approval, the foreign investors will carry out the establishment procedure to set up the new entity in Vietnam. These steps are also applicable if a company of which foreign shareholders together hold (directly and indirectly) 51 per cent or more of total shares or equity wants to set up its subsidiary in Vietnam.

In the case of a shares acquisition or subscription of an existing Vietnamese company, foreign investors must register the proposed acquisition or subscription with the investment licensing authority if the target company engages in conditional business sectors, or the proposed transaction would result in 51 per cent or more of the total shares being held (directly or indirectly) by foreign investors. This registration step is not required for other acquisition or subscription cases. Upon completion of the registration, the target company shall amend its enterprise registration certificate in accordance with the Law on Enterprises 2014. This procedure is also applicable when the acquirer or subscriber is a foreign-invested company based in Vietnam of which 51 per cent or more of the total shares are held (directly and indirectly) by foreign shareholders.

**The Law on Land 2013**

In general, domestic economic organisations, households and individuals may obtain land use rights by:

- **a** being allocated land from the state;
- **b** leasing land from the state;
- **c** receiving transfer, donation or inheritance of land use rights;
- **d** receiving land use rights as in-kind capital contribution from a lawful land user (applicable to economic organisations);
- **e** recognition by the state of land use rights;
- **f** leasing and subleasing land from a developer of an industrial zone, high-technology zone or economic zone;
- **g** receiving the transfer of an ongoing project using land; or
- **h** receiving land use rights in accordance with the result of a land dispute settlement.

In contrast, foreign-invested companies are only allowed to obtain land use rights by one of the following methods:

- **a** directly leasing the land from the state or from a developer of an industrial zone, high-technology zone or economic zone;
- **b** being allocated land from the state;
- **c** receiving land-use rights as in-kind capital contribution from a lawful land user;
- **d** receiving the transfer of investment capital being land use rights;
- **e** receiving the transfer of an ongoing project using land; or
- **f** receiving land use rights in accordance with the result of a land dispute settlement.

M&A transactions may change the status of the target company from a domestic private company into a foreign-invested one. In such a case, the target company shall have the
rights of a land user as those of a foreign-invested company if foreign investors together hold 100 per cent or controlling shares. Otherwise, the rights of the target company will remain unchanged (Article 183.4 of the Law on Land 2013).

Another key point under the Law on Land 2013 relates to the definition of ‘offshore entity’, under which it is clear that an offshore entity itself may not obtain a land-use right.

iii The Law on Securities

Decree 60/2015/ND-CP guiding the Law on Securities took effect on 1 September 2015, thereby relaxing the restrictions imposed on foreign investment in public companies. Foreign ownership in a public company is regulated as follows:

- if an international treaty to which Vietnam is a party has provisions on the foreign ownership ratio, then such provisions apply;
- if a public company operates in a business investment line for which the law on investment and other relevant laws have provisions on foreign ownership ratio, then those provisions apply. If a public company operates in a business investment line with conditions applicable to foreign investors, but there is not yet any specific provision on the foreign ownership ratio, then the maximum foreign ownership ratio is 49 per cent;
- if a public company operates in several business lines with different provisions on the foreign ownership ratio, then the foreign ownership ratio shall not exceed the lowest ratio of the business lines (in which the company operates) wherein there are provisions on foreign ownership, unless otherwise provided in international treaties; and
- for public companies not falling into any of the above scenarios, foreign ownership is unrestricted, unless otherwise provided in the company charter.

To attract further foreign investments in the stock market, in 2017, the Ministry of Finance introduced draft amendments to the Law on Securities to lift the maximum foreign ownership ratio of 49 per cent mentioned above, thereby allowing 100 per cent foreign ownership with respect to business investment lines that are not stipulated in Vietnam’s WTO Commitments. Subject to the approval of relevant ministries, this draft submission is scheduled to be referred to the government in the fourth quarter of 2018, in preparation for approval by the National Assembly in 2019.

IV FOREIGN INVOLVEMENT IN M&A TRANSACTIONS

According to the Ministry of Planning and Investment, Japan was ranked first on the list of countries investing in Vietnam in 2017 in terms of capital (US$9.11 billion: 25.4 per cent of the total), followed by Republic of Korea (US$8.49 billion: 23.7 per cent of the total) and Singapore (US$5.3 billion: 14.8 per cent of the total). China was placed fourth with investments worth US$2.17 billion. During 2017, Japan continued to be most active in M&A in the real estate and retail sectors, but also made significant investments in the power industry (Marubeni’s US$2.79 billion coal power plant in Nghi Son, Thanh Hoa Province and Sumitomo Corporation’s US$2.58 billion coal plant in the central province of Khanh Hoa).
The wave of Japanese investment in Vietnam is expected to continue for the following reasons:

a. the economic growth of companies in Japan, although upbeat, is still slower than estimated, and investment into South East Asian countries may improve this;

b. the continuing relocation of Japanese investment out of China; and

c. the similarity between Japanese and Vietnamese culture.

With a population of more than 95 million, an expanding middle class and strong domestic demand, Vietnam remains an attractive destination for investors in manufacturing and processing industries, power production and distribution, and real estate.

Outbound M&A investment from Vietnam to other countries is strictly managed by the licensing authorities, especially in the banking and financial sector. Accordingly, to conduct an outbound M&A project, a Vietnam-based company will need to seek approval by the centre-level licensing authority, the Ministry of Planning of Investment, which considers applications on a case-by-case basis. The number of licensed offshore investment projects to date has been limited compared with the number of licensed onshore investment projects, and most are made by large state-owned enterprises, such as Viettel, Vietnam's largest mobile network operator. However, offshore investments are expanding to new markets. In addition to South East Asian countries such as Laos, Cambodia and Myanmar, investments have been made in Cuba (in consumer goods, tourism, renewable energy) and are expanding in the telecommunications sector in several African countries and Peru.

V SIGNIFICANT TRANSACTIONS, KEY TRENDS AND HOT INDUSTRIES

Highlighted M&A deals during 2017 focused on food and beverages and real estate, as these were the most active sectors.

Particular highlights in the food and beverages sector include:

a. the purchase by Thailand-based Thai Beverage Pcl (through its subsidiary in Vietnam, Vietnam Beverage Company Ltd) of 53.59 per cent of shares in Saigon Beer Alcohol Beverage Corporation (Sabeco), a leading brewery in Vietnam, for an estimated US$4.89 billion, which was the highest-value deal in 2017;

b. the US$250 million investment by Asian Fund II (of Kohlberg Kravis Roberts & Company LP) in Masan Group by purchasing secondary shares worth US$100 million in Masan Group from private equity firm PENM Partners and by primary investment of US$150 million for a 7.5 per cent equity in Masan Nutri-Science, the branded meat unit of Masan Group;

c. the acquisition by Platinum Victory Pte Ltd (owned by Singapore-based Jardine Cycle & Carriage) of a 3.33 per cent stake in Vietnam Dairy Products Joint-Stock Company (Vinamilk) for US$400 million;

d. the increase by South Korea’s CJ CheilJedang’s of its equity in Cau Tre Export Goods Processing JSC to 71 per cent by purchasing US$12.4 million worth of shares and its purchase of 64.9 per cent of Minh Dat Food for US$13.44 million; and

e. the merger of sugar companies Thanh Thanh Cong Tay Ninh and Bien Hoa, creating the biggest sugar producer in Vietnam with capitalisation estimated at US$438.6 million.

The real estate sector continues to remain highly attractive to offshore investors, and in 2017 it was one of the most active in M&A although the value of many transactions were kept...
confidential. The physical transfer of land, buildings and other types of real estate property, however, is a problematic issue and can take a long time, especially if it is a transfer to a foreign investor. In particular, an offshore investor may need to (1) set up its subsidiary in Vietnam, (2) apply to the licensing authorities to implement projects in connection with the use of the real estate properties to be transferred and (3) register the physical transfer of the real estate properties with the relevant authorities. Therefore, in practice, foreign entities often consider acquiring vendors’ shares in the project company that owns the real estate properties. The procedure for shares acquisition is much simpler and the offshore investors still own the real estate properties through the project company. Highlight transactions in 2017 include the following:

a the acquisition of Dai Phuoc Lotus Project, with a total area of 198.5 hectares, by VNIC Investment 1 Company Ltd, a subsidiary of China-based China Fortune Land Development Company Ltd, for US$65.3 million;
b Elite Capital Resources Limited acquired Times Square Project, with a total area of 4 hectares in Hanoi City, from VinaLand Limited for US$41 million;
c Van Phat Hung transferred Lacasa Project, a seven-block complex condominium project in District 7, Ho Chi Minh City, to An Gia Investment and Creed Group for US$40 million;
d CapitaLand purchased a condominium project in District 4, Ho Chi Minh City next to the Saigon river, with a total area of 1.45 hectares, from Viet Hung Phu Real Estate Business Investment JSC for US$40 million;
e Krystal Investments Pte Ltd, which is owned by Keppel Land, acquired the Saigon Center project, one of the ‘golden’ projects in Ho Chi Minh City, from Southern Waterborne Transport Corporation for US$37 million; and
f Japanese companies Hankyu Realty and Nishi-Nippon Railroad, in cooperation with Nam Long Group, invested in Kikyo Residence, a real estate project in Ho Chi Minh City comprising villas and apartments with total investment of US$27.72 million.

The M&A market in 2017 recorded an increase in the number of transactions in the insurance sector, including:

a the acquisition by South Korea’s Mirae Asset Life from Groupe Prévoir of a 50 per cent stake in Prevoir Vietnam Life Insurance Company Ltd for US$52.6 million;
b the purchase by Samsung Fire & Marine Insurance Company Ltd of a 20 per cent stake in Petrolimex Insurance Corporation for around US$23.45 million; and


One of the notable transactions in the banking and finance sector in 2017 is the ongoing negotiations for the sale of 100 per cent of the capital contribution of Oceanbank to a foreign investor. Oceanbank was acquired by the State Bank of Vietnam in 2015 for 0 dong. If successful, it would be the first deal wherein a 0 dong-bank is wholly acquired by a foreign investor. Other highlights include (1) the purchase by Sinshei Bank of 49 per cent stake in MB Finance Limited Liability Company from Military Bank for around US$27 million, (2) ANZ’s transfer of its retail portfolio to Shinhan Bank Vietnam, (3) the acquisition by Commonwealth Bank of Australia of Vietnam International Bank’s Ho Chi Minh City
Vietnam branch and (4) the acquisition of a 49 per cent stake by Sumitomo Mitsui Trust Bank in BIDV Financial Leasing Company from the Bank for Investment and Development of Vietnam. The value of the latter three deals has not been disclosed.

Among the highlights in other sectors are:

a the acquisition by SCG Cement-Building Materials Vietnam LLC (owned by Siam Cement Group, a Thailand-based company) of a 25 per cent stake in QPI Vietnam, a subsidiary of Qatar Petroleum International Ltd, for US$36.1 million, to increase its investment in Long Son Petrochemical Project, and its full ownership of Vietnam Construction Materials JSC for US$156 million;

b the purchase by Earth Chemical of a 100 per cent stake in A My Gia JSC for an estimated US$80 million; and
c CJ Logistics (formerly known as CJ Korea Express and owned by CJ Group) acquired a 50.9 per cent stake in both Gemadept Shipping Holding Company Ltd and Gemadept Logistics Holding Company Ltd from Gemadept JSC for an estimated US$85 million total for both deals.

According to Notice No. 72/TB-VPCP issued by the government dated 14 February 2018, 69 state-owned enterprises underwent equitisation in 2017. The equitisation process continues to face the obstacle of incomplete legal regulations because of the delay in issuance of regulations related to equitisation. The following factors also discourage the participation of foreign investors in the equitisation process: lack of accuracy in evaluating the state-owned enterprises, the foreign ownership limitations in several sectors, lack of transparency in the process, and the complicated procedure. The government’s goal is, by 2020, to retain only 150 state-owned enterprises in the vital sectors of electricity transmission, cartography related to national security and military, railway infrastructure, air traffic services, post, irrigation management, lending for socioeconomic development, banking safety and lottery.

VI FINANCING OF M&A: MAIN SOURCES AND DEVELOPMENTS

Foreign investment is the main factor driving M&A in Vietnam. Foreign investors may mobilise capital from overseas countries and pour it into the domestic market. In the highest value deal for 2017, the entire purchase price of US$4.89 billion paid by Vietnam Beverage Company Ltd for 53.58 per cent of the total shares in Sabeco came from loans, with Thai Beverage (parent company of Vietnam Beverage Company Ltd) borrowing US$3.05 billion from Thai banks and BeerCo (a Hong Kong subsidiary wholly owned by Thai Beverage) obtaining a US$1.95 billion syndicated loan from the Singapore branches of Mizuho Bank and Standard Chartered Bank as arrangers and lenders. As regards Japanese acquirers, they seem to prefer to finance their acquisitions of Vietnamese companies by using their existing equity capital and retained profits.

In contrast, local buyers rarely disclose the source of the purchase price. In 2017, Mobile World Investment Corporation, one of the largest companies in Vietnam, sought its shareholders’ approval to raise its budget for M&A to US$110.3 million sourced from loan capital, bond proceeds and undistributed profit. Other domestic acquirers tried to mobilise capital from their shareholders and foreign investors to fund M&A deals.

In the middle of 2017, for the first time in three years, the State Bank of Vietnam reduced its lending interest rate by 0.25 per cent to 6.25 per cent to boost economic growth. However, enterprises, especially small and medium-sized ones, continue to face difficulties in approaching financial sources from domestic banks because of high rates of interest.

Vietnamese parties are familiar with typical clauses applicable to offshore loan arrangements such as financial covenants and security requirements. However, while an offshore creditor’s right to collect payment from debtors in the event of default is protected, enforceability of some terms may in practice be questionable. For instance, offshore creditors may face challenges if they want to exercise the right to acquire secured shares in the event of default if the project company is operating in areas that are conditional or restricted for foreign investment. In addition, offshore creditors are not allowed to have collateral over a land use right in Vietnam.

According to foreign exchange management regulations, offshore loans with terms of more than one year are subject to registration with the central bank of Vietnam (the State Bank of Vietnam). However, the loan registration requirement is just an administrative tool for the State Bank of Vietnam to manage and control the flow of foreign exchange currencies in Vietnam from time to time; it is not a confirmation or certification of the state that the agreement is legally recognised.

VII EMPLYMENT LAW

The current Labour Code 10/2012/QH13 has been effective since 1 May 2013. According to Article 106, the number of overtime hours worked by employees must not exceed 50 per cent of the normal working hours in one day. In the case of working on a weekly basis, the total of normal working hours plus overtime hours must not exceed 12 hours in one day, 30 hours in one month and 200 hours in one year. The previous law simply provided that the number of overtime hours must not exceed four hours per day and 200 hours per year.

Key provisions of the current Labour Code also include:

- adding one more day off during the lunar new year period (Article 115);
- extending the maternity leave period for female employees from four to six months in general (Article 157);
- extending the limitation period for dealing with breaches of labour discipline from three to six months, or 12 months in some special cases (Article 124); and
- providing more details regarding cases in which foreign workers are exempted from work permit requirements (Article 172). In particular, exemption cases include:
  - capital-contributing members or owners of limited liability companies;
  - members of the board of directors of joint-stock companies;
  - chiefs of representative offices and directors of projects of international organisations or non-governmental organisations in Vietnam;
  - those who stay in Vietnam for less than three months to offer services for sale;
  - those who stay in Vietnam for less than three months to deal with complicated technical or technological problems that adversely affect or are at risk of exerting adverse effects on production and business activities where these problems cannot be handled by Vietnamese and foreign experts who are currently in Vietnam;

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- foreign lawyers possessing a professional practice licence in Vietnam in accordance with the Law on Lawyers;
- cases that are in accordance with a treaty to which Vietnam is a contracting party;
- those who are studying and working in Vietnam, provided that their employer shall notify their employment to the provincial level state management agency of labour seven days in advance;
- internal transfer within an enterprise and within the scope of the 11 services on the List of Commitment on Services of Vietnam with the WTO, namely, business, information, construction, distribution, education, environment, financial, medical health, tourism, culture and entertainment, and transportation;
- entering Vietnam to provide expert technical consultancy services or to undertake other tasks servicing the work of research, formulation, evaluation, monitoring and assessment, management and implementation of a programme or project using official development assistance (ODA) in accordance with an international treaty on ODA signed by the competent authorities of both Vietnam and the foreign country; and
- entering Vietnam to work as an expert, manager, executive director or technician for a working period of less than 30 days and for a total cumulative period not exceeding 90 days in any one year.

VIII TAX LAW

Law No. 71/2014/QH13 on amending a number of articles of tax laws (Law No. 71) became effective from 1 January 2015. Some of the key amendments are outlined below.

The list of deductible expenses of companies used for the calculation of taxable income is expanded to include expenditure on vocational education. On the other hand, the list of non-deductible expenses shall exclude expenditure on advertising, marketing, promotion, commissions, receptions, conferences, support for marketing and expenses directly related to business that exceed 15 per cent of deductible expenses.5

A tax rate of 10 per cent for 15 years is expanded to include a company’s income from execution of a new investment project in:

a) the manufacturing of products on the list of ancillary products given priority and satisfying one of the following conditions:
- ancillary products supporting high technology as defined in the Law on High Technologies; or
- ancillary products serving manufacturing in the following industries: textiles, leather, electronic, automobile manufacturing and assembly, and mechanical engineering, provided the products could not be manufactured in Vietnam until 1 January 2015, or can be manufactured in Vietnam and satisfy technical standards established by the European Union or equivalent; and

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4 Article 1.3 of Law No. 71/2014/QH13.
5 Article 1.4 of Law No. 71/2014/QH13.
manufacturing, except for manufacturing of products subject to a special excise tax and mineral extraction, the capital investment in which is not less than 12,000 billion dong, the technologies applied are assessed in accordance with the Law on High Technologies and the Law on Science and Technology, and the registered capital is disbursed within five years of the day on which the investment is permitted as prescribed by regulations of the Law on Investment.\(^6\)

In 2017 and early 2018, the Ministry of Finance submitted draft proposals that will introduce significant changes to the laws on tax duties which may have a negative impact on tax payers. Key proposals include:

- **Corporate income tax**: on transfers by a foreign enterprise of its capital in a company in Vietnam may be calculated on the transfer price at a rate of 1 per cent, instead of 20 per cent on the income arising from the transfers;
- **Personal income tax**: on transfers by individuals, irrespective of whether they are residents or non-residents, of their capital in a company in Vietnam may be calculated on the transfer price at a rate of 1 per cent;
- **Value-added tax**: it is proposed that the current ordinary rate of 10 per cent is increased to 12 per cent from 1 January 2019;
- **Excise tax**: an amount at a rate of 10 per cent may be levied on sweet drinks from 2019, except for 100 per cent natural fruit or vegetable juices, milk and milk products;
- **Property tax**: organisations and individuals having use rights over land or ownership of houses, facilities constructed on land and other properties in Vietnam (such as aeroplanes, cruise ships and automobiles valued at 1.5 billion dong or more) may be levied a new tax called property tax; and
- **Environmental protection tax**: most of the current taxable products, including petroleum (excluding ethanol), diesel fuel, lubricant and coal, may be subject to the maximum tax rate level.

**IX \hspace{1em} COMPETITION LAW**

There has been no change to the Law on Competition to date. Under the current regulations, the following key points should be noted.

‘Economic concentration’ is defined in Article 16 of the Law on Competition as any of the following transactions: merger, amalgamation, acquisition, joint venture and other forms as stipulated in law.

An economic concentration is prohibited if the participating enterprises have a combined market share of more than 50 per cent of the relevant market (the relevant market consists of the relevant product market and the relevant geographical market), except for certain cases under Article 19 of the Law on Competition, which include cases where the enterprise (or enterprises) is at risk of being dissolved or of becoming bankrupt, and the economic concentration has an effect on the extension of exports, or contributions to socioeconomic development or to technical or technological progress.

An economic concentration to be conducted by enterprises with a combined market share in the relevant market of 30 to 50 per cent must be notified to the state authority (i.e., the Vietnam Competition and Consumer Protection Agency (VCCPA), formerly known

\(^6\) Article 1.5 of Law No. 71/2014/QH13.
as the Vietnam Competition Agency) in advance. As set forth in Article 24 of the Law on Competition, enterprises may only carry out the concentration after receiving a written reply from the VCCPA confirming that the concentration is not within a prohibited category.

A company with a dominant position in the market (i.e., holding a market share of 30 per cent or more), or a company with a monopoly position, will also be subject to certain restrictions and prohibitions to prevent the abuse of its dominant or monopoly position, including, *inter alia*, price dumping, price limiting, exclusive dealing and price discrimination in accordance with Articles 13 and 14 of the Law on Competition.

Finally, an ordinary company is prohibited from entering into anticompetitive agreements for the restriction of the entry of another enterprise into the market, the elimination of an enterprise from the market or bid rigging as set forth in Article 9 of the Law on Competition. A group of companies with a combined market share of 30 per cent or more are prohibited from entering into other anticompetitive agreements such as price fixing, dividing territories and exclusive dealing in accordance with Article 9.

The new Law on Competition was approved by the National Assembly on 12 June 2018 and will take effect on 1 July 2019.

**The case of Grab/Uber**
Grab’s acquisition of Uber’s business is a recent notable competition case in Vietnam.

On 26 March 2018, Grab officially announced that it had acquired Uber’s business in South East Asia, including Vietnam, wherein Grab will receive the ride-sharing service and food transport business of Uber in South East Asia and merge them into Grab’s multimodal transportation and fintech platform. In exchange, Uber will hold a 27.5 per cent stake in Grab.

Pursuant to the Law on Competition and its guiding regulations, if enterprises fail to notify the VCCPA (in the case of combined market share in the relevant market of 30 to 50 per cent), they shall be fined up to 10 per cent of the total revenue of each participating enterprise in the financial year prior to the year in which the breach was committed. By law, the transaction may even be prohibited if the combined market share exceeds 50 per cent. The VCCPA decided to conduct a preliminary investigation to determine whether Grab has formed a monopoly in Vietnam. It was Grab’s position that since its combined market share with Uber in Vietnam is less than 30 per cent, it does not have to inform the VCCPA before proceeding and completing this transaction. On 16 May 2018, the VCCPA announced that the Grab/Uber deal has shown signs of breach of the Law on Competition, exceeding a 50 per cent market share in Vietnam. Two days later, the VCCPA issued a decision to conduct an official investigation into this matter.

**X OUTLOOK**
Vietnam experienced strong economic recovery in 2017, with growth in gross domestic product (GDP) at 6.81 per cent (exceeding its target of 6.7 per cent), record high foreign direct investment and US$400 billion in trade, and it remains a very attractive place for investment in the private sector. Vietnam is expected to benefit greatly from the Comprehensive and Progressive Agreement for Trans-Pacific Partnership it signed in March 2018, which, according to the World Bank, is estimated to increase Vietnam’s GDP from 1.1 per cent to 3.5 per cent by 2030.
The banking sector could be more active than ever as the government works hard to reform the banking system. Foreign ownership limits relating to the restructuring of weak commercial banks may be relaxed by the Prime Minister on case-by-case basis, allowing for greater participation by foreign investors under a restructuring plan approved by the State Bank of Vietnam.

Real estate will remain one of the most attractive sectors for foreign investors, given the speed of the country’s urbanisation with the rise of the middle-income class. In 2017, the National Assembly issued a resolution aimed at easing the procedures for enforcement by banks of property mortgages. This is also one of the key factors to facilitate M&A in the real estate sector as banks will find it easier to sell mortgaged properties and real estate development projects.

Both foreign and domestic deal-makers continue to seek to acquire pharmaceutical distribution chains. Given the existing stringent restrictions on foreign investments in this sector, foreign deal-makers should structure the deals creatively.

Retail, energy and fast-moving consumer goods will continue to lure foreign investments. There are also opportunities in renewable energy projects, high-tech agriculture and other high-tech industries.

The speeding up of privatisation of state-owned companies offers foreign investors many more opportunities to enter the market through M&A. The government is planning to divest from around 180 companies in 2018 alone, followed by divestments from 100 companies in the next two years. The equitisation of the following may draw the attention of foreign investors: Airports Corporation of Vietnam, Vietnam Pharmaceutical Corporation (Vinapharm), Vietnam Machinery Installation Corporation (LILAMA), Viglacera Corporation, Vietnam National Textile and Garment Group (Vinatex), Vietnam Steel Corporation (VNSteel), and Foreign Trade Freight Forwarding and Warehousing Joint Stock Company (Viettrans).

According to Nikkei Asian Review, as efforts by manufacturers to establish a business in Vietnam has stabilised, infrastructure exports are creating a new wave of investment as Vietnam lures private sector funding in infrastructure development, with an anticipated need for US$400 billion in infrastructure spending over the next 10 years.
Appendix 1

ABOUT THE AUTHORS

OLE K AABØ-EVENSEN
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Ole K Aabø-Evensen is one of the founding partners of Aabo-Evensen & Co, a Norwegian boutique M&A law firm. He assists industrial investors, financial advisers, private equity funds and other corporations in friendly and hostile takeovers, public and private mergers and acquisitions, corporate finance and other corporate matters. He has extensive experience in all relevant aspects of transactions, both nationally and internationally, and is widely used as a legal and strategic adviser in connection with follow-ups of his clients’ investments.

Recognised by international publications such as *The Legal 500*, *IFLR1000* and *European Legal Experts*, during the past 12 years he has been rated among the top three M&A lawyers in Norway by his peers in the annual surveys conducted by Finansavisen. In the 2012, 2013, 2017 and 2018 editions of this survey, Finansavisen named Mr Aabø-Evensen as Norway’s number one M&A lawyer. He is also the author of a 1,500-page Norwegian textbook on M&A.

Mr Aabø-Evensen is also the co-head of the firm’s M&A team and the former head of M&A and corporate legal services of KPMG Norway.

CHARBEL ABOU CHARAF
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Charbel Abou Charaf is a local partner in the mergers and acquisitions group. Previously based in the firm’s New York office, Charbel focuses on domestic and cross-border mergers, acquisitions, joint ventures, equity investments and capital markets transactions in a broad range of industries.

Charbel has been involved in transactions in the Middle East, Europe, the Americas, Asia and Africa. He also advises clients on general corporate matters and restructurings. He is ranked as a notable practitioner by *Chambers Global* and a next generation lawyer by *The Legal 500*. ‘Charbel Abou Charaf is a rising star in the corporate field. Clients are full of praise and say: “He is great, always ready to help and very professional”.’ (*Chambers Global* 2016). Charbel was also awarded the Rising Star of the Year award at the 2016 IFLR Awards.
MARANATHA ABRAHAM
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Maranatha is an associate at ÆLEX, in the corporate/commercial, energy and intellectual property practice groups. She regularly advises on business restructuring transactions as well as regulatory compliance issues. She is also a member of the firm’s banking and finance group and was part of the team that conducted a due diligence on a Nigerian bank ahead of the issue of a Global Depositary Receipt.

Maranatha was educated at the Nigerian Law School (BL) and University of Lagos (LLB). She is a member of the Nigerian Bar Association.

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John Aguilar Quesada is a partner at Aguilar Castillo Love. He was born in San José in 1967 and was admitted to the Bar in 1989. He is also qualified as a notary public. He obtained his degree in law from the Autonomous University of Central America (*summa cum laude, Academic Crown Award, 1988*). In 1989, he attended a legal English course at Tulane University, and then received his LLM from Harvard University Law School in 1991. His publications include *Foreign Investment and Development in Costa Rica* (Harvard Law School, 1991), *Foreign Investment: A new proposal for Costa Rica* and *Intellectual Property, Economic Development and Costa Rica*. He is a member of the Costa Rican Bar Association and the International Bar Association, and speaks Spanish and English.

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A senior partner and member of the firm’s board of directors, Juan Domingo Alfonzo Paradisi graduated from Universidad Católica Andrés Bello in 1987. In 1990, he obtained a postgraduate degree in administrative law from the same university. In 1992, he obtained a doctorate in administrative law from Universidad Complutense de Madrid and a doctorate in superior studies in public administration from the National Public Administration Institute, graduating *cum laude*. From 1996 to 1999, he served as an alternate judge for the First Contentious Administrative Court.

Dr Alfonzo Paradisi is a board member of the Association of Graduates of the National Institute of Public Administration of Spain. He is also a member of the Venezuelan Tax Law Association, the Administrative Law Foundation, the Venezuelan Financial Law Association and the Venezuelan Law and Economy Association.

Dr Alfonzo Paradisi is Vice President of the Venezuelan Chapter of ECSA-Andina (the European Community Studies Association). He is also a member of the board of directors of the European–Latin American Integration Institute (IELEPI).

He is a professor of the chair of protection of free competition for postgraduate courses and a coordinator of the postgraduate programme in economic law at Universidad Católica Andrés Bello. At Universidad Central de Venezuela, he is a professor of the chair in administrative and fiscal decentralisation for the postgraduate programme in tax law, administrative law and constitutional law for the Law School, and in administrative law for the School of Political Studies. He speaks Spanish and English.
LAWRENCE FUBARA ANGA

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L Fubara Anga heads the banking, finance and transportation practice groups at ÆLEX.

He advises on M&A strategy, as well as on financial, corporate and commercial issues affecting projects and companies, especially in the oil, gas, electricity, aviation, maritime, banking and financial services sectors.

Mr Anga has been involved in project finance, banking and capital market transactions for several years. He is a former chair of the Capital Markets Solicitors Association.

He advised the government on the review of the Investment and Securities Act and was a member of the National Committee on the Review of Capital Market Structure and Processes.

He was invited to become a member of the Presidential Policy Advisory Committee; he was also a member of the subcommittee on finance and investment and authored the committee’s policy paper on foreign investment and privatisation. He is currently the chair of the board of Trustees of the Investors Protection Fund of the Nigerian Stock Exchange. He was a member of the Securities and Exchange Commission’s (SEC) master plan committee and is currently a member of the rules and compliance subcommittee of the capital markets committee of the SEC.

Mr Anga was educated at Yale University and the University of Cambridge. He is admitted to practise law in Nigeria, England and Wales, and Ghana.

RAMONA AZZOPARDI

WH Partners

Ramona Azzopardi is recognised as one of the leading taxation lawyers in Malta. Although her expertise covers any industry, she is particularly active in the commercial, private clients and financial services industries. She has in-depth experience in both direct and indirect tax issues in cross-border transactions. She regularly assists private clients with wealth management and relocation services.

Prior to joining WH Partners in 2014, Ramona worked at Fenech & Fenech Advocates, where for seven years she was a tax lawyer assisting clients in tax matters in relation to gaming, aviation, shipping, financial services and ICT.

Ramona graduated with a master’s in financial services from University of Malta in 2009 after submitting her thesis ‘The case for change in the VAT treatment of Financial Services’. She graduated as a doctor of laws from University of Malta in 2007 after writing and successfully defending a thesis entitled ‘The case of the enactment of a Taxpayer’s Charter’. Ramona was also awarded a diploma in taxation from the Malta Institute of Taxation in the same year.

Ramona is a member of the Malta Institute of Taxation, the Chamber of Advocates and the Institute of Financial Services Practitioners, where she also serves as a member of the taxation subcommittee. She is frequently invited to speak at various tax conferences and has contributed to a number of international tax publications.
MIHÁLY BARCZA

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Dr Barcza graduated from the József Attila University Szeged in 1994 and studied at University of Economics Budapest between 1995 and 1997. He was a trainee at the Budapest Stock Exchange and later was inhouse counsel at CO-Nexus Investment House. He was a trainee, then attorney and later partner with a reputable Hungarian law firm, Réti Szeghéő and Partners, from 1995 to 2004, spending seven months at Clifford Chance, London, on a scholarship. He was senior counsel and co-head of corporate with international law firm Freshfields Bruckhaus Deringer from 2004 to 2007. He is a founding partner of Oppenheim. He has been a member of the Money and Capital Market Arbitration Court since 2000.

JUSTIN BHARUCHA

*Bharucha & Partners*

Justin is a partner at Bharucha & Partners and his practice focuses on M&A and finance. He advises on acquisitions by and from non-residents, especially in sectors where foreign investment is subject to restrictions, illustratively, real estate, defence and retail. Justin has also structured transactions and advised Indian clients acquiring companies offshore.

NICOLAS BIRKHÄUSER

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Nicolas Birkhäuser specialises in merger control proceedings and cartel and abuse of dominance investigations, including multi-jurisdictional coordination, high-profile investigations and transactions, set-up of business (including cooperation, distribution, sourcing, research and development, dominance) and compliance. A particular focus of his practice lies on intellectual property-related aspects of competition law (including cooperation agreements, distribution systems and licensing).

MIGUEL BOLÍVAR TEJEDO

*Uría Menéndez*

Miguel Bolivar joined Uría Menéndez in 2010, and he has been a senior associate at the firm since 2018. From March to September 2016, he was seconded to the London office of Slaughter and May. Miguel practises as a lawyer in Uría Menéndez’s corporate department.

His main practice areas are commercial law in general, corporate law, M&A, and refinancing and restructuring of companies. He has advised on very diverse operations, including financing and debt restructuring operations, both bilateral and syndicated; buying and selling of companies; real estate transactions and the purchase and sale of asset portfolios; and merger and restructuring operations of groups of companies and contracting in general.
HUMBERTO BOTTI
*Creel, García-Cuéllar, Aiza y Enríquez, SC*

Humberto Botti is a partner in the Mexico City office. His practice focuses on M&A, private equity and capital markets. Among others, Mr Botti represents investment banks, private equity funds and corporate clients in connection with acquisitions, mergers, divestitures and joint ventures. He also advises underwriters, investors and issuers with respect to equity offerings and other debt investment and financing transactions.

Prior to rejoining the firm, Mr Botti worked as an investment banker for Goldman Sachs’ Mexico City office, where he participated in the execution of several M&A and capital market transactions focused on Mexico and Latin America.

He has been professor of corporate and financial law at Universidad Iberoamericana.

JAMES BOWDEN
*Afridi & Angell*

James Bowden joined Afridi & Angell in 2006 and, after leaving the firm in 2009 for two years, he rejoined in 2011. He became a partner in 2014. He advises clients on a broad range of corporate, commercial, employment and compliance matters, focusing on M&A and restructuring.

From 2009 to 2011, Mr Bowden worked as in-house counsel with one of Canada’s leading technology outsourcing companies, where he gained in-depth technology outsourcing experience.

Prior to joining Afridi & Angell, Mr Bowden practised in Canada, in the Toronto office of a global law firm. He is admitted to the Ontario Bar.

FRANCISCO BRITO E ABREU
*Uría Menéndez – Proença de Carvalho*

Francisco Brito e Abreu joined Uría Menéndez in 2001 after working as in-house counsel in the Portuguese subsidiary of a multinational corporation, a privately owned holding company and a listed Portuguese company, and as a lawyer in another prestigious Portuguese law firm. He was made a partner of Uría Menéndez in January 2005.

He focuses his practice on commercial and corporate law issues, and has extensive experience in corporate restructuring, M&A and private equity transactions.

He is recognised by major publications (*Chambers Global*, *IFLR 1000*, *PLC Which Lawyer?*) for his work in M&A and private equity.

THOMAS BRÖNNIMANN
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Thomas Brönnimann’s practice focuses on capital markets and private and public M&A transactions, with a particular focus on listed entities and other large enterprises. His M&A practice includes private transactions for both strategic and financial buyers and sellers, and public tender offers. He represents clients before the Swiss Takeover Board.
ADRIANO CASTELLO BRANCO
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Adriano focuses his practice on a wide range of corporate matters, mergers and acquisitions and restructuring transactions, with an emphasis on listed companies and private equity investments. He is Director of the Brazilian Institute of Business Law (Ibrademp) and has experience in law firms in Brazil and abroad, having worked as an international associate in the New York office of Davis Polk & Wardwell LLP. He has also held executive in-house positions and been a board member of listed domestic corporations. He is author of the book *The Board of Directors in Corporations* and several academic articles in collective works and law reviews.

JOÃO MARCELINO CAVALCANTI JÚNIOR
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João counsels national and international companies (including listed companies), private equity funds and investors on corporate matters, including mergers, acquisitions, joint ventures and divestments. He is admitted to practise in Spain and Brazil. From 2007 to 2012, he gained international experience in Spain, where he practised at a Big Four firm, a multinational company and top-tier Spanish law firms. He holds an LLM degree in international business law from the ESADE Law and Business Schools and an LLM degree in taxation from University of Barcelona. He also received a bachelor of laws degree from the Federal University of Pernambuco.

HO KYUNG CHANG
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Attorney Ho Kyung Chang is a partner in the corporate and M&A practice group of Bae, Kim & Lee LLC. He advises domestic and international clients in connection with a broad range of general corporate and transactional matters, including mergers and acquisitions, foreign investments, private equity investments, capital markets and corporate governance since he joined Bae, Kim & Lee LLC in 2009.

Mr Chang gained experience of working as a secondee in the foreign affairs and transactions team at LG Display Co, Ltd in 2011 and as a foreign attorney in the Washington, DC, office of Arnold & Porter LLP in 2014 and 2015. He was appointed by the Ministry of Justice of Korea as a member of the Legal Advisory Committee for International Investment Disputes in 2011.

Mr Chang received a bachelor of law degree from Seoul National University in 2005, completed the Judicial Research and Training Institute in 2009 and graduated from Georgetown University Law Center (LLM) in 2014. He was admitted to the Korea Bar in 2009 and the New York Bar in 2015.
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Mr Wei (David) Chen is a managing partner and head of cross-border transactions. He mainly represents state-backed investment funds, state-owned enterprises and private enterprises in outbound M&A, especially in semiconductors and mining. He is named in the March 2018 edition of Asian Legal Business as one of the top 10 M&A lawyers in China. In recent years, he has acted as lead counsel in notable deals, included advising E-Town International, an outbound investment fund of the Municipal Government of Beijing, in consortium acquisitions of Mattson Technology and iML Technology, both Silicon Valley-based semiconductor companies. In 2016, he advised JAC Capital as PRC counsel in a US$2.5 billion acquisition of the Standard Products Unit of NXP Semiconductors. During the past year, Mr Chen has represented China Gold in major proposed mining deals.

VASSILIS S CONSTANTINIDIS

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Vassilis S Constantinidis is active in the fields of M&A, employment law, commercial law, intellectual property, litigation and arbitration. He is specialised in employment law, having extensive experience in all HR issues (including code of conduct policies, data protection policies, employers’ handbooks, business-level CLAs and individual employment contracts of any kind). He has worked for 18 years as an in-house lawyer and legal director in the holding company of Boutari Group and Mythos Brewery SA (part of S&N and subsequently Carlsberg Group), and was also in charge of the HR and corporate affairs department, contributing to several international projects of Carlsberg Group.

Mr Constantinidis is a graduate of the Athens University Law School, and is a member of the Athens Bar. He is qualified to practise before all courts of all levels of jurisdiction. He speaks Greek, English and French.

ROGER A COOPER

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Roger Cooper is a partner at Cleary Gottlieb Steen & Hamilton LLP, based in New York.

Mr Cooper’s practice focuses on complex civil litigation, with an emphasis on disputes arising out of securities, M&A and derivative transactions, and on corporate governance issues.

Mr Cooper has been recognised as a leading lawyer by Chambers USA, Benchmark Litigation and The Legal 500 US and has written for numerous publications, including New York Law Journal: Complex Litigation, New York Law Journal Litigation, US Law Week, Derivatives, White Collar Crime and Derivatives Litigation in Business and Commercial Litigation in Federal Courts.

Mr Cooper joined the firm in 2003 and became a partner in 2011. He received a JD from Columbia University School of Law, a PhD in political philosophy from Duke University and an undergraduate degree from the University of Wisconsin. He also served as a law clerk to the Honourable B Avant Edenfield of the US District Court for the Southern District of Georgia.

Mr Cooper is a member of the Bar of New York, and is currently a member of the Committee on Securities Litigation of the Bar Association of the City of New York and of the Board of The Fund for Modern Courts.
SUZANNE CORREY

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Suzanne Correy is a member of the Maples and Calder corporate team. She has extensive experience in all aspects of corporate work, including joint ventures, initial public offerings (IPOs), mergers and acquisitions, and advises on a wide variety of structured finance, capital markets and investment fund transactions. Suzanne has a strong focus on public company work, advising clients through all stages of their growth from start-up to IPO and beyond. She has advised on numerous mergers and acquisitions transactions involving listed and widely held companies.

As part of the Latin America practice group, Suzanne also advises clients both originating from Latin America and investing into the Latin American region.

Additionally, Suzanne has advised telecommunications clients and hardware companies on Cayman Islands licensing and regulatory issues.

INGY DARWISH

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Ingy Darwish is an associate at Al Tamimi & Co’s Egypt office.

She holds a bachelor of arts in economics from the American University in Cairo (2015), a bachelor of laws from the Institute of International Business Law (2015) (IDAI-University of Paris 1 Pantheon Sorbonne, Cairo, Egypt and Cairo University) and a bachelor of laws from Cairo University (2016).

Ingy’s particular expertise is in drafting legal documents, preparing due diligence reports, and implementing corporate restructuring plans for local and international clients in the context of M&A and IPOs.

She has further experience in preparing commercial and legal advisory for the healthcare, education, and sports and recreational sectors.

Ingy also has experience in drafting and advising on civil and commercial agreements, including franchise, commercial agency, distributorship, sale, marketing, brokerage and services provision, and in corporate secretarial work including for general assemblies and board meetings.

She speaks Arabic, English and French.

FABRICIO DÁVILA LAZO

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Fabricio Dávila Lazo is an associate at Coronel & Pérez, where he works on mergers and acquisitions transactions in both regulated and non-regulated industries. He has experience in corporate matters with an emphasis on complex corporate structures, restructurings, shareholder advisory and the implementation of compliance systems. In addition, he provides counsel to both national and foreign companies regarding commercial, labour and civil matters.

He is member of the Ecuadorian Academy of Corporate Law and a research associate at the Ibero-American Institute for Law and Finance. He has written about various topics in Ecuadorian and comparative corporate law, such as shareholder agreements and their enforcement in Ecuador and about reforms to the laws regulating bankruptcies.

He graduated as an attorney at Universidad Católica Santiago de Guayaquil and obtained a master’s in corporate law at Centro de Estudios Garrigues in Madrid, Spain.
CLIFFORD DAVIS
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Clifford Davis is a partner at S Horowitz & Co, where he co-heads the international corporate group and specialises in cross-border and domestic corporate and banking law for international and Israeli companies and financial institutions. Mr Davis advises on all aspects of local and multinational mergers and acquisitions, joint ventures, IPOs, syndicated and non-syndicated bank financings and securities laws. In addition to advising on individual transactions, he provides legal counsel to international clients on all matters relating to the operation, management and development of their business and trading activities in Israel. Mr Davis is a member of the Israel Bar Association, the Law Society of England and Wales, the City of London Law Society and the Israel–British Law Association, where he serves on the committee. He is also an associate member of the American Bar Association and a contributor to World Bank’s corporate governance project and Doing Business, a co-publication of the World Bank and the International Finance Corporation. Mr Davis is highly recommended as one of Israel’s leading lawyers in the field of mergers and acquisitions by Chambers Global, The Legal 500, PLC Which Lawyer? and European Legal Experts.

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Juan Manuel de la Rosa is a partner in the firm’s mergers and acquisitions and private equity practice groups in Bogotá. Mr de la Rosa was a member of the Columbia Latin American Business Law Association, and was appointed to the board of directors of several financial institutions and blue chip companies, including ABN AMRO Bank, Jardine Lloyd Thompson and Colfondos SA. He also worked as a professor at the Universidad de los Andes.

Mr de la Rosa focuses on advising private equity investors, and private and publicly held companies, in complex mergers, acquisitions and dispositions of assets in Colombia and Latin America. He also advises clients on general corporate matters when undertaking business in Colombia.

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Guillermo de la Rosa Stolk has been a senior partner at Torres, Plaz & Araujo since 1992 and became a member of its board of directors in 1996. He joined the firm in 1984 and became a junior partner of the firm in 1988. Before joining Torres, Plaz & Araujo, he worked at Chadbourne, Parke, Whiteside & Wolf (which joined forces with Norton Rose Fulbright in July 2017) in its New York office as a foreign associate (1983 to 1984).

He received his graduate degree from Universidad Católica Andrés Bello (Caracas) in 1982. He completed postgraduate studies in comparative law at the Inter-American Law Institute, New York University School of Law (1983) and in financial law at Universidad Católica Andrés Bello (1994).

He devotes his practice not only to assisting the firm’s clients’ regular corporate needs, but is also very active in numerous domestic and international transactions, including, but not limited to, asset protection and cross-border structuring. He also advises on both federal and municipal taxes and estate planning. In his practice, Mr de la Rosa Stolk deals with domestic and international clients, the latter being from America, Europe and the Far East.
On the academic side, Mr de la Rosa Stolk has taught as a guest professor in the masters of economic law programme at the Pontificia Universidad Javeriana in Bogotá, and in the specialisation in finance at the Instituto de Estudios Superiores de Administración in Caracas.

He is a member of the International Bar Association and the Inter-American Bar Association (Venezuelan Chapter), and represents Torres, Plaz & Araujo at the Capital Markets Committee of the Venezuelan-American Chamber of Commerce and Industry and at the Venezuelan-Colombian Economic Integration Chamber, of which he has been head of the legal committee and a member of its board of directors. Mr de la Rosa Stolk was a member of the board of directors of Mavesa SA, a former publicly traded large industrial food conglomerate from 1994 to 2000. He speaks Spanish and English.

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Olha Demianiuk is a partner in Baker McKenzie’s corporate M&A practice group and the head of the firm’s healthcare industry group in Kiev. Olha is an experienced transactional lawyer with more than 13 years of relevant expertise. Olha advises on private M&A, both cross-border and domestic, and cross-border equity capital market deals in various industries. Olha also advises clients on the establishment of joint ventures and corporate restructuring. Olha is recognised by *Chambers Europe*, *IFLR1000* and Ukrainian law firm legal directories in M&A and healthcare practices in Ukraine.

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Valmy Diaz Ibarra is a graduate of Universidad Católica Andrés Bello (2001) and has a postgraduate degree in tax law from Universidad Central de Venezuela.

He joined the Torres Plaz & Araujo team in 2011 as a general partner. He has been involved in tax advice, litigation and planning for 18 years. As a litigator, he has represented local companies and multinationals before the Superior Tax Courts and the Supreme Tribunal of Justice, challenging tax laws and regulations, as well as tax deficiency memos issued by federal, state and municipal tax authorities.

Tax advice activities relate to application of tax rules, tax consequences in personal and corporate reorganisations and contracts.

He is currently an active member of the Venezuelan Tax Law Association (AVDT). He speaks Spanish and English.

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Robert Dooley is an Australian foreign attorney in the corporate group at Bae, Kim & Lee LLC. Robert advises public and private companies, multinationals and regulated entities on a wide variety of corporate and commercial matters, including mergers and acquisitions, joint ventures, corporate governance, commercial contracts, infrastructure investments and corporate restructures. Before joining Bae, Kim & Lee LLC, Robert practised privately in Australia for nine years, including eight years with Norton Rose Fulbright.
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Engy is a corporate commercial lawyer with experience in M&A and capital markets transactions. She has been engaged in various corporate restructurings in onshore and offshore jurisdictions. She has assisted in advising on regulatory strategies and compliance, coordinating cross-border transactions, obtaining approvals from regulatory bodies and providing advice on all aspects of corporate licensing.

She speaks Arabic, English and French.

JÓZSEF BULCSÚ FENYVESI
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Dr Fenyvesi graduated from the Janus Pannonius University of Pécs in 1998 and pursued postgraduate studies in EU law at the University of Pécs. He obtained an LLM in international economic law at the University of Warwick in 2004, and attended the University of Oxford as a Chevening scholar and received a *magister juris* degree in 2006. Mr Fenyvesi joined the Budapest office of Freshfields Bruckhaus Deringer in 2005. He became an associate of Oppenheim in 2007 and has been a partner at the firm since 2010. Mr Fenyvesi has been the head of the corporate practice of Oppenheim since 2014.

LAURA FERNÁNDEZ-PEIX PÉREZ
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JEREMY FRAIBERG
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Jeremy is co-chair of the firm’s mergers and acquisitions group. He has acted for public and private companies, private equity firms and investment bankers on a range of acquisitions, securities offerings and other corporate transactions. He is a ‘most frequently recommended’ M&A lawyer in The Lexpert/AmLaw Guide to the Leading Corporate Lawyers in Canada. He has taught at the University of Toronto Faculty of Law on contested mergers and proxy contests, and has spoken and written about a range of legal issues. After graduating from law school, he served as a law clerk to Chief Justice Antonio Lamer at the Supreme Court of Canada.

MOHAMED GABR
Al Tamimi & Co
Mohamed Gabr is a partner and the head of corporate commercial at Al Tamimi & Co’s Egypt office. He holds a BA in economics from American University in Cairo (AUC), an LLB from Cairo University, Faculty of Law and an MA from AUC in international relations.

He is admitted to the Egyptian Bar Association.

Mohamed has extensive experience in M&A and capital markets transactions. He has advised various local and international clients on transaction documents, deal negotiations and due diligence in the context of M&A involving public and private companies.

He speaks Arabic and English.

EDUARDO GONZÁLEZ
Creel, García-Cuéllar, Aiza y Enriquez, SC
Eduardo González is a partner in the Mexico City office. His practice focuses on M&A, representing buyers, sellers, boards of directors and financial advisers in connection with complex transactions, including M&A, private equity deals, spin-offs, joint ventures, strategic alliances, minority investments and asset sales. Among others, Mr González regularly advises large multinationals and global private equity investors and sponsors on acquisitions and investments in Mexico across multiple industries.

Mr Gonzalez has been repeatedly recognised as one of the country’s leading practitioners in mergers and acquisitions by specialised publications such as Chambers and Partners Latin America, Who’s Who Legal and The Legal 500.

Mr González has authored and co-authored several articles on M&A and private equity-related topics for prestigious publications, including The Chambers Legal Practice Guide and The Private Equity Review.

MARK I GREENE
Cravath, Swaine & Moore LLP
Mark I Greene serves as the head of Cravath’s corporate department and the leader of its international practice. His practice focuses on mergers and acquisitions, corporate governance and securities matters, including advising on cross-border transactions, private equity deals, complex restructuring transactions, proxy fights, takeover defence, hedge fund activism and global securities offerings.
Mr Greene has long been recognised as one of the world’s leading M&A practitioners by, among others, *Chambers USA*, *Chambers Global*, *The Legal 500 United States*, *The Legal 500 Latin America* and *IFLR1000*. In 2018, he was named the ‘Cross-Border Dealmaker of the Year’ by *The Deal*.

Mr Greene received a BA from Cornell University in 1989 and a JD from the University of Pennsylvania in 1993. After a clerkship with Hon Charles Legge of the US District Court for the Northern District of California, he joined Cravath in 1994 and became a partner in 2001.

**SOPHIA K GRIGORIADOU**

*Dyrrlerakis & Associates*

Sophia K Grigoriadou is active in the fields of M&A, privatisations, international transactions and public contracts, and specialises in tax law (VAT, tax withholding, stamp tax, capital concentration tax, consumption tax, import duties, third-party taxes, and the Books and Data Code). She has experience in major privatisations, M&A and project finance deals.

Mrs Grigoriadou is a graduate of the Thessaloniki University Law School and the Université de Misericorde, Fribourg, and is a member of the Athens Bar and the IFA. She is qualified to practise before all courts of all levels of jurisdiction. She speaks Greek, English and French.

**HA HOANG LOC**

*Nishimura & Asahi*

Ha Hoang Loc is a partner at Nishimura & Asahi. He has extensive experience in cross-border M&A deals and other corporate transactions in a wide range of sectors. He has been practising since 2001 at both domestic and international law firms. He is a graduate of Ho Chi Minh City University of Law (LLB, 2001) and Southampton Solent University (LLM, 2008), and is admitted to the Ho Chi Minh City Bar Association.

**RICHARD HALL**

*Cravath, Swaine & Moore LLP*

Richard Hall is a partner in Cravath’s corporate department. His practice focuses on mergers and acquisitions, corporate governance advice and matters relating to activist defence. Mr Hall is the head of Cravath’s mergers and acquisitions practice for EMEA.

Mr Hall has been repeatedly cited as one of the country’s leading practitioners in mergers and acquisitions by, among others, *Chambers USA*, *Chambers Global*, *The Legal 500 United States*, *The Legal 500 Latin America* and *IFLR1000*. He was named a ‘Dealmaker of the Year’ by the *American Lawyer* magazine in 2018.

Mr Hall received a BCom with honours in 1984 and an LLB with honours in 1986 from the University of Melbourne, and an LLM from Harvard University in 1988. He joined Cravath in 1988 and became a partner in 1996.
TARO HIROSAWA

Nishimura & Asahi

Taro Hirosawa is admitted to the Japan Bar (2005) and the New York Bar (2014), and is registered as a foreign attorney in Vietnam (2013). He is a graduate of Tokyo University (LLB, 2004) and Duke University School of Law (LLM, 2013). Since August 2013, he has practised law at Nishimura & Asahi’s Vietnam office. He has varied experience in cross-border transactions between Japan and Vietnam, and in providing legal advice to foreign-invested companies in Vietnam.

CHRISTIAN HOEDL

Uría Menéndez

Christian Hoedl is a lawyer in the Madrid office of Uría Menéndez. He joined the firm in 1987 and became a partner in 1998. He was resident partner in the firm’s Bilbao office between 1999 and 2001.

Christian focuses his practice on M&A and private equity.

He heads the M&A and private equity practice area in Uría Menéndez. He has participated in a large number of private equity deals for national and international funds, with or without a presence in Spain, both in private and P2P deals. Christian has extensive experience in M&A and joint ventures, and has also advised on financing, directors’ bonuses and refinancing in private equity-owned companies. He acts as secretary to the board of several companies.

He is recognised as a leading lawyer by the main international legal directories (Chambers and Partners, PLC, Who’s Who Legal, etc.).

HANS HENNING HOFF

Heuking Kühn Lüer Wojtek

Hans Henning Hoff is qualified in both Germany and Iceland. He studied law, Scandinavian languages and history at the universities of Erlangen, Reykjavík and Bonn, and obtained his Dr jur summa cum laude from the University of Munich with a thesis on the influence of Roman law on the oldest written Icelandic law.

Hans advises domestic and international corporate clients and financial institutions in Germany and in Iceland. His areas of practice are corporate and commercial law with a special focus on energy-related projects. Hans also has considerable experience in real estate transactions. Regarding corporate law, he advises his clients with regard to M&A transactions, corporate restructurings and joint ventures.

PHILIPPE HOSS

Elvinger Hoss Prussen

Philippe Hoss became a member of the Luxembourg Bar in 1987 and joined Elvinger Hoss Prussen in 1988, where he has been a partner since 1990.

Philippe holds a maîtrise en droit from the Université Paris I Panthéon-Sorbonne (France) and a postgraduate degree (DEA) in business law from the same university.

He lectures on various business and financial matters at the University of Luxembourg, and on company law as part of the course for admission to the Luxembourg Bar.
He has been a member of the board of directors of the ILA (Luxembourg Institute of Directors) since 2010 and a member of the Capital Market Committee set up by the CSSF (Financial Sector Supervisory Commission).

Philippe’s principal fields of activity are M&A, capital markets, banking and finance, and securitisations.

Philippe authored the first published English translation of the law of 10 August 1915 on commercial companies and of all subsequent updates thereof.

THIERRY KAUFFMAN

Elvinger Hoss Prussen

Thierry Kauffman became a member of the Luxembourg Bar in 2009 and joined Elvinger Hoss Prussen the same year where he became a partner in 2018.

Thierry holds a maîtrise en droit from the Université Paris I Panthéon-Sorbonne (France) and a master's degree in international private and business law from the Université Paris II Panthéon-Assas (France).

He is vice president of the Luxembourg Young Bar Association for 2017–2018 and will be the president for 2018–2019.

Thierry’s principal fields of activity are M&A, capital markets, corporate and finance.

HEINRICH KNEPPER

Hengeler Mueller

Heinrich Knepper received his law degree after studying at the universities of Regensburg, Germany and Paris II Panthéon-Assas. He was admitted to the German Bar in 1996 and began his career at the Berlin office of Hengeler Mueller.

Mr Knepper has been a partner at Hengeler Mueller since 2001. From 2003 to 2006 he headed Hengeler Mueller’s London office, before returning to Frankfurt. He advises both German and international corporate and financial clients on private and public M&A and on debt financing, in particular acquisition finance with a focus on leveraged buyout transactions, as well as restructuring transactions.

HIROKI KODATE

Anderson Mōri & Tomotsune

Hiroki Kodate is a partner at Anderson Mōri & Tomotsune and is principally involved in the fields of corporate and commercial law, with an emphasis on M&A and corporate governance. In addition to his experience at Anderson Mōri & Tomotsune, he has served as an attorney at the Civil Affairs Bureau of the Ministry of Justice of Japan (2002 to 2005), where he was engaged in the modernisation of Japanese corporate law. He also worked at Slaughter and May in London from 2000 to 2001.

Mr Kodate received his LLM from Harvard Law School (2000) and his LLB from the University of Tokyo (1994).

Mr Kodate is a member of both the Daini Tokyo Bar Association in Japan (since 1996) and the New York Bar (since 2001). He speaks Japanese and English.
MELTEM KONING-GUNGORMEZ

*Kennedy Van der Laan*

Meltem Koning-Gungormez is partner and the head of the corporate team. She specialises in mergers and acquisitions, private equity and venture capital transactions, with a particular focus on the technology, media and retail sectors. She also regularly advises on the formation of investment funds. Meltem creates close working partnerships with her clients to help achieve their commercial and legal goals. She delivers pragmatic and value-adding advice.

MEREDITH KOTLER

*Cleary Gottlieb Steen & Hamilton LLP*

Meredith Kotler is a partner at Cleary Gottlieb Steen & Hamilton LLP based in New York.

Ms Kotler’s practice focuses on securities, M&A, general commercial and shareholder derivative litigation, in federal and state trial and appellate courts. She regularly represents clients in securities class actions and a host of corporate governance matters.

Ms Kotler has been recognised as a leading lawyer by *Chambers USA*, *Benchmark Litigation* and *The Legal 500 US*, and has spoken on securities issues and other topics before the Practising Law Institute, the SEC Institute and the Compliance, Governance and Oversight Council. Her writings on the latest developments in Delaware courts and deal litigation have been published in the Harvard Law School Forum on Corporate Governance and other outlets.

Before entering private practice, Ms Kotler served as an assistant US attorney in the Southern District of New York from 1998 to 2004. During the last year and a half of her tenure, she was the Deputy Chief Appellate Attorney in the Civil Division.

Ms Kotler joined the firm as a partner in 2009. She received a JD from Harvard Law School and an undergraduate degree from Princeton University. She also served as a law clerk to the Honourable Barbara S Jones of the US District Court for the Southern District of New York.

Ms Kotler is a member of the Bar of New York.

JASPER KUHLEFELT

*Dittmar & Indrenius*

Jasper Kuhlefelt is a senior associate in Dittmar & Indrenius’ M&A and private equity and intellectual property teams. His work focuses on M&A as well as corporate law and intellectual property. Mr Kuhlefelt has a law degree from University of Helsinki.

RORY LANG

*Duane Morris & Selvam LLP*

Rory is an international corporate lawyer and senior associate at Duane Morris & Selvam LLP’s offices in Yangon and Singapore. He practises in all areas of insurance (contentious and non-contentious), dispute resolution, banking and finance, capital markets, corporate, cross-border transactions, commercial, M&A, real estate, employment, and energy and resources law. He has significant experience in all forms of foreign direct investments and cross-border transactions. Rory provides legal assistance in relation to corporate structuring for investment, commercial contracts with local and international corporations and individuals, labour law, local regional compliance requirements, and real estate guidance for developers and hospitality providers.
Rory’s clients regularly refer to ‘his exceptional insight and understanding of the legal framework in Myanmar and ASEAN’ as he provides ‘good legal advice that helps to map our business plan and strategy’. Apart from corporate and project matters, Rory is also actively involved in pro bono services, which a client described as ‘could not have been more attentive, kind and professional’. Rory is listed as a 2018 Next Generation Lawyer in the practice areas of corporate and M&A by The Legal 500 Asia Pacific. He is also named as a recommended lawyer in projects (including energy) by The Legal 500 Asia Pacific 2018 for his ‘extensive experience in foreign investment, project finance and commercial contracts’.

Rory has more than nine years of experience in Australia and South East Asia, including nearly four years on-the-ground experience in Myanmar, Laos, Thailand and Singapore. He speaks regularly on market entry, M&A, employment law, energy, resources, insurance and property matters at conferences around the world. Rory is admitted to practise as a lawyer of the Supreme Court of Western Australia and as a solicitor of the Federal and High Courts of Australia. He is also a registered foreign lawyer in Singapore. Rory is a graduate of University of Notre Dame Australia, where he was a member of Notre Dame Law Students Society, and a master of law graduate of University of Western Australia.

ALAN PEUM JOO LEE
Bae, Kim & Lee LLC
Attorney Alan Peum Joo Lee graduated from Seoul National University (BS in economics) in 2006 and from Yonsei University Law School (LLM) in 2014. He joined Bae, Kim & Lee LLC in 2014. His current work areas include corporate legal advisory, legal advisory for Japanese companies and corporate litigations.

DANIEL LEE
Maples and Calder
Daniel Lee is a member of the Maples and Calder corporate team in the Cayman Islands. His experience includes advising public and private companies, financial institutions and management teams in relation to mergers and acquisitions (including public takeovers and private equity transactions), IPOs, joint ventures, restructurings and investment funds.

LEE KEE YENG
Allen & Gledhill
Kee Yeng’s areas of practice encompass mergers and acquisitions (for both public and private companies), equity capital markets and corporate advisory work for financial institutions and public companies listed on the Singapore Exchange. Kee Yeng has advised sovereign funds, private equity firms and multinational corporates in an extensive range of domestic and cross-border transactions, including public takeovers, private acquisitions and joint ventures. She is also actively involved in the listing of structured warrant programmes on the Singapore Exchange.

Kee Yeng has been recognised for her work in corporate/M&A in Chambers Global, Chambers Asia-Pacific and IFLR1000. She has also been recommended by The Legal 500 Asia Pacific for public mergers and acquisitions.

Prior to joining Allen & Gledhill, she served as a justices’ law clerk and as an assistant registrar with the Supreme Court of Singapore. Kee Yeng has been a partner since 2009.
LIM MEI

*Allen & Gledhill*

Lim Mei is co-head of the corporate mergers and acquisitions department at Allen & Gledhill. Her areas of practice include mergers and acquisitions, equity capital markets and derivatives. She is also actively involved in the listing of structured warrant programmes on the Singapore Exchange.

Lim Mei is recognised for her expertise in capital markets and corporate/M&A in publications including *Chambers Global*, *Chambers Asia-Pacific*, *IFLR1000* and *The Legal 500 Asia Pacific*.

In *Chambers Asia-Pacific*, Lim Mei is noted as being ‘one of the market’s most prominent corporate lawyers and continues to advise on an array of major transactions’. In *Chambers Global*, Lim Mei is noted by clients for ‘her ability to handle multi-jurisdictional deals, one reporting: “We were delighted with her first-rate legal representation for complex cross-border matters.”’

Lim Mei has been a partner with the firm since 1996.

Rolf Lindsay joined Walkers in 2005, and is a partner in the firm’s Cayman Islands office and a member of the firm’s global investment funds group. His practice focuses primarily on private equity funds and their activities, and encompasses the structuring of fund sponsor vehicles, the formation of alternative investment funds and the consummation of transactions undertaken by them.

Rolf has extensive experience advising a broad range of clients in relation to the structuring, formation and management of general partners and the alternative investment funds controlled by them. A significant part of his practice involves advice in relation to mergers and acquisitions, initial public offerings of securities, secured financing facilities and derivative products, both within the private equity context and more broadly. Rolf also leads regular seminars in relation to the legal and practical issues affecting alternative investment fund formation and Cayman corporate and transactional matters.

DANIELLE LOBO

*Afridi & Angell*

Danielle Lobo specialises in mergers and acquisitions, private equity and general corporate matters. She has considerable experience in and has advised vendors, trade purchasers and management on both the acquisition and disposal of companies, as well as on private equity investments, including the funding of start-up companies and a number of oil and gas technology companies.

Ms Lobo is qualified as a solicitor in Scotland. She obtained a bachelor of laws degree from University of Aberdeen.
YOZUA MAKES
Makes & Partners Law Firm

Yozua Makes is senior and managing partner at Makes & Partners Law Firm, a Jakarta-based boutique law firm focusing on the areas of corporate finance, mergers and acquisitions, capital markets, banking and foreign investments. He has more than 30 years of experience in these areas and has handled a broad range of complex cross-border commercial transactions. He has often been recognised as a leading corporate lawyer in Indonesia, most recently as the Most Commended External Counsel in South East Asia in the 2017 Asian Mena In House Community Awards in Hong Kong in October 2017.

Yozua is an alumnus of the Faculty of Law at University of Indonesia, University of California at Berkeley (Boalt Hall School of Law), the Asian Institute of Management and Harvard Business School. In 2015, he obtained his doctorate decree from University of Indonesia after successfully defending his dissertation on the takeover of public companies under Indonesian securities regulations.

Yozua is actively involved in various professional and social organisations. He was the first appointed member of the National Commission of Good Corporate Governance and is a member of the board of experts of the Indonesian Publicly Listed Company Association. He is a registered legal consultant with the Indonesian Capital Market and Financial Institution Supervisory Board (Bapepam-LK, now OJK), has formerly worked as a special adviser to the Minister of Defence and is a distinguished associate professor at the Faculty of Law at University of Pelita Harapan. Yozua has been a member of the expert staff of the Minister of the Cooperatives, Medium and Small-Scale Industries, the Steering Committee for Indonesian State Policy Guidelines and the Steering Committee for Jakarta Stock Exchange/Surabaya Stock Exchange merger. He is on the board of trustees of World Vision Indonesia.

Yozua’s paper, ‘Challenges and Opportunities for the Indonesian Securities Takeover Regulations: General Framework and Analysis from Dutch Law and Theoretical Perspectives’ has been published by University of Pennsylvania East Asia Law Review.

DIDIER MARTIN
Bredin Prat

Didier Martin is a partner at Bredin Prat and one of the leading specialists on French public tender offers, securities laws and privatisations. He also devotes a significant part of his time to litigation in various areas such as securities law and takeovers, white-collar crime and bankruptcy.

He is a member of several committees and associations, including the Financial Transactions Committee of the MEDEF (the French employers’ federation) and ANSA (a French business association), as well as the recently created Haut Comité Juridique de la Place Financière de Paris. He is also a founding member of the Observatoire de la Communication Financière and co-president of Commission Europe within the French legal think-tank, the Club des Juristes.

He has written numerous books and articles on corporate law and securities law, and has recently published Les Offres Publiques d’Acquisition, Les Sociétés Holdings, Mergers & Acquisitions in France and Le Code Monétaire et Financier.

Admitted to the Paris Bar in 1977, Didier Martin is a graduate of the University of Paris II Panthéon-Assas (DEA in private law, 1976; DEA in criminal law, 1977).
RICHARD MAY
*Maples and Calder*

Richard May is managing partner of Maples and Calder’s British Virgin Islands office, and head of the BVI corporate and finance groups. He advises on a variety of corporate transactions including M&A, joint ventures, stock exchange listings and corporate reorganisations. He also advises investment managers and private equity houses on the structuring, formation and financing of investment funds and private equity funds. Richard is a member of a focus group advising the Financial Services Commission on regulatory legislation in the British Virgin Islands.

JORGE MONTAÑO
*Creel, García-Cuéllar, Aiza y Enríquez, SC*

Jorge Montaño is a partner in the Mexico City office. His practice focuses on M&A, private equity and capital markets transactions. He has actively represented domestic and international companies in cross-border transactions, including advising on the structuring and execution of joint ventures and private equity transactions. Mr Montaño also represents fund managers in the creation of their investment platforms, in Mexico and abroad, in both the private equity and venture capital sectors. In the field of capital markets, he represents US and Mexican underwriters and Mexican issuers in equity capital market transactions, including initial public offerings, and in investment-grade and high-yield bond transactions.

Mr Montaño has been ranked in M&A and capital markets by many publications, including *Chambers Latin America, The Legal 500* and *Latin Lawyer 250*.


ALEXANDRA MONTEALEGRE
*Baker McKenzie*

Alexandra Montealegre is an associate in Baker McKenzie's mergers and acquisitions group in Bogotá. She graduated from Columbia University School of Law and was a member of the Columbia Latin American Business Law Association. She also worked as a teaching assistant for the cross-border M&A class at New York University.

Alexandra focuses on cross-border mergers and acquisitions, representing mainly private equity investors, multinational corporations and international clients in the acquisition of domestic companies, and representing Colombian companies in acquisitions abroad. She also advises Colombian and multinational companies in their corporate day-to-day affairs when undertaking business in Colombia.

CLAUDIA NAGY
*CMS Romania*

Claudia Nagy is a senior associate in the corporate and M&A team of CMS Romania, with a great deal of experience in corporate and commercial transactions. She advises a variety of
international clients on transactional and regulatory matters with respect to their acquisitions or divestments in Romania. Her practice includes mergers and acquisitions, competition law, regulatory, tax matters and commercial issues. She regularly advises clients on projects and transactions in the sector, as well as working with public institutions, including both local level projects (e.g., with the Romanian Competition Council) and EU level projects of the European Commission.

HIKARU OGUCHI
Nishimura & Asahi
Hikaru Oguchi leads the South East Asia practice, including Vietnam, providing legal consultation in a broad range of areas in relation to foreign investment (i.e., green field investment, M&A and post-investment general corporate, such as labour and compliance matters). She is admitted to practise in Japan (since 1998) and in New York (since 2005), and is registered as a foreign attorney in Vietnam (since 2010). She has been recognised by Chambers Global as a leading individual in corporate and M&A in Vietnam every year since 2012.

JAN OLLILA
Dittmar & Indrenius

DOMINGO PISCITELLI NEVOLA
Torres, Plaz & Araujo

He is the author of 'Primeras aproximaciones al problema de temporalidad surgido de la modificación del régimen del traslado de pérdidas en la reforma de la Ley de Impuesto Sobre la Renta', published in Revista de Derecho Público No. 140, and 'Notas sobre la reforma a la Ley Orgánica de Precios Justos del 19 de noviembre de 2014', published in Revista Electrónica de Derecho Administrativo Venezolano (REDAV) No. 5.

His professional practice has focused on constitutional law, administrative-economic law and commercial law. He has advised in expropriation processes and matters of prior temporary occupancy, and has specialised in audits and inspections by the National Superintendency for the Defence of Socioeconomic Rights. He has also assisted in administrative and contentious-administrative proceedings.
HOREA POPESCU
CMS Romania

Horea Popescu is head of the corporate and M&A practice of CMS Romania. A Bucharest-based corporate partner, Horea has broad experience in advising on all aspects of corporate and M&A transactions in Romania and the CEE region, and has worked on some of the most significant M&A deals in Romania in recent years. Horea specialises in M&A, capital markets transactions, corporate transactions, competition law, private equity, privatisations, restructuring and commercial transactions. He has substantial experience in working on complex, multijurisdictional M&A transactions throughout Eastern Europe and beyond, regularly working with colleagues throughout CMS and elsewhere. Horea was recently ranked in band 1 for corporate and M&A in Chambers Global and Chambers Europe, being described as a ‘commercial, smart and fast’ M&A lawyer who ‘anticipates the issues that may come up in a case’. The International Financial Law Review guide to leading law firms states that Horea Popescu is ‘very quick, attentive, intelligent, a good coordinator with very good communication skills’.

EMMANUEL PRESSMAN
Osler, Hoskin & Harcourt LLP

Manny Pressman is chair of the corporate department and former head of the mergers and acquisitions group. He represents public and private companies, private equity sponsors, special committees, boards and financial advisers involved in takeover bids, proxy contests, joint ventures, negotiated and contested mergers and acquisitions, and a range of corporate transactions and restructurings. His clients have included Magna International, Fairfax Financial, KingSett Capital, Walter Energy, The ADT Corporation, Shoppers Drug Mart, Blackstone and Vector Capital. Manny is repeatedly recognised as a leading M&A practitioner, including by Who’s Who Legal (M&A, corporate governance), IFLR 1000 (M&A), Chambers Global: The World’s Leading Lawyers for Business (corporate/M&A), The Lexpert/AmLaw Guide to the Leading 500 Lawyers in Canada (corporate/M&A), The Legal 500 (corporate/M&A), The Best Lawyers in Canada (M&A) and The Canadian Legal Lexpert Directory (M&A, corporate finance, corporate mid-market). He is a frequent speaker at conferences relating to mergers and acquisitions, and has guest lectured at the McGill University Faculty of Law and the University of Toronto Faculty of Law.

KRISHNA RAMACHANDRA
Duane Morris & Selvam LLP

Krishna Ramachandra is managing director of Selvam & Partners in Yangon and of Duane Morris & Selvam LLP in Singapore. As head of its corporate finance, investment and private client practice groups, his expertise includes M&A and capital markets, investment funds and private equity, and technology, media and telecommunications law.

He has almost two decades of experience in advising issuers, funds, investment banks, listed and private companies, and high-net-worth individuals in Asia, Europe and the United States on equity and debt securities issuances, compliance and regulatory matters. He also has extensive experience in providing counsel to Myanmar business leaders on issues involving a cross-border element in Myanmar’s key industry sectors. His valued legal advice has earned him numerous accolades by respected industry authorities, including Asialaw Leading Lawyers,
Chambers and Partners, The Legal 500 Asia Pacific and IFLR1000. The Legal 500 has noted that Krishna’s ‘intellectual stamina and acute appreciation of commercial realities make him a formidable adviser – his ability to come up with creative, workable solutions is second to none’.

Krishna graduated from Christ’s College, Cambridge University with an LLM in corporate finance on a Freshfields Bruckhaus Deringer scholarship in 1996. He articled and qualified with Freshfields in London prior to relocating to Singapore with Clifford Chance in 2003 and subsequently joined Selvam LLC in 2006. In 2011, Duane Morris and Selvam LLC entered into the first US–Singapore joint law venture to form Duane Morris & Selvam LLP.

Krishna is an advocate and solicitor of the Supreme Court of Singapore and a solicitor of England and Wales. He previously sat on the Singapore Law Society’s Corporate Practice Committee for Mergers and Acquisitions and Insolvency, Corporate Commercial Matters and Listing Matters. He is invited to speak regularly on M&A, corporate governance, listings and fundraising matters at conferences around the world.

VANESSA C RICHARDSON
Cleary Gottlieb Steen & Hamilton LLP

Vanessa Richardson is an associate at Cleary Gottlieb Steen & Hamilton LLP based in New York.

Ms Richardson’s practice focuses on litigation, with an emphasis on M&A and shareholder derivative litigation, and on corporate governance issues.

Ms Richardson joined the firm in 2014. She received a JD from New York University School of Law, where she was a Robert McKay scholar and the managing editor of the New York University Law Review. Additionally, she was awarded the Daniel G Collins Prize for Excellence in Contract Law. She received an undergraduate degree from American University, where she was a presidential scholar. She also served as a law clerk to the Honourable Leo E Strine, Jr of the Delaware Supreme Court and the Delaware Court of Chancery.

Ms Richardson is a member of the Bar of New York.

ANDRÉS N RUBINOFF
Arias, Fábrega & Fábrega

Andrés N Rubinoff is a partner of the firm and focuses his practice on mergers, acquisitions and joint ventures, banking and finance, international business transactions, and corporations. Prior to joining the firm, Mr Rubinoff worked as an associate with Greenberg Traurig, PA in Miami (2006–2009). He also worked as a senior research associate for the Corporate Executive Board Company, Washington, DC (2001–2003). Mr Rubinoff has a JD from the University of Miami School of Law and a bachelor of science from Georgetown University.

EMRE AKIN SAIT
Legal Attorneys & Counselors

Emre Akin Sait acquired his LLB from University of Warwick in 1995. In the same year, he joined the Honourable Society of the Inner Temple of the United Kingdom. Mr Sait further pursued his legal studies at King’s College London and earned his master of arts degree in European competition law in 2011. He was called to the Bar of England and Wales in July 2013 after completing his Bar Practice Training Course at University of the West of England.
Mr Sait has acted as the legal manager of Fiat Auto Turkey, and as the corporate relations director in charge of the legal, media relations, public relations and corporate governance departments, to which he was also appointed as a steering committee member for two consecutive years.

Mr Sait has been a consultant at Legal Attorneys & Counselors since 2004. He specialises in M&A, competition law, international labour law, corporate and commercial law.

He was a lecturer at the Faculty of Law of Özyeğin University from 2013 to 2014, and at the Faculty of Law of MEF University from 2015 to 2016. Mr Sait also currently serves as a board member of various companies in the automotive, energy, solid waste and defence sectors.

**ABDUS SAMAD**

*Afri di & Angell*

Abdus Samad specialises in mergers and acquisitions and transactional work, as well as general corporate and commercial matters. He has extensive knowledge and experience in cross-border transactional and corporate advisory matters, including complex acquisitions and divestures, for a broad range of public and private clients.

Mr Samad is a member of the Punjab Bar Council. He obtained a bachelor of laws degree from King’s College, University of London.

**MARIO SANTA MARIA**

*Santa Maria Law Firm*

Mario Santa Maria is a partner at Santa Maria Law Firm in the M&A department. His practice is focused on corporate law and M&A, and in particular on joint ventures, public offerings, restructurings, the purchasing and selling of assets, corporate governance and international commercial contracts.

He has been involved in a number of M&A transactions, including tender offers, residual tender offers and squeeze outs. He has been counsel to financial advisers in connection with M&A and securities transactions. Mario Santa Maria was a member of the Italian desk based at Greenberg Traurig, New York and worked at another important US law firm. He is a Columbia University School of Law LLM graduate (Harlan Fiske Stone Scholar) and is admitted to practise both in Italy and in New York.

**GEORGES SANTONI RECIO**

*Russin, Vecchi & Heredia Bonetti*

Georges Santoni Recio is the managing partner of Russin, Vecchi & Heredia Bonetti. He has developed a strong practice in foreign investment law, international trade and related matters, providing specialised consulting services to private-sector clients on corporate (mergers and acquisitions), foreign investment, tax, finance structuring, agreements and real estate law matters, and is also a practising litigator, specialising in general civil and commercial litigation. He has been internationally ranked by *Chambers and Partners* and *The Legal 500*. 
CARLO SCAGLIONI
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Carlo Scaglioni is a partner at Santa Maria Law Firm in the M&A department. He represents public and private companies in domestic and cross-border transactions. He has been involved in a significant number of major M&A deals, mainly involving banking, chemical, energy, financial, healthcare and industrial companies. Additionally, he drafts and negotiates international and domestic commercial contracts.

He regularly advises foreign and Italian clients on commercial, banking and corporate matters, assisting them in the completion of corporate transactions, including joint ventures, commercial cooperation agreements and settlement negotiations. He worked at the US law firm Greenberg Traurig LLP in New York, and is a New York University LLM graduate admitted to practise in both Italy and New York.

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Clemens Philipp Schindler is a founding partner of Schindler Attorneys. Before establishing the firm, he spent six years as partner at Wolf Theiss, where he led some of the firm’s most prestigious transactions and headed its Brazil operations.

Prior to that, he practised with Haarmann Hemmelrath in Munich and Vienna, and with Wachtell Lipton Rosen & Katz in New York.

Mr Schindler’s practice focuses on corporate and tax advice in relation to public and private M&A, private equity and corporate reorganisations (such as mergers, spin-offs and migrations), most of which have a cross-border element. Furthermore, he is specialised in international holding structures, including charter financing and leasing operations. His practice is complemented by private client work (e.g., as counsel to families owning stakes in large corporations).

Mr Schindler holds law degrees from University of Vienna and New York University Law School (LLM), and a degree in business administration from the Vienna University of Economics and Business Administration.

Mr Schindler is admitted in Austria as both an attorney-at-law and a certified public tax adviser. He has authored and co-authored more than 50 articles, books and commentaries in his fields of expertise, for which he is also much sought after as a speaker at conferences and seminars.

Mr Schindler is ranked by international legal directors such as Chambers Global, Chambers Europe, The Legal 500, IFLR1000, Best Lawyers and Who’s Who Legal. The German legal directory JUVE lists him as one of Austria’s top 20 corporate and M&A lawyers, while the Austrian business magazine TREND named him among Austria’s top 10 corporate lawyers and among Austria’s top 10 tax lawyers. Besides their Austrian listings, Chambers Global and Chambers Europe acknowledge his Brazilian expertise in a special ranking on outstanding expertise in foreign jurisdictions.
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Dr Benedikt von Schorlemer, LLM (NYU), is a partner at Ashurst in the Frankfurt office and a member of the corporate department. Benedikt studied at the universities of Freiburg, Geneva and Munich and received his doctoral degree (Dr jur) from the University of Regensburg. Benedikt is specialised in the areas of private equity and M&A. In the area of M&A, he advises German and international clients on private acquisitions and divestitures, including all related matters. Benedikt assists private equity investors in all phases of an investment cycle, from the acquisition, including management participations, through portfolio management to exit. Benedikt has particular expertise in the chemical, medical devices, automotive, energy and renewable sectors.

JAMES SCICLUNA
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James is a Malta advocate and a solicitor of the Senior Courts of England and Wales. He has practised law in the United Kingdom and Malta both in private practice and as in-house counsel.

Before forming WH Partners with Olga Finkel, James held the position of chief of regulatory and corporate affairs with the Betclic Group, and was general counsel of Betclic and Expekt, two of the Betclic Group’s brands. Prior to that, he was a foreign lawyer and then a solicitor with London firm Jeffrey Green Russell’s company and commercial team.

His main areas of expertise are mergers and acquisitions, joint ventures, international corporate and tax structuring in strictly regulated industries. He is particularly known for his in-depth cross-border expertise of the gambling industry, and he also regularly acts for software developers and for operators in the leisure industry.

James graduated with an LLM summa cum laude in international business law from University College London after having been awarded a Chevening Scholarship by the British Foreign and Commonwealth Office in 2004. He holds a doctor of laws degree and a bachelor of arts degree in law and sociology from University of Malta. He was admitted to the Bar in Malta in 2003 and to the Roll of Solicitors of England and Wales in 2007. He is a member of the International Masters of Gaming Law and the International Bar Association.

James is a lecturer in gaming law at University of Malta and he speaks English, Maltese, Italian and French. He is ranked by the leading legal directories as a top M&A lawyer, and as a leading lawyer globally in the gaming and gambling, intellectual property, and sports and entertainment areas.

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Keith Shaw is a partner at S Horowitz & Co in the corporate and transactions practice group of the firm. He is a graduate of Downing College, Cambridge, where he received a master’s degree in law. He specialises in cross-border and domestic corporate, commercial and securities law, advising multinational companies, local businesses, investors and private individuals on a wide range of international corporate and financial matters, including mergers and acquisitions, public offerings, private placements, joint ventures, securities regulations, corporate governance, intellectual property licensing, technology transfer,
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Marco Solano is a partner in the corporate and finance department at Aguilar Castillo Love. He holds an LLM from Georgetown University Law Centre, Washington, DC, and a JD from University of Costa Rica. He has practised for almost 20 years in the Aguilar Castillo Love office in Costa Rica, and with Sidley Austin, in Washington, DC, and Greenberg Traurig, in New York, to gain exposure to cross-border transactions throughout the Americas.

His practice focuses on corporate and financial matters, including structure finance, mergers and acquisitions, private equity and project finance.

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Till Spillmann specialises in large and complex international and domestic private and public M&A, capital markets and corporate finance transactions. In addition, he advises on corporate governance and other corporate and commercial law matters.

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Ms Téllez has experience in M&A transactions and dispute resolution, and she regularly advises clients in the area of corporate law.

She graduated from Universidad de Los Andes and was called to the Colombia Bar in 2014.
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Joana Torres Ereio joined Uria Menéndez as a trainee lawyer in September 2007 and became a senior associate in September 2012.

She spent the period from October 2011 to February 2012 on secondment to the Uria Menéndez offices in Madrid.

Joana focuses her practice on corporate and commercial law, mergers and acquisitions, private equity and restructurings.

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Michiel leads the corporate and M&A team in Qatar, which was described by The Legal 500 as ‘undoubtedly a first-tier practice’. Active in the region since 2009, Michiel has represented some of the leading state-owned and private sector companies in the Middle East on a range of M&A and corporate finance transactions. He recently led the team on the US$5.3 billion Barwa/Qatari Diar asset sale transaction, which was recognised as Domestic M&A Deal of the Year at the 2014 IFLR Middle East Awards. Chambers has praised him as ‘an excellent lawyer on M&A transactions’.

Michiel’s experience is both extensive and truly global. He has advised on closed M&A transactions involving targets located in the United States, Brazil, Russia, Qatar, the United Arab Emirates, France, Germany, the Netherlands, Turkey, Spain, Italy, the United Kingdom, Greece and Japan.

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Ulysses von Salis specialises in private equity, financing and M&A transactions, with a particular focus on large companies and financial institutions. He regularly advises investors, managers and target companies on private equity transactions.
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Bei is an international corporate lawyer and associate at Duane Morris & Selvam LLP's office in Yangon. Bei practises in the areas of banking, corporate, commercial, capital markets, employment, energy and real estate law. Bei advises in relation to foreign direct investment, corporate structuring, M&A, commercial contracts, employment-related matters and legal compliance for real estate development.

Bei is a graduate of National University of Singapore. She is admitted to the Bar of the People's Republic of China and registered as a foreign lawyer in the Republic of Singapore.

Bei speaks fluent English and is also a native Mandarin speaker.

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Mr Yuan Wang is a partner with broad experience in inbound M&A and other forms of inbound foreign investment. He has advised foreign investors on the entire cycle of a foreign investment, including establishment, equity transfer and exit.

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Jason Webber is a partner at Slaughter and May who is based in Hong Kong. He joined the firm in 1991 and became a partner in 2001. Mr Webber is involved in a wide range of corporate, commercial and financing work, advising companies, financial institutions and fund management groups. He regularly advises in relation to complex matters involving the Hong Kong regulatory authorities and governmental bodies. Mr Webber has also worked in the London office of Slaughter and May.

Mr Webber’s experience includes advising MTR Corporation Limited, Hong Kong’s mass transit railway operator, in relation to various projects, including its privatisation (being Hong Kong’s first and, to date, only privatisation of this kind), its merger with the Kowloon-Canton Railway Corporation (being one of the largest and most complex mergers in Asia), and various significant new railway projects such as the Disney Resort Line, the West Island Line, the Shatin to Central Line, the Express Rail Line, the South Island Line, the West Island Line, the Kwun Tong Extension, and the construction and operation of the Tung Chung Cable Car on Lantau Island; advising various financial institutions on numerous regulatory matters involving the Hong Kong Monetary Authority, the Hong Kong Securities and Futures Commission, the Hong Kong Stock Exchange and other Hong Kong regulators, such as advising a consortium of financial institutions in relation to the Hong Kong regulatory aspects of operating an automated trading and clearing system; advising Mercer on its agreement to acquire SCM Strategic Capital Management AG; advising one of the largest international asset management groups on the launch of retail funds in Hong Kong; advising various asset management groups in relation to acquisitions and disposals of asset management vehicles; advising the Oxford Asset Management Group on the launch of the OxAM Quant Fund, a Cayman Island-based hedge fund; and advising several international hedge fund groups on the establishment of operations in Hong Kong. Mr Webber has also sat on one of the disciplinary committees of the Hong Kong Securities and Futures Commission. He is qualified in England and Wales and in Hong Kong.
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Philippe Weber specialises in large cross-border M&A and financing transactions in various industries, including technology, luxury, industrial goods, travel and retail, life sciences and financial services. He regularly advises international companies and investors (including foreign sovereign wealth funds, state-owned enterprises, private equity) in important investments and other business transactions.

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Mr Kai Xue is a counsel. He work focuses on cross-border banking and financing, and outbound M&A. He has also advised on a wide range of mandates with a cross-border element, including representing a defendant in an antitrust class action lawsuit and facilitating recovery in fraud cases. He often writes opinion commentary about international political economy and has been published in the South China Morning Post, Times of India, Ottawa Citizen and other newspapers.

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Robert Yalden is a partner in Osler, Hoskin & Harcourt LLP’s business law department. He is co-chair of the firm’s mergers and acquisitions group, and head of the Montreal office’s corporate law group. Mr Yalden’s career with Osler spans over 25 years, during which he has participated in some of Canada’s most innovative and pioneering transactions. He was intimately involved with implementing the first poison pill in Canada and has since worked with many companies on their defence strategies. He led the Osler team involved in Canada’s largest-ever completed leveraged buyout, and the Osler teams involved in some of the largest private equity deals in Quebec. He also led the Osler team involved with significant proxy fights that have seen the problem of ‘empty voting’ on the part of hedge funds receive considerable public scrutiny in Canada. Mr Yalden advises management and boards of directors in connection with a wide range of M&A transactions, including hostile and friendly business acquisitions, the implementation of defensive strategies, going-private transactions and strategic alliances. Mr Yalden is a former Supreme Court of Canada law clerk, serves as adjunct professor at McGill University’s Faculty of Law, and has written extensively on business law issues. From August 2018, he will be the inaugural holder of the Stephen Sigurdson Professorship In Corporate Law and Finance at Queen’s University.
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Viacheslav Yakymchuk is an expert in handling cross-border M&A transactions and has extensive knowledge of corporate, M&A, private equity and equity capital markets. Mr Yakymchuk heads the firm’s corporate and M&A and private equity practice groups in the Kiev office. He frequently advises major private equity funds on their investments in Ukraine.

Viacheslav is ranked as a top-tier practitioner in the areas of corporate law, M&A and capital markets by Chambers, IFLR and The Legal 500 EMEA. He frequently speaks on the diverse aspects of M&A and private equity transactions in Ukraine. Viacheslav is admitted to practise in Ukraine and in New York, US.

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Cleomenis G Yannikas is active in the fields of corporate law, mergers and acquisitions, competition law and investment incentives, and has experience in major M&A and project finance deals with an international profile. He is a graduate of the Athens University Law School, a member of the Athens Bar and the European Academy of Law, and is qualified to practise before courts of appeal in all jurisdictions. He is an author and contributor to several local and international publications on corporate law, investment incentives and competition law. He speaks Greek, English and German.

MARK ZERDIN

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Mark Zerdin has been a partner at Slaughter and May since 2007. He advises on a wide range of corporate and commercial transactions for both corporate and private equity clients. His principal areas of work are public takeovers, private acquisitions and disposals, private equity investments, initial and secondary public equity offerings, and joint ventures.

FERNANDO S ZOPPI

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Fernando Zoppi is primarily focused on mergers and acquisitions, banking and finance and business law. He regularly advises clients on a variety of domestic, regional and cross-border transactions, including M&A, joint ventures and other business associations, private equity and venture capital, foreign investments, project finance and financings (including debt restructurings).

Mr Zoppi obtained his LLM degree from Columbia University – School of Law (New York) in May 2004. He graduated (with honours) from University of Buenos Aires in December 1999.

He was a foreign associate at O’Melveny & Myers, LLP (New York) in 2005 and 2006. He was also associated with Latham & Watkins, LLP (New York) in 2007. Mr Zoppi was a partner at Perez Alati, Grondona, Benites, Arntsen & Martínez de Hoz until 2018. In February 2018, he founded Martínez de Hoz & Rueda.

Mr Zoppi has been an assistant professor at University of Buenos Aires (private international law and civil law). He has also lectured at the Instituto Universitario ESEADE.

He is admitted to practise law in Argentina and is a member of the Bar Association of the City of Buenos Aires.
Appendix 2

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