GLOBAL

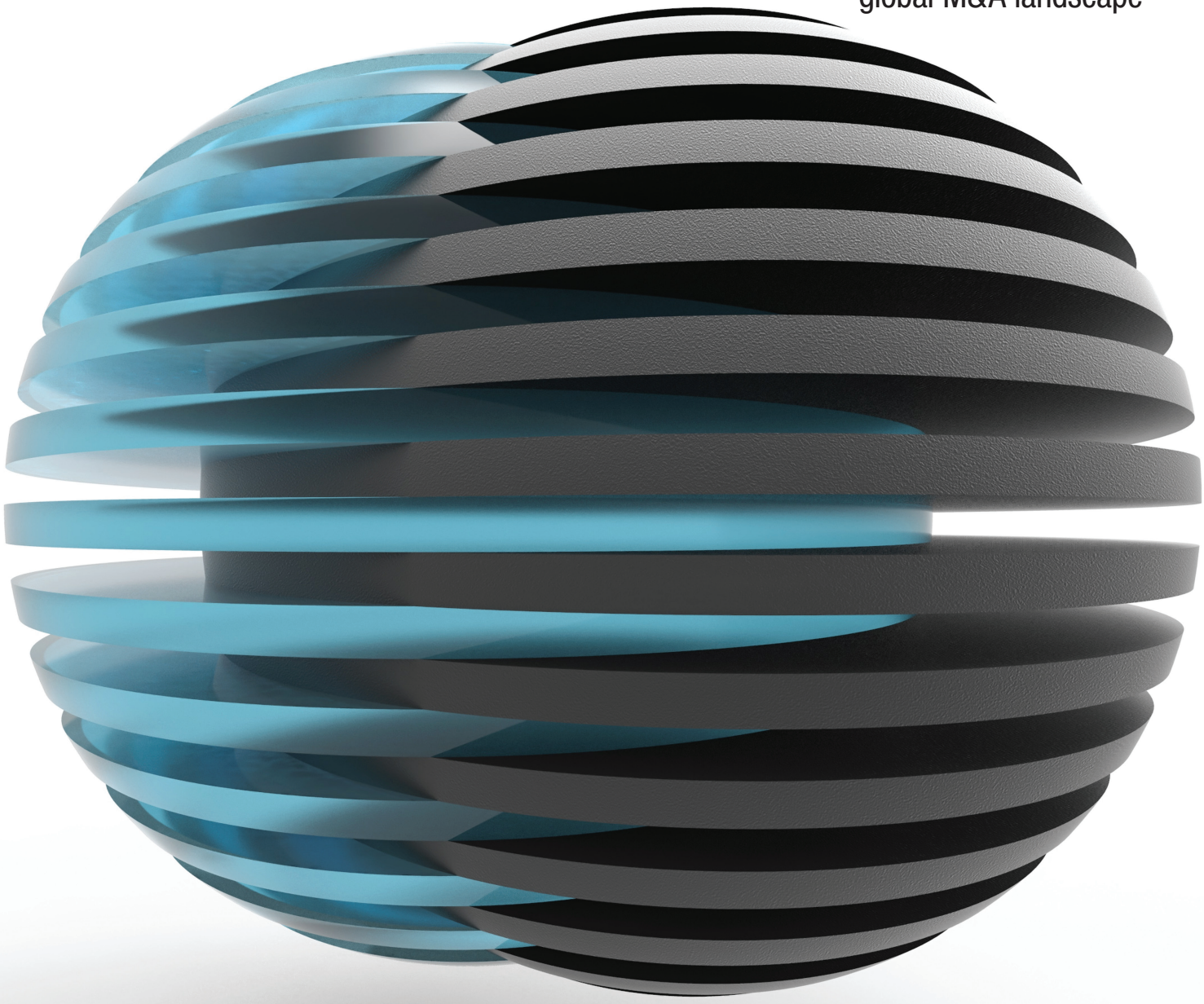
# Mergers & Acquisitions

GUIDE 2017

An ALM Publication

## LEADING THE WAY

A country by country guide to the global M&A landscape



EXPERT ANALYSIS FROM LEADING M&A LAW FIRMS AROUND THE WORLD

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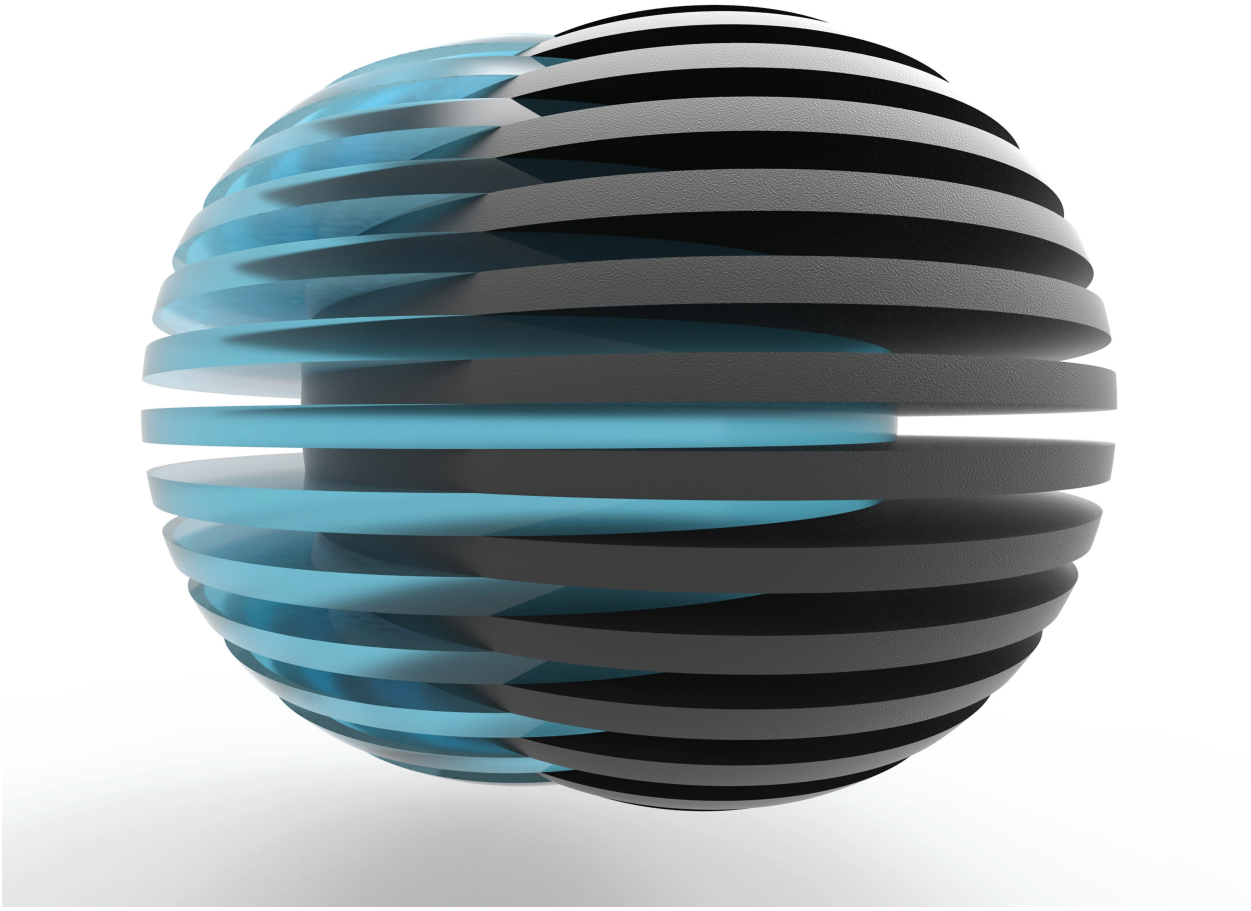



The ALM editorial team was not involved in this publication. All contributions are from the local representative law firm.

# Welcome

Dear Colleague,

Welcome to the Global Mergers & Acquisitions Guide 2017, which provides expert analysis and updates from some of the leading law firms across the globe.

While 2016 was characterized by geopolitical volatility, epitomized by Brexit and Donald Trump's election as U.S president, many of the commentators in this guide are cautiously optimistic about the prospects for M&A activity in their jurisdictions.

For example, while the global volume of African M&A deals slowed in 2016, the volume of African-led deals saw record highs; a sign of growing self-confidence among home grown African companies. Meanwhile, sources of foreign direct investment into Africa continued to grow.

A common theme in this guide is China's importance as a driver for global M&A. It is a major source of investment into Africa, not least because of its drive to create an economic belt in the Eurasia region connecting China's ports with Africa's coasts and the Mediterranean through Southeast Asia and the Suez Canal. Chinese companies are also notable investors in other jurisdictions featured in this guide, including the UK and Israel, where public companies have attracted interest from corporates seeking to acquire new technologies.

There have been reports that controls on Chinese companies seeking to invest overseas may be tightened in order to slow down capital outflow. However, this is expected to be only temporary. This, and the overall strength of the Chinese economy, are among the many factors that will influence M&A activity in 2017. At the same time, governments, regulators and central banks across the globe will continue to do their best to generate the right conditions for a healthy flow of M&A deals.

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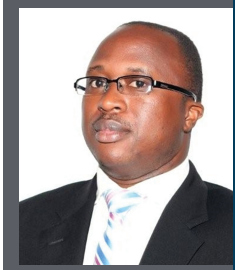
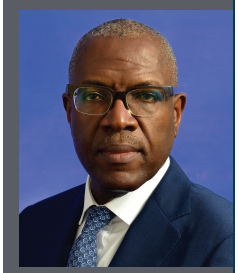
BOWMANS
THE VALUE OF KNOWING

EZRA DAVIDS

PARAS SHAH



WILLIAM KASOZI



DAN AGBOR

# The laws governing M&A activity in Africa

A combination of African-led and international cross-border acquisitions is fuelling regional M&A activity as African businesses grow in self-confidence. While the global volume of African M&A has slowed down, the volume of African-led acquisitions saw record highs in 2016. This is according to Ezra Davids, chairman of Corporate/ M&A at pan-African law firm Bowmans. He notes that the geographical source of foreign direct investment (FDI) also appears to be expanding.

"We are seeing lively FDI interest in Africa from North America, China, Western Europe, Japan and India, especially," he says.

"It is well known that South African deals are, frequently, driven by investors who would like to establish launch pads for broader African investment. South Africa does not, however, enjoy exclusive African gateway status. Other African cities are improving their positions in this regard. Nairobi, where we have a significant office with more than 100 people, is a good example in East Africa. Lagos obviously remains key to Nigerian access but, in our view, is yet to be seen as a broader West African gateway," he notes.

## SOUTH AFRICA

According to Davids, cross-border opportunities have helped to buttress domestic activity and keep M&A buoyant in South Africa, despite a slowing domestic economy and energy concerns.

Davids explains that M&A activity in South Africa is governed by a sophisticated legal framework which comprises both statute and common law. In private M&A deals, where much is regulated by agreement between the parties, the uncodified common law of contract plays a particularly significant role. In public M&A deals, once an offer is made, the process is highly regulated by the provisions of the Companies Act (including the takeover regulations) and the listings requirements of the Johannesburg Stock Exchange (JSE). It is typical for transactions to be initiated by one CEO connecting with another. This is often followed by a formal approach to the board of the target by one chairman to another.

"The Companies Act, in relation to listed companies, contains extensive provisions regarding accountability, corporate social responsibility and stakeholders' rights. The Act simplified and made significant changes to the existing law governing takeovers and mergers, and replaced previous takeover rules with a more comprehensive, modernised set of regulations," he notes.

David notes that the Promotion and Protection of Investment Act was passed into law in 2015. The Act regulates the protection of foreign investors. It is intended to promote investment by modernising the current investment regime and achieving a balance of rights and obligations that will apply to all investors in South Africa. Importantly, it provides a foreign investor with the same rights as a domestic investor in South Africa, and provides that foreign investors will be treated no less favourably than domestic investors.

"There has been controversy surrounding the protection standards, such as the ability to seek recourse from an international tribunal and guaranteed market-related compensation for any expropriation. However, the Department of Trade and Industry has defended the Act by saying that South Africa has one of the highest levels of investor protection, and foreign investors will always benefit from the legal protection of prop-

erty rights granted by the South African Constitution," he explains.

Davids notes that although South Africa faces social challenges with respect to unemployment, a large current account deficit, a volatile currency and slower demand for commodities, there is huge scope for FDI in resources, financial services, telecommunications and information technology, retail, pharmaceuticals, hospitality and the fast-moving consumer goods sectors.

## KENYA

Paras Shah, a partner in Bowmans' Kenya office, says that in the past few years Kenya has seen a significant increase in investment activity and deal interest, particularly from private equity funds and large multinationals from United Kingdom, the Middle East and also the United States.

There has been an increase in investment activity from India and the Middle East in the manufacturing, healthcare and pharmaceutical and infrastructure sectors. South African firms are growing more aggressive in their expansion plans into the continent, using Kenya as a gateway to the rest of East Africa. China continues to invest in the country, most notably in infrastructure and construction.

Shah notes that Kenya has long been the preferred entry point for investors looking for deals in the East African region. Kenya facilitates access to the common market that includes Burundi, Rwanda, Tanzania, and Uganda and also provides easier access to Ethiopia, the Democratic Republic of Congo and South Sudan.

"In the private equity and M&A space presently, fast moving consumer goods, financial services (especially microfinance companies and insurance companies), pharmaceuticals and healthcare and manufacturing are the most active sectors. The energy sector has seen significant activity. Real estate is slowing down somewhat due to oversupply of stock, although we are seeing good activity in managed industrial estates. The banking sector has had significant issues recently, largely due to increasing non-performing loans and three banks being placed under statutory administration," he says.

Shah explains that there has been a massive overhaul of Kenya's legislative framework recently - particularly with new Companies and Insolvency legislation – which, in the long term, will be positive for Kenya. Investors should be aware of overlapping regional and local competition laws.

"M&A and private equity investors in Kenya can mitigate transaction risks by structuring their deals correctly; consulting local legal, tax and competition law advisers; having a policy in place to identify and swiftly deal with corruption; and planning their exits before they begin. Overall, Kenya remains an attractive investment destination," he notes.

## UGANDA

William Kasozi, managing partner of Bowmans in Uganda, notes that many of the companies doing business in Uganda operate in several African jurisdictions simultaneously and so there is high demand for advice on cross border M&A deals.

"We have seen a marked increase in the appetite for private equity and M&A transactions in the East African region," he notes.

Kasozi says that the oil and gas sector had in the past few years driven the demand for specialist legal services, but that the lower oil price had slowed down activity.

"However, investment activity in telecommunications, banking, insurance and pensions, as well as energy infrastructure projects such as renewables and the construction of large dams and mini hydros, has increased," he says.

"There have been a good number of concluded M&A transactions in distribution, fast moving consumer goods and healthcare.

"Most of the top tier law firms are connected to international firms or are part of African networks. Clients need cross-border M&A services and prefer their law firms to operate seamlessly across borders, with local specialists in each jurisdiction. Companies tend to form close personal relationships with their law firms in their home countries, and then they want to carry those relationships with them into other jurisdictions."

"Therefore a law firm's M&A team must be represented in all the countries in which its clients do business. Local firms that are integrated with other law firms, either regionally or globally, are able to exploit these opportunities. Essentially, risk can arise in any form across jurisdictions and clients want their lawyers to operate in a standardised way across borders to address this risk," Kasozi adds.

### NIGERIA

Dan Agbor, managing partner at Udo Udoma & Belo-Osagie (Bowmans' relationship firm in Nigeria), says that the number of M&As in Nigeria has decreased over the last year due, in part, to currency fluctuations and investor concerns about their ability to remit dividends. Nigeria has been, up until this point, a leading destination for foreign investors in Africa.

Agbor says that Nigeria has always been dependent on its oil production and so the fall in global oil prices has exerted a downward pressure on the naira. The Central Bank of Nigeria (CBN) has implemented policies to increase its control over the foreign exchange market and these reforms, coupled with a substantially reduced supply of foreign exchange to the market, has led to the devaluing of the naira. In March 2015, the CBN pegged the currency at 197-199 naira per dollar and although the official peg was lifted in June 2016, the CBN has maintained various measures that still have the effect of capping the exchange rate at an artificially low level.

A large portion of the Nigerian government's foreign reserves continues to be used in support of this non-market derived exchange rate. This has resulted in limited availability of funds in the official foreign exchange market and an expectation that the currency will shortly be devalued, both of which are believed to be responsible for the significant drop in M&A transactions.

"While foreign investors can convert locally denominated dividends and returns into foreign currency at the official exchange rate, the scarcity of foreign currency at that rate means that it is often difficult to obtain the required foreign currency in the official foreign exchange market. In practice, this means that investors must wait until funds become available," he says.

Agbor notes that although it is not clear whether or when the CBN will implement a fully 'flexible rate' its introduction would certainly be a welcome development for the M&A market as it should ease availability issues and result in a rate that is closer to the 'real' rate that exists on the parallel market.

Agbor says that in terms of the legislation in Nigeria, mergers and acquisitions are principally regulated under the Investments and Securities Act 2007 (the ISA) and the Rules and Regulations made pursuant to the ISA (the SEC Rules). The listing rules of the Nigerian Stock Exchange also contain regulations that impact on M&A transactions. The provisions governing schemes of arrangement are contained in the Companies and Allied Matters Act, Cap C20, Laws of the Federation of Nigeria 2004 (CAMA). ■

## ABOUT BOWMANS

Bowmans' M&A team delivers integrated legal services to clients throughout Africa from six offices (Antananarivo, Cape Town, Durban, Johannesburg, Kampala and Nairobi) in four countries (Kenya, Madagascar, South Africa and Uganda) and provides coverage of francophone OHADA jurisdictions across the continent from its office in Madagascar.

Bowmans works closely with leading Nigerian firm, Udo Udoma & Belo-Osagie, which has offices in Abuja, Lagos and Port Harcourt. The firm also has strong relationships with other leading law firms in Africa.

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astrea

# M&A in Belgium – Current Trends and Outlook

Astrea discusses the current M&A climate in Belgium and gives its view on what 2017 might bring.

## BELGIUM'S ATTRACTIVENESS FOR M&A

Belgium has proven to be quite attractive for M&A deals. According to the "Transaction Attractiveness Indicator", Belgium is the seventh most attractive country for M&A transactions in the world. The main reason for its attractiveness is caused by Belgium's long-standing tradition of welcoming foreign investment. It possesses an open economy and a desire to gain scale internationally. The general principle is one of global equity: no discrimination is made between domestic and foreign companies. In addition, Belgium has also some unique strategic selling points which makes it attractive to foreign companies, such as tax incentives, its strategic location, and its high-tech environment.

First of all, one of the tax incentives (besides many tax incentives relating to R&D activities) includes the exemption of a capital gains tax on the sale of shares. However, as a result of the Omega Pharma/Perrigo transaction, the absence of a capital gains tax is currently being discussed. As of 1 January 2016, a speculation tax (amounting to 33% withholding tax) was also introduced in Belgium. However, since it has not brought the desired result, the Belgian government is currently considering abolishing this tax. Secondly, Belgium is strategically situated in the heart of Western Europe and possesses a highly developed transportation network. Thirdly, Belgian companies have acquired European as well as global leadership positions due to a high-tech environment well-suited to the development of tomorrow's technologies. Being an early innovator in broadband, wireless and satellite communication in the 1990s, Belgium was one of the first countries in Europe to install a broadband network infrastructure that could reach the entire population. Given today's fast-moving global economy and the increased focus of companies on their digital future, this selling point will only gain in importance.

Furthermore, like other countries in continental Europe, Belgium is mainly characterized through concentrated shareholders' structures. But, in contrast with neighbouring countries, it has a lot of small and medium-sized companies, including a large amount of family-owned businesses that usually own a majority share in the company. These days, four out of ten family-owned businesses are acquired by a third party, and it seems that this percentage will only increase in the coming years due to financial reasons, such as the increased access to finance, intra-familial disagreements, and succession issues. Hence, this structure offers some interesting investment opportunities for both industrial and financial investors. In fact, 60% of Belgian companies are planning to pursue an M&A transaction in the near future.

## KEY BELGIAN M&A DEALS OF 2016

Many major deals were closed during the past year. At the start of the year, the acquisition of BASE, the Belgian mobile subsidiary of the Dutch telecom

company KPN, by Liberty Global, was completed, resulting in a merger between BASE and Telenet, the Belgian cable operator controlled by Liberty Global. The European Commission cleared the deal during February 2016. The approval was conditional upon the implementation of commitments (i.e., the sale of the 50% share in Mobile Vikings to Medialaan and the sale of JIM Mobile to Medialaan) to ensure effective competition in the Belgian retail mobile market. As a result of the acquisition, Liberty Global acquired its own mobile network in Belgium.

**STEVEN DE SCHRIJVER**
PARTNER

The consumer retail sector saw the closing of two major deals during 2016. First of all, during July 2016, the 25bn EUR deal between Ahold and Delhaize was closed. The merger resulted in one of the biggest retailers with an annual revenue of approximately 54bn EUR. On the US market, the merged companies are now the fourth largest retailer. On the Benelux retail market, Ahold Delhaize will be one of the biggest competitors during 2017. Secondly, during October 2016, the giant deal between the two leading beer companies, AB Inbev and SABMiller, was completed. The deal made AB Inbev the world's fifth-largest consumer goods company by revenue, and enabled its expansion to developing countries in Africa.

## SOME PECULIARITIES OF M&A DEALS AND BUSINESS ETIQUETTE IN BELGIUM

In Belgium, most acquisitions take the form of a negotiated process. In comparison to neighbouring countries, (hostile) take-over bids are rare. The typical process roughly goes through the following stages: (i) a letter of intent, (ii) negotiations, (iii) due diligence, (iv) an agreement, and (v) closing. The process is roughly similar to Anglo-Saxon countries, with the exception of some noteworthy Belgian features.

The acquisition process is usually rolled out with a letter of intent. This letter is, except for certain clauses, mostly not intended to be binding upon the parties. However, it is important to note that, unlike in some other countries, under Belgian law, if there is agreement on the essential elements of a transaction (i.e., the price and object of the sale), the document will in principle bind the signatories. Furthermore, as in most other countries, the parties have an obligation to negotiate in good faith. In the Belgian market, parties tend to attach considerable importance to the due diligence process (as opposed to merely relying on representations and warranties). Due diligence has an essential role in the acquisition process, as it allows the purchaser to evaluate and identify the risks linked to the acquisition. In addition, in the technology sector, data privacy compliance has gained in importance when conducting due diligence during the last years. In respect of due diligence, and the representations and warranties that are associated with this process, the M&A insurance practice, a US trend, has quietly entered the Belgian M&A market. Depending on the nature of the transaction, the final agreement is, based on Belgian civil law principles, less exhaustive than Anglo-Saxon transaction documents. However, the core elements can be considered identical. Finally, the closing occurs either simultaneously with the signing of the acquisition agreement, or after the fulfilment of the conditions precedents mentioned in the acquisition agreement. Recently, some other steps have been incorporated into the acquisition process, especially in larger transactions or in transactions where there is an auction.

In addition, financial assistance by a company to a third party for the acquisition of its own shares is only permitted under very stringent conditions, *i.e.*, the transaction must take place at fair market conditions, is subject to prior approval of the general shareholders' meeting (at the same quorum and majority requirements as for an amendment of the articles of association), and the board of directors must establish a special report with respect to the transaction. Finally, the assistance must be paid out and cannot exceed the amount of distributable profits.

With respect to the employment peculiarities, Collective Bargaining Agreement no 32bis, imple-

menting the "Acquired Rights" Directive is of particular importance in asset deals (like in many other European countries), since, on the date of transfer, all the employees of the target will be automatically transferred to the acquiring company with preservation of their rights and obligations resulting from the employment contract. In addition, employees of the target benefit from information and consultation rights in case of a structural change in the control over the company or a transfer of part of the business of the company. Finally, frequent post-closing integration issues are the streamlining of salaries and fringe benefits, the integration of works councils and other bodies of employee representation, and the application and impact of different collective bargaining agreements at company level.

Furthermore, Belgians prefer doing business in person: the business etiquette starts out on in a rather formal manner, but, usually evolves quickly towards a relationship on a first name basis. Belgians have an entrepreneurial character, which is illustrated by the countless small and medium-sized companies. On the other hand, however, Belgian entrepreneurs are sometimes reluctant to delegate responsibilities, which in turn may be a barrier to the further expansion of small and medium-sized businesses.

For more information on the legal peculiarities of M&A deals in Belgium, we refer to the Belgian chapter we contributed to the ICLG Guide on Mergers and Acquisitions: http://www.iclg.co.uk/practice-areas/mergers-and-acquisitions/mergers-and-acquisitions-2016/belgium

## OUTLOOK ON M&A ACTIVITY IN 2017

Although Europe generally experienced a decrease in investors' confidence during the first months of 2016, and had to overcome the infamous Brexit, it seems that this has not directly affected the European deal appetite, and has, at most, only led to certain unsuccessful deals. Belgium in particular has experienced strong and stable activity levels during 2016. In fact, 2015 and the first half of 2016 were characterised by an increase in the number of transactions, with deals rising up to 92bn EUR. Achieving synergies and economies of scale still prove to be among the main motivations for M&A deals. Based on these findings, the M&A forecast of 2017 seems to be rather positive, although unexpected situations, as was the case with the Brexit, might in turn lead to more prudence and failure in completing M&A deals successfully.

For Belgium in particular, it is expected that, apart from domestic mergers, inbound cross-border M&A activity will rise to 92% of Belgium's total M&A deal value in 2017, given the country's attractive factors such as its openness to trade and strategic location. However, we also notice more prudence in M&A deals, which indeed results in a decline of the number of successful deals. There is more caution on the deal quality and an increased target-selectivity. On the one hand, sellers are increasingly more risk averse. Buyers, on the other hand, require more sophisticated strategies and a detailed due diligence before closing a deal, in order to increase their return. This prudence might be compensated by the new mechanism of the upcoming M&A insurance, although it is still quite premature to assess what its effects will be in M&A deals. ■

## ABOUT THE AUTHOR

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Steven De Schrijver is a partner in the Astrea Corporate and Finance department. Steven has more than 20 years of experience in advising Belgian and foreign companies on mergers and acquisitions, joint ventures, corporate restructuring, acquisition financing, private equity and venture capital. His corporate transactions have involved him in several national and cross-border transactions in a wide array of sectors, with a special focus on the TMT sector. Steven offers maximum availability and responsiveness while maintaining a personalized and business-oriented approach. He serves a mainly international clientele with an outstanding price proposition and round-the-clock availability. His goal is always to provide legible, to-the-point, and practical advice.

Conyers
Dill & Pearman

# The Structure of M&A Deals in Bermuda

David Lamb at Conyers Dill & Pearman looks at Bermuda law governing the takeover (or privatisation) of public companies.

## INTRODUCTION

This guide deals in general terms with certain aspects of Bermuda law governing the takeover (or privatisation) of public companies.

## REGULATIONS GOVERNING TAKEOVERS

- The Companies Act 1981 and other applicable legislation.
- Domestic Takeover Codes and Listing Rules when the shares of the target are listed or traded. These often impose additional thresholds which must be met before any compulsory acquisition can be effected.
- The memorandum of association and bye-laws of the target and any shareholder rights plan or other material contracts.
- Domestic rules on disclosure and transparency, insider dealing, market manipulation and financial promotion.

## GENERAL OFFERS

### PROCEDURE AND ACCEPTANCES

A general offer for all the shares of the target or all the shares of a particular class must be made and accepted by the holders of at least 90% of the shares which are subject to the offer to enable the offeror to acquire the remaining shares compulsorily. Bermuda law allows a maximum four-month offer period within which this level of acceptance must be reached.

Where the offeror already holds more than 10% of the shares of the target, acceptances of the offer must not only amount to 90% of the shares but the number of accepting shareholders must be at least 75% in number of the holders of those shares. This requirement is, however, normally avoided by the use of a bid vehicle.

### COMPULSORY ACQUISITION THRESHOLDS AND TIMETABLE

The procedure to effect a 90% squeezeout following a general offer is as follows:

1. Within one month of the offeror (together with its subsidiaries and nominees) holding in aggregate 90% in value of the shares in the target, including those held prior to the offer, the offeror must serve an "Ownership Notice" notifying the remaining shareholders that the offeror holds 90% of the shares.
2. Dissentient shareholders have three months from receipt of the Ownership Notice to give the offeror notice requiring the offeror to acquire their shares on the terms of the offer or on such terms as may be agreed, or as the Court thinks fit to order.
3. The offeror has two months from the date of reaching 90% in which to give notice to the remaining shareholders that the offeror wishes to acquire their shares (a "Compulsory Acquisition Notice"). A Compulsory Acquisition Notice is normally given at the same time as an Ownership Notice.

4. Dissentient shareholders have one month from receipt of the Compulsory Acquisition Notice to apply to the Court to set aside the compulsory acquisition.
5. Within one month of the offeror becoming entitled and bound to acquire the remaining shares (typically one month after serving the Compulsory Acquisition Notice in the absence of any application to Court) the offeror must send to the target (i) a copy of the Compulsory Acquisition Notice; (ii) a share transfer form signed by the offeror and a person appointed by the offeror to sign on behalf of the dissentient shareholders; and (iii) the consideration. The target must then register the offeror as the holder of the shares and hold the consideration on trust for the dissentient shareholders.

**DAVID LAMB**
PARTNER

An alternative method of compulsory acquisition applies if a shareholder or group of shareholders acquires 95% or more of the shares. This method will give any dissentient shareholder appraisal rights similar to those which apply on a merger or amalgamation (see below).

## SCHEMES OF ARRANGEMENT

### PROCEDURE

A scheme of arrangement will provide a 'section 3(a)(10) exemption' from the registration requirements of section 5 of the Securities Act of 1933.

A takeover by way of scheme of arrangement involves the target proposing a scheme to its shareholders to cancel their shares (a cancellation scheme) or to transfer their shares to the offeror (a transfer scheme) in return for cash or securities of the offeror. A cancellation scheme usually avoids stamp duty or documentary tax which would otherwise be payable on a transfer scheme (and on a general offer).

The board of the *target* will be in control of the scheme and be responsible for drafting the composite scheme document, making the applications to the Supreme Court, mailing the composite scheme document to shareholders, holding the relevant meetings and making the necessary filings. The offeror will undertake to abide by the scheme and pay the scheme consideration.

### INDICATIVE TIMETABLE

*Day 1*: File originating summons and affirmation in support
*Day 7*: Summons for directions hearing
*Day 14*: Despatch of scheme document
*Day 44*: Court Meeting/SGM
*Day 49*: Publish notice of reduction of capital (cancellation scheme)
*Day 52*: File chairman's report, petition, and affirmation in support
*Day 65*: Petition hearing to sanction the scheme
*Day 65*: Effective Date: file scheme order with Registrar of Companies

### SCHEME DOCUMENT

The composite scheme document will include the expected timetable, a letter from the board of the target, a letter from the independent directors or board committee, a letter from the independent financial advisers, an explanatory statement, financial and general information, the scheme of arrangement document itself and notice of the relevant meeting(s).

### APPROVALS

A scheme of arrangement requires approval from the Supreme Court as well as the approval of the directors (in practise).

All schemes must also be approved by a majority in number (head count) representing three-fourths in nominal value (share count) of the scheme shareholders voting at the requisite meeting which will have been convened pursuant to an order of the Supreme Court.

The voting requirements of any applicable Takeovers Code must also be met.

In addition, the shareholders present and voting at the court meeting must represent a fair cross-section of the shareholders as a whole and every effort should be made to secure a good attendance by shareholders.

The statutory thresholds apply to each class of share. A class will be created if shareholders have rights against the target company which are so dis-

similar as to make it impossible for them to consult together with a view to their common interest. The makeup of any classes will normally be settled at the directions hearing but this determination is not necessarily binding at the subsequent petition hearing.

The statutory majority of shareholders must also act *bona fide* with no coercion of minority shareholders and the scheme must be one that an intelligent and honest man acting in respect of his interests in the class might reasonably approve.

Unlike a general offer these thresholds cannot be reduced or waived; if they are not met, the scheme will fail.

### EFFECTIVE DATE

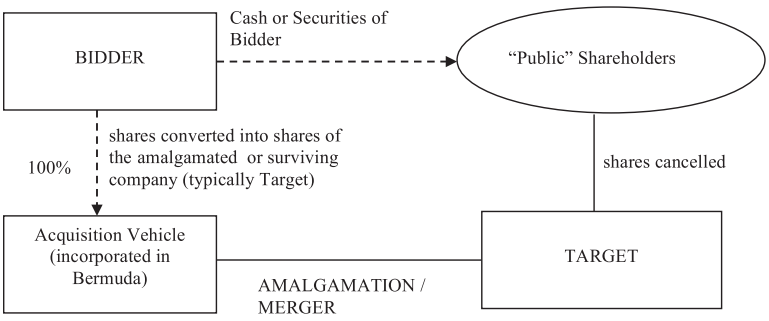
The scheme will be effective when a copy of the court order is delivered to the Registrar of Companies for registration.

### AMALGAMATIONS BY WAY OF SCHEME OF ARRANGEMENT

Amalgamations may also be effected through a "special" scheme of arrangement. The scheme of arrangement must have been proposed for the purpose of or in connection with: (i) the "reconstruction" or "amalgamation" of the offeror and the target; and (ii) the transfer of the whole or any part of the undertaking of any company concerned in the scheme of arrangement.

## AMALGAMATIONS AND MERGERS

Amalgamations or mergers are the most common structure used in offshore M&A transactions in North America.




### AMALGAMATION

An amalgamation involves two or more companies amalgamating and continuing as one company.

### MERGER

A merger involves two or more companies merging and their undertaking, property and liabilities vesting in one of the companies as the surviving company.

The basic structure of a typical triangular amalgamation or merger is set out below:

#### *Amalgamation Agreement / Circular*

An amalgamation agreement is approved by the respective boards of the acquisition vehicle and the target and submitted to the shareholders of the target for approval. The offeror, as the sole shareholder of the acquisition vehicle, approves the amalgamation agreement.

The target sends a circular to shareholders explaining the amalgamation and including (i) a copy of the amalgamation agreement; (ii) a notice convening a special general meeting to approve the amalgamation; and (iii) fairness opinion from an independent financial advisor. The notice must state the fair value of the shares of the target.

The content of the circular is determined by the Companies Act 1981 but the circular would also be expected to comply with the content requirements of any applicable Takeover Code, listing rules, securities legislation and good market practice, both where the shares are listed and in the jurisdiction where the key shareholders reside.

#### *Approval Thresholds*

The statutory threshold for approval of an amalgamation by the target is 75% of shareholders present and voting at a special general meeting at which a quorum of at least two persons holding or representing by proxy more than one-third of the issued shares is present.

However, this can be reduced to a simple majority by an appropriate provision in the bye-laws of the target. If the bye-laws of the target contain no such provision, the bye-laws can generally be amended with board approval by a simple majority vote of the shareholders so that there may be potential for an amalgamation or merger to be approved by a simple majority vote.

### *Conditions*

The amalgamation agreement will contain conditions which are commercially driven, but which will usually include a right of termination if a stated percentage of dissentient shareholders exercise their appraisal rights.

### *Timetable*

An amalgamation can be completed as soon as the special general meeting to approve the amalgamation has been held and any conditions have been fulfilled, typically around one month from publishing the circular.

### *Appraisal Rights*

Dissentient shareholders may apply to the Court within one month of the notice convening the special general meeting to approve the amalgamation to have the fair value of their shares appraised by the Court.

Recent shareholder activism has increased the risk of appraisal proceedings.

### *Advantages*

The advantages of an amalgamation or merger are as follows:

(a) no court approval is required;

(b) dissentient shareholders have no statutory right to prevent the amalgamation or merger;

(c) an amalgamation can be completed more quickly than a scheme of arrangement or a general offer and requires a lower threshold to effect a squeezeout. It may be completed even if appraisal proceedings have been instigated, although in such a case the offeror will lose the right to terminate the amalgamation and will be compelled to pay the fair value determined by the court to the dissentient shareholders.

## EFFECT OF AN AMALGAMATION OR MERGER

### AMALGAMATION

The property of each amalgamating company becomes the property of the amalgamated company which continues to be liable for the obligations of each amalgamating company and existing causes of action, claims or liabilities to prosecution are unaffected.

### MERGER

The surviving company continues to be liable for the obligations of each merging company and existing causes of action, claims or liabilities to prosecution are unaffected. ■

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David Lamb is a partner and co-chairman of Conyers Dill & Pearman based in the Hong Kong office. His practice includes all aspects of corporate law with particular experience in M&A, schemes of arrangement, mergers, tender offers, squeeze-outs, proxy fights and battles for board control. He has been involved in a significant number of the major M&A transactions (many of which have been award winning) involving Bermuda, BVI and Cayman Islands companies listed on many of the world's major stock exchanges including:

- Tongjitang Chinese Medicines Company Limited (award winning take-private, the first ever to use the merger provisions in the Cayman Islands)
- Qihoo 360's US$9.3 billion take-private transaction cited by the Wall Street Journal as the "*largest take-private deal of a US-listed Chinese company*"
- Youku Tudou's US$3.5 billion going private merger with Alibaba Group Holding Limited
- Excelsior Union Limited in connection with a US$3.3 billion buyout of Mindray Medical International Limited
- Biosensors International's privatisation, the first ever amalgamation on the SGX
- Nirvana Asia Ltd's privatisation by scheme of arrangement
- New WuXi Life Science Ltd.'s US$3.3 billion buyout

David has been a speaker at M&A conferences and is the author of numerous articles published in such journals as The Company Lawyer; Butterworth's Journal of International Banking and Financial Law; Accountancy. He is a contributing editor to *Negotiating and Structuring Acquisitions in China* (Thomson Reuters); *Professional Conduct and Risk Management in Hong Kong* (Sweet & Maxwell); *Cayman Islands Company and Commercial Law* (Sweet & Maxwell).

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# The Structure of M&A Deals in the British Virgin Islands

Robert Briant at Conyers Dill & Pearman looks at British Virgin Islands law governing the takeover (or privatisation) of public companies.

## INTRODUCTION

This guide deals in general terms with certain aspects of British Virgin Islands law governing the takeover (or privatisation) of public companies.

## BVI REGULATIONS GOVERNING TAKEOVERS

- BVI Business Companies Act.
- The memorandum and articles of association of the target and any shareholder rights plan or other material contracts.

## GENERAL OFFERS

### PROCEDURE AND ACCEPTANCES

British Virgin Islands law allows shareholders holding 90% of the outstanding shares to give a written instruction to the company at any time directing the company to redeem the shares held by the re-maining shareholders. Upon receipt of the written instruction, the company is required to redeem the shares specified in the written instruction irrespective of whether or not the shares are by their terms redeemable. As a result, in order for an offeror to acquire all the shares of the target, the offeror must hold at least 90% of the shares in order to enable the offeror to acquire the entire company.

### DISSENTING SHAREHOLDERS

A shareholder whose shares have been forcibly redeemed may dissent. The company is required to make a written offer to each dissenting shareholder to purchase his shares at a specified price that the company determines to be their fair value. The company and the dissenting shareholder then have thirty days to agree that value. However, if the company and the dissenting shareholder fail, within that thirty days window, to agree on the price to be paid for the shares, then within twenty days (i) the company and the dissenting shareholder are required to each designate an appraiser, (ii) the two designated appraisers together are required to designate a third appraiser, (iii) the three appraisers are required to fix the fair value of the shares, excluding any appreciation or depreciation directly or indirectly induced by the redemption or its proposal, which value is binding on the company and the dissenting shareholder for all purposes, and (iv) the company is required to pay this amount in money to the dissenting shareholder. Unlike a Court ordered valuation process common in other jurisdictions, the BVI Business Companies Act provides for a fast and efficient fair value determination carried out by appraisers.

Clarification on the dissent procedure was provided in *Olive Group*, a 2016 Court of Appeal decision, which confirmed that the appraisal procedure is an Expert Determination procedure with limited scope for the Court to interfere both during and after the Expert Determination.

## PLANS OF ARRANGEMENT AND SCHEMES OF ARRANGEMENT

### PROCEDURE

A takeover by way of plan of arrangement or a scheme of arrangement involves the target propos-

ing a plan or scheme to its shareholders to cancel their shares (a cancellation plan/scheme) or to transfer their shares to the bidder (a transfer plan/scheme) in return for cash or securities of the bidder.

The board of the target will be in control of the plan or scheme and be responsible for drafting the composite plan or scheme document, making the applications to the Court, mailing the composite plan or scheme document to shareholders, holding the relevant meetings and making the necessary filings. The bidder will undertake to abide by the plan or scheme, and pay the plan or scheme consideration.

**ROBERT J.D. BRIANT**
PARTNER

## TIMETABLE

An indicative timetable setting out the major steps is set out below:

*Day 1:* File draft petition/summons for directions.
*Day 21:* Directions hearing (depends on Court availability).
*Day 25:* Despatch composite plan or scheme document.
*Day 55:* Shareholder meeting to approve the plan or scheme.
*Day 56:* File chairman's report of the meeting.
*Day 66:* Petition hearing to sanction the plan or scheme.
*Day 69:* Effective Date – file court order with Registrar of Corporate Affairs.

## SCHEME DOCUMENT

The composite plan or scheme document will include the expected timetable, a letter from the board of the target, a letter from the independent directors or board committee, a letter from the independent financial advisers, an explanatory statement, financial and general information, the plan of arrangement or scheme of arrangement document itself and notice of the relevant meeting(s).

## APPROVALS

Both a plan of arrangement and a scheme of arrangement require approval from the Court as well as the approval of the directors.

A plan of arrangement (following the Canadian model) requires such approvals as may be determined by the Court, which is generally a shareholders resolution approved by shareholders holding a majority of the shares at a quorate meeting. A scheme of arrangement (following the English model) must be approved by a majority in number (head count) representing three-fourths in nominal value (share count) of the scheme shareholders voting at the requisite meeting. In both instances, the meeting will have been convened pursuant to an order of the Court.

In practice, the shareholders present and voting at the court meeting must represent a fair cross-section of the shareholders as a whole and every effort should be made to secure a good attendance by shareholders.

The statutory thresholds apply to each class of share. A class may be created if shareholders have rights against the target company which are so dissimilar as to make it impossible for them to consult together with a view to their common interest. The makeup of any classes will normally be settled at the directions hearing but this determination is not necessarily binding at the subsequent petition hearing.

The statutory majority of shareholders must also act *bona fide* with no coercion of minority shareholders and the plan or scheme must be one that an intelligent and honest man acting in respect of his interests in the class might reasonably approve.

Unlike a general offer these thresholds cannot be reduced or waived; if they are not met, the plan or scheme will fail.

## DISSENT RIGHTS

On a plan of arrangement, it is expect that the Court will order dissent rights similar to those available to a dissenting shareholder in a 90% forcible redemption or a merger or consolidation. On a scheme of arrangement, there are no dissent rights.

## EFFECTIVE DATE

The plan or scheme will be effective when a copy

of the court order is delivered to the Registrar of Corporate Affairs for registration.

## MERGERS AND CONSOLIDATIONS

### MERGER

Merger means the merging of two or more constituent companies into one of the constituent companies (the "surviving company") and the vesting of the assets and liabilities of the constituent companies in the surviving company.

### CONSOLIDATION

Consolidation means the consolidation of two or more constituent companies into a new company (the "consolidated company") and the vesting of the assets and liabilities of the constituent companies into the consolidated company.

The cessation of a constituent company which participates in a consolidation or which is not the surviving company in a merger does not require a winding-up.

### PROCEDURE

The directors of each constituent company must approve a written plan of merger or consolidation (the "Plan"). The Plan must contain certain prescribed information including the basis of cancelling, reclassifying or converting shares in each constituent company into shares, debt obligations or other securities of the surviving company or consolidated company, or money or other assets, or a combination thereof. British Virgin Islands law provides that some or all shares of the same class in each constituent company may be converted into a particular or mixed kind of assets and other shares of the class, or all shares of other classes of shares, may be converted into other assets.

The Plan must also include any proposed amendments to the memorandum and articles of the surviving company in a merger, or the proposed new memorandum and articles of the consolidated company in a consolidation.

### APPROVALS

The Plan must be approved by a resolution of directors and a resolution of the shareholders of each constituent company. Any other authorisation required by a constituent company's articles of association must also be obtained. A copy of the Plan must be given to each shareholder, whether or not entitled to vote.

Shareholders do not need to approve a merger between a British Virgin Islands parent company and its subsidiary. For this purpose, a subsidiary is a company of which at least 90% of the issued shares entitled to vote are owned by the parent company.

### FILINGS

Articles of merger or consolidation (the "Articles"), which have the Plan attached to them, are then signed by each constituent company. The Articles are filed with the Registrar of Corporate Affairs, together with the amendment to the memorandum and articles of association, if any, in the case of a merger, and the proposed new memorandum and articles of association in the case of a consolidation.

Provided the Registrar of Corporate Affairs is satisfied that the requirements of the BVI Business Companies Act have been complied with, he registers the Articles and issues a certificate of merger or consolidation. For a premium filing fee of $500, the Registrar of Corporate Affairs will process the filing within four hours. Otherwise, the processing can take two to three days.

### DISSENTING SHAREHOLDERS AND APPRAISAL PROCESS

A shareholder of a constituent company may dissent (unless the company is the surviving company in a merger and the shareholder continues to hold the same or similar shares) and be paid the fair value of his shares in cash. A shareholder who dissents must dissent in respect of all his shares, and upon giving written notice of his election to dissent, the shareholder ceases to have any of the rights of a shareholder other than the right to be paid the fair value of his shares.

**The following procedure will apply:**

1. The dissenting shareholder must give written objection (notice of objection) to the constituent company before the vote to approve the merger or consolidation.
2. Within 20 days of the vote approving the merger or consolidation, the constituent company must give written notice of the approval (approval notice) to all dissenting shareholders who served a notice of objection.

3. Within 20 days (dissent period) of the approval notice a dissenting shareholder must give a written notice of his election to dissent to the constituent company demanding payment of the fair value of his shares.
4. Within seven days of the expiry of the dissent period or within seven days of the date on which the plan of merger or consolidation is filed with the Registrar of Corporate Affairs (whichever is later), the surviving company or consolidated company must make a written offer (fair value offer) to each dissenting shareholder to purchase his shares at a price determined by the company to be their fair value.
5. If the company and the dissenting shareholder fail to agree the price within 30 days of the fair value offer (negotiation period), then within 20 days of the expiry of the negotiation period each of the following shall apply: (a) the company and the dissenting shareholder must each designate an appraiser, (b) the two appraisers together must designate a third appraiser, (c) the three appraisers must fix the fair value of the shares, excluding any appreciation or depreciation directly or indirectly induced by the merger or consolidation, which value is binding for all purposes, and (d) the company must pay this amount in money to the dissenting shareholder.

The analysis provided in *Oliver Group* would be equally applicable to a dissent under a merger or consolidation.

### EFFECTIVE DATE

The effective date of a merger or consolidation is the date the Articles are registered by the Registrar of Corporate Affairs, or such later day as may be specified in the Articles not exceeding 30 days after the date of registration.

### EFFECT OF A MERGER OR CONSOLIDATION

As soon as the merger or consolidation becomes effective, all assets of every description, including choses in action and the business of each constituent company, immediately vests in the surviving or consolidated company, and the surviving or consolidated company is liable for all claims, debts, liabilities, and obligations of each of the constituent companies.

### CERTIFICATE OF MERGER OR CONSOLIDATION

A certificate of merger or consolidation is issued by the Registrar of Corporate Affairs which is conclusive evidence of compliance with all statutory requirements in respect of the merger or consolidation. ■

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Robert Briant is Partner and Head of the BVI Office. He is considered one of the most senior corporate practitioners in the BVI and influences legislative changes in the jurisdiction, including by creating and chairing a committee of fifteen leading corporate lawyers in the BVI to recommend changes to Government and the Financial Services Commission on financial services legislation. Robert focuses on mergers and acquisitions, joint venture companies, public companies and investment vehicles. He also provides specialist advice to hedge funds and private equity funds, as well as advising on a broad range of financing transactions. His clients include Ziraat Bank, Diageo, Burger King, the Virgin Group, Virgin Galactic, Denham Capital, NRG Energy, Bank of America, Morgan Stanley, JP Morgan, Commerzbank AG and others.

Robert sat on the Premier's Financial Services Task Force (the only private sector lawyer to do so), a task force established by the head of the BVI Government to oversee the entirety of the financial services industry. He also sits on the Securities, Investment Business and Mutual Funds Advisory Committee and has recently completed his term as a member of the Joint Anti-Money Laundering and Terrorist Financing Advisory Committee of the BVI. Robert is a regular contributor to the media on matters of BVI law.

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# The Structure of M&A Deals in the Cayman Islands

David Lamb at Conyers Dill & Pearman looks at Cayman Islands law governing the takeover (or privatisation) of public companies.

## INTRODUCTION

This guide deals in general terms with certain aspects of Cayman Islands law governing the takeover (or privatisation) of public companies.

The Cayman Islands also has a stock exchange (the "CSX") and a Code on Takeovers and Mergers and Rules Governing Substantial Acquisitions of Shares which applies to all companies listed on the CSX apart from open-ended mutual funds. When a company listed on the CSX is also subject to primary regulations governing takeovers and mergers by a recognised stock exchange (as defined in the CSX listing rules) or other applicable law, then those primary regulations will generally govern the conduct of the takeover. Early consultation with the Council of the CSX is strongly recommended when transactions are subject to the dual jurisdiction of the CSX and an overseas regulator. The Cayman Islands Takeovers Code does not contain any compulsory acquisition or squeeze-out provisions.

## REGULATIONS GOVERNING TAKEOVERS

- The Companies Law (2016 Revision) and other applicable legislation.
- Cayman Islands Code on Takeovers and Mergers and Rules Governing Substantial Acquisitions of Shares.
- Domestic Takeover Codes and Listing Rules when the shares of the target are listed or traded. These often impose additional thresholds which must be met before any compulsory acquisition can be effected.
- The memorandum and articles of association of the target and any shareholder rights plan or other material contracts.
- Domestic rules on disclosure and transparency, insider dealing, market manipulation and financial promotion.

## GENERAL OFFERS

### PROCEDURE AND ACCEPTANCES

A general offer for all the shares of the target or all the shares of a particular class must be made and accepted by the holders of at least 90% of such shares to enable the offeror to acquire the remaining shares compulsorily. Cayman law allows a maximum four-month offer period within which this level of acceptance must be reached.

### COMPULSORY ACQUISITION NOTICE AND TIMETABLE

A compulsory acquisition notice seeking to acquire the remaining shares may not be served before the expiration of four months from the date the offer was made and must be served within a two-month window commencing on the expiration of this four month period. This means it will usually take a minimum of five months from the date of posting the offer document to complete the acquisition of 100% of the target (assuming no action is taken by any dissentient shareholders).

When a compulsory acquisition notice is given, the bidder is entitled and bound to acquire the shares of the remaining shareholders on the same terms as the general offer, unless an application is made by dissentient shareholders to the Grand Court and the Grand Court thinks fit to order otherwise.

**DAVID LAMB**
PARTNER

### DISSENTIENT SHAREHOLDERS

An application may be made by any dissentient shareholders within one month of the date on which the compulsory acquisition notice was given to prevent the compulsory acquisition, usually on technical grounds. Dissentient shareholders do not have express appraisal rights whereby they could apply to the Grand Court to have the fair value of their shares appraised or assessed by the Grand Court, although the Grand Court has a broad discretion to make whatever orders it considers appropriate.

Within one month of the compulsory acquisition notice the bidder must send a copy of the compulsory acquisition notice to the target and pay the consideration to the target. If an application has been made to the Grand Court then this must be done within one month of that application being determined. The target is then required to register the bidder as the holder of the shares and to hold the consideration on trust for the dissentient shareholders.

## SCHEMES OF ARRANGEMENT

### PROCEDURE

A takeover by way of scheme of arrangement involves the target proposing a scheme to its shareholders to cancel their shares (a cancellation scheme) or to transfer their shares to the bidder (a transfer scheme) in return for cash or securities of the bidder. A cancellation scheme usually avoids stamp duty or documentary tax which would otherwise be payable on a transfer scheme (and on a general offer).

The board of the target will be in control of the scheme and be responsible for drafting the composite scheme document, making the applications to the Grand Court, mailing the composite scheme document to shareholders, holding the relevant meetings and making the necessary filings. The bidder will undertake to abide by the scheme and pay the scheme consideration.

### INDICATIVE TIMETABLE

An indicative timetable setting out the major steps is set out below:

*Day 1*: File draft petition/summons for directions
*Day 21*: Directions hearing (depends on court availability)
*Day 25*: Despatch composite scheme document
*Day 55*: Court Meeting to approve the scheme and EGM to approve the reduction in capital (cancellation scheme)
*Day 56*: File chairman's report of the Court Meeting
*Day 66*: Petition hearing to sanction the scheme and capital reduction
*Day 69*: Effective Date - file court order with Registrar of Companies

### SCHEME DOCUMENT

The composite scheme document will include the expected timetable, a letter from the board of the target, a letter from the independent directors or board committee, a letter from the independent financial advisers, an explanatory statement, financial and general information, the scheme of arrangement document itself and notice of the relevant meeting(s).

### APPROVALS

A scheme of arrangement requires approval from the Grand Court as well as the approval of the directors (in practise).

All schemes must also be approved by a majority in number (head count) representing three-fourths in nominal value (share count) of the scheme shareholders voting at the requisite meeting which will have been convened pursuant to an order of the Grand Court.

The voting requirements of any applicable Takeovers Code must also be met.

In addition, the shareholders present and voting at the court meeting must represent a fair cross-section of the shareholders as a whole and every effort should be made to secure a good attendance by shareholders.

The statutory thresholds apply to each class of share. A class will be created if shareholders have rights against the target company which are so dissimilar as to make it impossible for them to consult together with a view to their common interest. The makeup of any classes will normally be settled at the directions hearing but this determination is not necessarily binding at the subsequent petition hearing.

The statutory majority of shareholders must also act bona fide with no coercion of minority shareholders and the scheme must be one that an intelligent and honest man acting in respect of his interests in the class might reasonably approve.

Unlike a general offer these thresholds cannot be reduced or waived; if they are not met, the scheme will fail.

### EFFECTIVE DATE

The scheme will be effective when a copy of the court order is delivered to the Registrar of Companies for registration.

### AMALGAMATIONS BY WAY OF SCHEME OF ARRANGEMENT

Amalgamations may also be effected through a "special" scheme of arrangement. The scheme of arrangement must have been proposed for the purpose of or in connection with: (i) the "reconstruction" or "amalgamation" of the bidder and the target; and (ii) the transfer of the whole or any part of the undertaking of any company concerned in the scheme of arrangement.

## MERGERS AND CONSOLIDATIONS

### MERGER

Merger means the merging of two or more constituent companies into a sole remaining constituent company (the "surviving company") and the vesting of the assets and liabilities of the constituent companies in the surviving company.

### CONSOLIDATION

Consolidation means the combination of two or more constituent companies into a new consolidated company and the vesting of the assets and liabilities of the constituent companies in the consolidated company.

The cessation of a constituent company which participates in a consolidation or which is not the surviving company in a merger does not require a winding-up.

### PROCEDURE

The directors of each constituent company must approve a written plan of merger or consolidation (the "Plan"). The Plan must contain certain prescribed information including the basis of either converting the shares in each constituent company into shares of the consolidated company or surviving company and the rights attached to the shares or cancelling those shares in exchange for the applicable consideration, any proposed amendments to the memorandum and articles of the surviving company in a merger, or the proposed new memorandum and articles of the consolidated company in a consolidation, details of all secured creditors and the effective date of the merger/consolidation.

### APPROVALS

The Plan must be approved by a special resolution of the shareholders of each constituent company. Any other authorisation required by a constituent company's articles of association must also be obtained.

Shareholders do not need to approve a merger between a Cayman parent company and a Cayman subsidiary. For this purpose, a subsidiary is a company of which at least 90% of the issued shares entitled to vote are owned by the parent company.

The consent of each holder of a fixed or floating security interest over a constituent company is required unless this requirement is waived by the Grand Court.

Other consents (and filings) may be required, for example, under the Banks and Trust Companies Law, Securities Investment Business Law, Mutual Funds Law or Insurance Law.

### FILINGS

The Plan must be filed with the Registrar of Companies, together with supporting documents including:

(a) a declaration:
- (i) of solvency (debts as they fall due);
- (ii) that the merger or consolidation is *bona fide* and not intended to defraud unsecured creditors of the constituent companies;
- (iii) of the assets and liabilities of each constituent company;

(iv) that no proceedings are outstanding and that no order has been made or resolution passed to wind up a constituent company or to appoint a receiver, trustee or administrator in any jurisdiction;

(v) that no scheme, order, compromise or arrangement has been made in any jurisdiction whereby the rights of creditors have been suspended or restricted.

(b) an undertaking that a copy of the certificate of merger or consolidation will be given to members and creditors of a constituent company and published in the Cayman Islands Gazette.

## DISSENTIENT SHAREHOLDERS AND APPRAISAL PROCESS

A dissentient shareholder of a Cayman constituent company is entitled to payment of the fair value of his shares as assessed by the Grand Court upon dissenting to a merger or consolidation unless: (i) an open market exists for the shares on a recognised stock exchange or interdealer quotation system at the end of the dissent period (see below); and (ii) the merger or consolidation consideration consists of shares or depository receipts of the surviving or consolidated company, or shares or depository receipts of any other company which are listed on a national securities exchange or designated as a national market system security on a recognised interdealer quotation system or held of record by more than 2,000 holders on the effective date of the merger or consolidation. The exercise of appraisal rights will preclude the exercise of any other rights save for the right to seek relief on the grounds that the merger or consolidation is void or unlawful.

## THE FOLLOWING PROCEDURE WILL APPLY:

1. The dissentient shareholder must give written notice of objection (notice of objection) to the constituent company *before* the vote to approve the merger or consolidation.
2. Within 20 days of the vote approving the merger or consolidation, the constituent company must give written notice of the approval (approval notice) to all dissentient shareholders who served a notice of objection.
3. Within 20 days (dissent period) of the approval notice a dissentient shareholder must give a written notice of dissent to the constituent company demanding payment of the fair value of his shares.
4. Within seven days of the expiry of the dissent period or within seven days of the date on which the plan of merger or consolidation is filed with the Registrar of Companies (whichever is later), the constituent company, surviving company or consolidated company must make a written offer (fair value offer) to each dissentient shareholder to purchase their shares at a price determined by the company to be their fair value.
5. If the company and the dissentient shareholders fail to agree the price within 30 days of the fair value offer (negotiation period), then within 20 days of the expiry of the negotiation period the company must apply to the Grand Court to determine the fair value of the shares held by all dissentient shareholders who have served a notice of dissent and who have not agreed the fair value with the company.

The exercise of appraisal rights has been an increasing trend following the *Integra Group* case in 2015 and a number of other cases are in process.

## EFFECTIVE DATE

The effective date of a merger or consolidation is the date the Plan is registered by the Registrar of Companies, although the Plan will usually specify the effective date and may provide for an effective date not exceeding 90 days after the date of registration.

## EFFECT OF A MERGER OR CONSOLIDATION

All rights, benefits, immunities, privileges and property (including business and goodwill) of each of the constituent companies will vest in the surviving or consolidated company which will be liable for all debts, contracts, obligations, mortgages, charges, security interests and liabilities of each constituent company. Existing claims, proceedings, judgments, orders or rulings applicable to each constituent company will automatically apply to the surviving company or the consolidated company.

## CERTIFICATE OF MERGER OR CONSOLIDATION

A certificate of merger or consolidation is issued by the Registrar of Companies which is *prima facie* evidence of compliance with all statutory requirements in respect of the merger or consolidation ■

Paul|Weiss

# M&A Madness

Judie Ng Shortell of Paul, Weiss, Rifkind, Wharton & Garrison describes the hottest trends fueling Chinese deal activity, solutions to top regulatory issues and vital tips for foreign and domestic M&A parties.

## 1. WHAT HAVE BEEN THE KEY REGULATORY DEVELOPMENTS AFFECTING INBOUND M&A IN THE PAST 12 MONTHS?

In September 2016, the Standing Committee of the National People's Congress adopted a decision under which the foreign investment approval requirement was replaced by a filing system for foreign-invested enterprises (FIEs) that engage in a business that is not subject to restrictions or "special administrative measures for access" with effect from October 1, 2016. These non-restricted FIEs only need to make a filing with the Ministry of Commerce (MOFCOM).

To implement the new filing process, MOFCOM issued rules for filings in respect of the establishment of, and changes to, non-restricted FIEs (Filing Measures), and jointly with the National Development and Reform Commission (NDRC) released *Announcement [2016] No. 22* (Announcement 22), which defines restricted businesses as those (i) specified under the restricted and prohibited categories of the *Foreign Investment Industrial Guidance Catalogue (Amended in 2015)* (Catalogue); and (ii) specified under the "encouraged" category but subject to foreign shareholding limits or requirements for senior management.

The Filing Measures simplified acquisitions of non-restricted FIEs. MOFCOM approval is no longer a condition to the completion of transfers of equity interests in non-restricted FIEs, as the filing can be made after completion. A new requirement is that the ultimate actual controller of the FIE must be disclosed under the rules.

In practice, MOFCOM still needs to provide details for the implementation of the Filing Measures to enable local commerce bureaus to proceed with the new filing regime.

In May 2015, China broadened its national security regime for all foreign investment activities in free trade zones (FTZs) in China.

Inside the FTZs, all foreign investments that have national security implications must undergo national review, regardless of whether they are structured:

- As new enterprises;
- Through a merger or acquisition of a pre-existing enterprise; or
- By way of other investments, such as through contractual arrangements, share entrustments, trusts, reinvestments, overseas transactions, leases or convertible bond subscriptions.

It is anticipated that a similar type of extensive review regime will ultimately be adopted nationwide.

## 2. CAN YOU DESCRIBE CHINA'S MERGER CONTROL REGIME AND PROCESS?

Under the *PRC Anti-Monopoly Law*, transactions triggering a change of business concentration must file a pre-merger notification to MOFCOM if the concentration reaches certain thresholds.

The relevant thresholds are met where either of the following are satisfied:

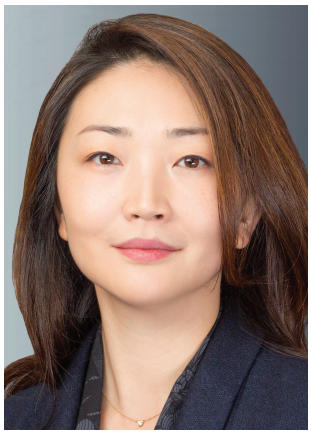
- The combined worldwide turnover of all business operators in the prior fiscal year is more than Rmb10 billion, and the domestic turnover of each

of at least two of the business operators in the prior fiscal year is more than Rmb400 million.

- The combined domestic turnover of all business operators in the prior fiscal year is more than Rmb2 billion, and the domestic turnover of each of at least two of the business operators in the prior fiscal year is more than Rmb400 million.

The process:

- Upon receipt of all the application documents, MOFCOM will conduct a preliminary review and decide whether to initiate a further review within 30 days.
- If initiated, MOFCOM must either complete the further review within 90 days following the date of its decision to do so or extend its review for a further 60 days, after which time it is required to give its decision.
- However, the time periods above only commence when the application is formally accepted by MOFCOM.



**JUDIE NG SHORTELL**
PARTNER

MOFCOM is aware that merger reviews have caused delays for the completion of M&A transactions.

To streamline the merger review process, MOFCOM launched a simplified merger review procedure in 2014. The simplified procedure is available in the following circumstances:

- Horizontal mergers where in the same relevant market, the collective market share of all operators concerned in the concentration is less than 15%;
- Vertical mergers where the market share of each of the operators concerned in the concentration in each of the relevant upstream and downstream markets is less than 25%;
- Mergers that are neither horizontal nor vertical where the market share of each of the operators concerned in the concentration in each of the markets is less than 25%;
- Offshore joint ventures or acquisitions where the arrangement or target does not engage in business within China.
- Reduction of the number of controlling parties.

The simplified track may reduce review timing to two to three months (as opposed to four to six months for the normal procedure).

### 3. WHICH INDUSTRIES HAVE ATTRACTED THE MOST FOREIGN INVESTMENT AND EXPERIENCED THE MOST M&A ACTIVITY?

Throughout the past year, the TMT industry in China has attracted the most foreign investment and experienced the most M&A activity.

Foreign investment into China has attracted growth despite a slowing domestic economy, specifically in the technology sector. Investors from the U.S. and EU have been some of the biggest contributors to this trend. According to MOFCOM, FDI into China rose 4.2% to reach $98 billion (Rmb666.3 billion) in the first ten months of the year.

We expect to see continued growth in FDI in China in the future due to MOFCOM's reforms aimed at benefiting FIEs.

The TMT industry continues to be the most active M&A sector in China with over $100 billion in deal value despite fluctuating macroeconomic conditions. This trend has been led by mega-deals such as Tencent's $8.6 billion acquisition of Supercell, Didi Chuxing's $7 billion takeover of Uber's operation in China, HNA Group's $6 billion acquisition of Ingram Micro, among others. The fintech sector has seen a particular rise in M&A activity from top Chinese internet companies like Alibaba, Baidu, Tencent due to the huge growth potential in financial infrastructure in China.

### 4. WHICH SECTORS HAVE RECENTLY OPENED UP TO INCREASED FOREIGN SHAREHOLDING OR OWNERSHIP?

- E-commerce: Online data processing and transaction processing is now fully open to foreign investment.
- Energy: The construction of power grids has been moved from the restricted to encouraged category in the 2015 Catalogue. The construction and operation of power stations using re-

newable energy is also encouraged under the Catalogue.

- Real estate: Restrictions on foreign investment in subways and real property projects have been lifted in the Catalogue. The construction and operation of rail transit is encouraged and no longer requires a Chinese majority shareholder.

**The TMT industry continues to be the most active M&A sector in China with over $100 billion in deal value**

### 5. WHICH RECENT TRANSACTIONS HAVE HIGHLIGHTED THE ONE BELT, ONE ROAD INITIATIVE?

China's One Belt, One Road initiative set out by President Xi Jinping aims to create an economic belt in the Eurasia region and to develop a modern maritime "Silk Road" to connect China's ports with Africa's coasts and the Mediterranean through Southeast Asia and the Suez Canal.

A recent transaction that highlights this initiative is Shanghai Electric's majority stake investment in Pakistan's K-Electric; which was the largest M&A deal in Pakistan in a decade according to *Reuters*. This transaction comes after China's pledge of $46 billion in infrastructure projects in Pakistan, known as the "China Pakistan Economic Corridor", which will pave the way to link China's trade with the Arabian Sea.

Other examples of One Belt, One Road transactions include:

- The Thar Coal power project in Pakistan involving Chinese sponsors and lenders;
- China Everbright Group's takeover of an Albanian airport operator, the first major investment by a Chinese company into Albania; and
- China COSCO's takeover of the Greek port of Piraeus, the second largest privatization deal in Greece this year.

### 6. HOW IMPORTANT IS M&A DUE DILIGENCE IN CHINA?

Due diligence is a vital element for a successful M&A in China, especially for inbound foreign investors.

Legal, financial and tax due diligence must be conducted carefully and thoroughly. In addition, due diligence should also cover any third-party agents acting on behalf of the target to identify possible compliance violations.

Other types of due diligence should also be performed on the target company in China, in particular, reviews on anti-corruption compliance. Investigations on any violations of the *Foreign Corrupt Practices Act* of the U.S., the *Bribery Act* of the UK and other foreign anti-corruption regulations that may apply to foreign investors in China should be conducted. This must be a priority particularly for corruption-prevalent industries such as pharmaceutical and healthcare. Review of other matters such as environmental protection is necessary if the target is engaged in environment-related sectors. More care in the due diligence exercise is called for if the transaction involves government entities or state-owned enterprises (SOEs).

### 7. WILL OUTBOUND APPROVAL MEASURES BE FURTHER RELAXED? WHAT DOES THIS MEAN FOR THE GLOBAL BIDDING POWER OF CHINESE ACQUIRERS?

It is reported that the Chinese government plans to tighten controls on Chinese companies seeking to invest overseas in order to slow down capital outflow. It is understood that the measures to be adopted will mainly be targeted at large transactions of deal values exceeding $10 billion, property investments by SOEs above $1 billion, and investments of $1 billion or more by any Chinese company in an overseas entity unrelated to the buyer's core business. The new controls are likely to be temporary, remaining in effect until the end of September 2017, when the next leadership reshuffle takes place.

Hopefully, after stabilizing the market and currency, further relaxation can continue to push ahead, implementing the NDRC's *Measures for the Administration of the Check and Approval and Record Filing of Overseas Investment Projects (Draft for Public Comments)* (Outbound Draft), which was published in April 2016 for public consultation, further streamlin-

ing the outbound approval process. The proposed amendments are:

- The NDRC will assume final verification authority over outbound investments in a sensitive country or industry without reference to a minimum threshold amount, and State Council approval will no longer be required.
- The requirement for a confirmation letter will be removed.
  - In the initial stage, a simple "letter of receipt" will replace the "letter of confirmation".
  - In the second stage, registration will still be required but the filing process will be simplified.
- The requirement for a letter from a bank expressing its intent to finance the transaction will be removed.
- While the Measures do not apply to investments made by Chinese enterprises in Taiwan, the Outbound Draft proposes that investment projects in Taiwan will be subject to the same offshore investment regime with the additional requirement that the NDRC will consult with the Taiwan Affairs Office on the transaction.

If the proposed amendments are formally adopted, the approval process for outbound investment projects will be further streamlined. This will no doubt increase the bidding power of Chinese acquirers. More Chinese buyers will be encouraged to bid for offshore assets and they will be more likely to pursue deals involving sensitive industries. In addition, non-Chinese sellers will be more willing to consider multiple potential Chinese buyers.

### 8. WHICH SECTORS HAVE CHINESE INVESTORS BEEN MOST DRAWN TO OVERSEAS? WHAT ARE THE KEY OUTBOUND TRENDS YOU ARE WITNESSING?

As China is moving from an export-driven manufacturing hub to a technologically-centered industrialized environment, Chinese investors have been drawn into investing strategically into the industrials and technology sectors overseas. This strategy focuses on acquiring industrial know-how, high-value products and brands, as well as technological capabilities that can be offered back to the Chinese consumer market.

The key outbound trends include:

- Government policies such as the One Belt, One Road initiative and relaxed regulatory reviews that encourage outbound investing in an effort to increase Chinese influence globally;
- Chinese companies investing overseas to diversify their assets in developed and mature markets;
- Rising stock prices and positive market reactions through strategic overseas acquisitions;
- Strategic focus on procuring technology-driven assets, as well as high-value foreign products and brands that can be offered to domestic consumers; and
- Heightened sophistication by Chinese M&A players as they increase their involvement in global transactions.

The Chinese government needs to balance both the need to control capital outflow and stabilize the domestic economy and the growing demands of Chinese enterprises to expand outside of China to diversify, internationalize and gain access to technology and knowhow. Although outbound investments may slow down in the short term as a result of the reported tightening measures, in the medium to long run, Chinese outbound acquisitions will inevitably continue to increase due to opportunities presented by the global economy and the domestic competitive landscape in China.

### 9. WHAT IS YOUR ADVICE TO FOREIGN CLIENTS ENGAGING IN DEALS WITH CHINESE INVESTORS, BOTH INBOUND AND OUTBOUND?

It is important for foreign inbound investors to:

- **Know your target:** It is essential to perform proper due diligence of the target in all relevant aspects thoroughly. In addition, understand why the target enters into the transaction and what it expects to gain from the deal.
- **Be aware of the limits:** Take note of any restrictions for foreign investment in the particular industry and whether there are specific approval requirements. Also, different regulations apply if the target is an SOE or a private company.
- **Optimize the deal structure:** Decide whether it is an equity or asset acquisition as different Chinese regulations are applicable.
- **Notify the regulators:** Be aware of the requirement to file for merger review. If such re-

view is necessary, it may significantly change the timing for the completion of the transaction.

- **Consider all factors:** Other key issues such as tax and foreign exchange must be taken into account. These may impact how the foreign investor should structure its inbound acquisition.

As for foreign companies working with outbound Chinese investors, it is advisable to ensure the following:

- **China's approval:** Confirm the Chinese investor has obtained approval for the outbound investment. An outbound investment of less than $2 billion involving a sensitive country or region or a sensitive industry requires NDRC approval. MOFCOM approval is also required, regardless of the amounts involved, if the investment is made in a sensitive country, region or industry. Approvals from other government departments, such as the State Asset Supervision and Administration Commission, and industry regulators such as the China Insurance Regulatory Commission may also be required.
- **Enough funds:** Confirm the Chinese investor's ability to obtain foreign exchange to fund the acquisition. The Chinese government has been tightening measures to prevent capital outflows. There have been reports that the State Administration of Foreign Exchange has tightened bank quotas for currency swaps to fund outbound acquisitions.
- **Thresholds:** Be aware of merger control filings, requirements for approval (such as by the Committee on Foreign Investment in the U.S. or the Foreign Investment Review Board of Australia), and security reviews required under the regulations of China or the host country.
- **Safeguarding measures:** To address the risks that may result from Chinese and foreign country regulation and review, foreign sellers may consider asking for reverse break fees and non-refundable deposits.
- **Integration details:** Consider separation and transitional services arrangements, including IT separation, de-branding requirements, technical support and other transitional services should be considered by both the foreign seller and the Chinese investor in their negotiations of the transaction.

### 10. HOW DO YOU SEE M&A TRENDS AND INVESTMENT STRATEGIES EVOLVING OVER THE NEXT 12 MONTHS?

The deal trends and investment strategies to evolve in the next year include continued growth in outbound M&A into developed countries, with a focus on sectors such as technology, high-value products, brands and industries. One Belt, One Road will also attract Chinese investors to acquire foreign assets in infrastructure globally. SOEs may play a less prominent role in outbound M&A due to a high leverage and their frequent reliance on debt financing.

We are likely to see a consolidation within China's top logistics companies within the next 12 months with companies such as ZTO Express, SF Express, YTO Express, and others raise funds to fuel their acquisition appetites. In addition, logistics technology and data analytics are advancing substantially, leading to a further appetite for M&A deals.

Another likely consolidation will be the media & entertainment sector in China, specifically in the cinema sector. While Chinese corporations like Dalian Wanda Group have been investing overseas into various media & entertainment assets, these companies have also begun acquiring other China-based cinema competitors to gain market share and increase synergy. ■

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**LegalSmallFirm**
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# A Snapshot of Irish M&A

Alan Casey, A&L Goodbody provides an overview of the key factors that have been driving Ireland's M&A market.

Notwithstanding an eventful and unpredictable global backdrop from both a political and economic standpoint, 2016 has seen Ireland continue on its path of economic growth. With its economy on target to grow by 6.5% this year, Ireland has regained its position as the fastest growing economy in Europe. Ireland's cost competitiveness, attractive tax regime, talented work-force and pro-business environment continue to attract foreign investors from the U.S., Europe and Asia who are seeking to access the EU single market through direct investment and/or acquisitions.

**ALAN CASEY**
HEAD OF A&L GOODBODY'S NEW YORK OFFICE

Consistent with global trends, Irish deal activity slowed compared with the bumper activity levels of 2014 and 2015. Brexit, and the uncertainty it has brought with it, presents significant challenges and opportunities for the Irish economy and it has undoubtedly impacted the pace of deal activity throughout 2016. Nevertheless, overall activity levels have remained healthy with a number of significant deals taking place. As in previous years U.S. buyers have been key drivers of M&A activity in Ireland. However, 2016 has also seen a growth in confidence among domestic buyers with a number of Irish corporates announcing acquisitions overseas.

## PUBLIC M&A TRENDS

2016 has continued to see a very active public company M&A market in Ireland. Despite the U.S. Treasury steps to curb the number of corporate migrations by U.S. companies, Milwaukee based Johnson Controls Inc's acquisition of Tyco International plc for nearly $16.5bn was successfully completed in September 2016. Those new U.S. Treasury rules had previously derailed the proposed Pfizer acquisition of Irish-incorporated Allergan plc earlier in the year. Like the proposed Pfizer deal, the Johnson Controls transaction was structured as a reverse merger subject to the Irish Takeover Rules (as was the Willis Towers Watson merger which completed in early 2016). An advantage of the reverse merger structure is that the Irish Takeover Rules do not automatically apply in their entirety to such transactions. Instead certain key rules will apply by default while the Irish Takeover Panel has discretion to decide which other rules will apply during the offer period.

The Johnson Controls / Tyco acquisition was also notable in that it involved a post-merger spin-off of Johnson Controls' automotive interiors and seating business into an independent, publicly traded Irish company, Adient plc, with 75,000 employees worldwide. This is consistent with global trends in 2016, which have seen an uplift in the number of international corporates shedding non-core assets with

a view to focussing their business lines and raising capital.

Throughout 2015 a particular feature of the Irish M&A market was a significant number of bolt-on acquisitions by previously migrated companies using their Irish platforms. This trend continued in 2016 with the announcement by Horizon Pharma plc of its $800m acquisition of Raptor Pharmaceutical as well as significant deal activity from Allergan, Medtronic and Accenture using their Irish platforms. At the higher value end of this scale we saw Jersey incorporated, Irish tax resident Shire's $32bn acquisition of Illinois-based Baxalta in 2016 to create a world leading biotechnology company focussed on rare diseases.

A positive sign for the Irish market in 2016 was a return to more traditional strategic M&A as international buyers began to seek out successful home-grown Irish companies in order to diversify their existing global offering. A strong example of this was Verizon Communications Inc's $2.4bn acquisition of Fleetmatics Group plc. Fleetmatics is an Irish born company listed on NYSE and the leading global player in the developing telematics industry. The deal was announced shortly after Verizon announced the acquisition of Yahoo's core business.

The Fleetmatics acquisition was a straight takeover of an Irish company by way of scheme of arrangement, governed by both the SEC Rules and by the Irish Takeover Rules. In that context, the transaction was distinguished from the more recent inversion transactions as regards the application of the Takeover Rules, which required a number of complex changes to the structure of the transaction compared to previous U.S. buyer/Irish target deals.

## IRISH PUBLIC COMPANY TAKEOVER STRUCTURES

As U.S. bidders are likely to continue to consider attractive Irish targets, it is worth reviewing some of the key differences between U.S. and Irish takeovers:

- The break fees payable by an Irish target are more limited than for a U.S. target under the Irish Takeover Rules. Generally such fees are restricted to reimbursing the bidder's expenses of up to no more than 1% of the target's equity value in the deal.
- It is more difficult for an Irish target to take any action which may result in the frustration of an offer or possible offer, including soliciting competing or alternative offers.
- Invoking a condition precedent in order to abandon a pending takeover offer for an Irish company requires prior Takeover Panel approval, which will not be granted where the Panel deems the condition to be of a subjective nature and where breach of the condition is not of such materiality as to alter the core purpose of the deal.
- Other provisions customary in U.S.-style acquisition agreements for friendly, negotiated transactions will generally need to be reviewed and approved in advance by the Takeover Panel as some of these may be uncommon in the Irish M&A market.
- Stakebuilding is permitted under the Irish and U.S. rules outside of an offer period. However, once a potential bidder receives material non-public information from an Irish target as part of diligence, Irish insider trading considerations restrict the bidder's ability to acquire any shares on the open market.

## PRIVATE M&A TRENDS

As in recent years, much of Ireland's M&A growth can be attributed to greater access and choice in sources of finance, reflecting a return to more stable investment opportunities. Ireland continues to attract capital from many sources including debt financiers and private equity. The number of large funds in the market, the very favourable tax regime, availability of debt and the number of private equity funds competing with each other for assets have combined to provide for a favourable environment for mid-market private M&A activity.

Private equity deal value in Ireland increased by 106% in the first half of 2016 up to $2bn. This is driven in many cases by private equity houses using Irish acquisitions as a launchpad for expanding into the UK. Significant transactions included the acquisition of motoring group AA Ireland by Carlyle Global Financial Services Partners and Carlyle Cardinal Ireland for $166m as well as the sale by

Permira of Creganna-Tactx Medical to Swiss-based TE Connectivity for $871m.

The robust recovery in the Irish economy means we are now seeing more Irish businesses strong and confident enough to actively take steps to grow their global footprint through foreign acquisitions. Examples of this include Kingspan's acquisition of German company ESSMANN Gruppe, Kerry Group's acquisition of Vendin S.L., Fyffe's acquisition of All Seasons Mushrooms Inc. and Greencore's acquisition of The Sandwich Factory. This would indicate that M&A remains the preferred strategy for international growth for most Irish corporates as opposed to organic growth.

## FOREIGN DIRECT INVESTMENT

Despite the uncertainty in global markets as a result of the Brexit decision as well as the U.S. and European elections, the combination of a talented English speaking workforce and continued access to the EU has seen both blue-chip multinationals and international (in particular, U.S.) emerging high growth businesses continue to establish European operations in Ireland. Since the Brexit referendum result on 23 June 2016, total job announcements from IDA Ireland (the Irish government's FDI agency) in Ireland was over 5,000 across 57 different companies such as Storyful, MetLife, Pfizer, Ayrton Group, Oneview Healthcare, SAS, Jazz Pharmaceuticals, GE Healthcare, Coca Cola, Mallinckrodt, Deutsche Bank, Software One, Fazzi, Trusource Labs and WP Engine.

## FUTURE PROSPECTS FOR IRISH M&A

Ireland's strong recovery, which was initially driven by net exports, is now, according to the European Commission, firmly based on demand across economic sectors and appears to be resilient to weaker global growth. In a period of political and economic uncertainty the Irish market offers a steady platform from which to take advantage of future M&A opportunities. Consistent with global trends and following record deal levels in 2014 and 2015, we expect the more normalised M&A activity levels of 2016 to continue into 2017. 2017 is also likely to see the sale by the Irish Government of at least 25% of Allied Irish Banks plc, one of Ireland's pillar banks, and the readmission of its shares to trading on the main markets of the London Stock Exchange and Irish Stock Exchange, and this will likely represent one of the largest Dublin and London IPOs in 2017.

While the full extent of the impact of Brexit and the fallout from the U.S. presidential election on M&A activity remains to be seen in 2017, the business as usual message from the Irish market should continue to prove attractive. As indigenous businesses continue to expand by way of acquisition, emerging international businesses continue to locate operations in Ireland and foreign acquirers seek potential expansion targets. We expect that the U.S. will remain the number one source of direct investment into Ireland and continue to be a key driver of M&A activity throughout 2017. ■

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HERZOG FOX & NEEMAN
LAW OFFICE

# Taking Private Transactions in Israel

Herzog Fox & Neeman examines the growing trend of foreign purchasers acquiring tech-focused Israeli public companies.


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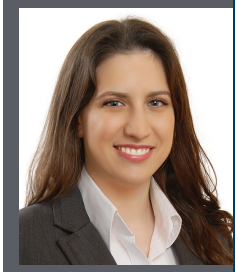

YAEL HAUSER
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It is no secret that the Tel Aviv Stock Exchange (TASE) is struggling with low trade volume, low liquidity, and regulation considered by many to be cumbersome. In addition, some of the largest and best known businesspeople and conglomerates in the Israeli marketplace have been facing financial difficulties, forcing them to dispose of their holdings in public companies. The challenges of being traded on the TASE, along with an excess of willing sellers, make Israeli listed companies an attractive Target for foreign companies looking to acquire undervalued companies. In turn, Israeli listed companies often view an acquisition by a foreign buyer as an opportunity to leverage and grow in international markets. The year 2016 has seen a growing trend of foreign companies, mostly based out of east Asia and in particular China, who are looking at acquiring Israeli public companies as a way to acquire new technologies and innovations. But also, in a form of arbitrage, after these foreign companies take Israeli listed companies private, they either re-list them as public companies or inject them into existing public companies on Chinese and other exchanges, in the hope of cashing in on higher margins.

## TAKING PRIVATE – LEGAL MECHANISMS

### *THREE ALTERNATIVES*

Under Israeli law, including case law, there are three main alternative structures for "going private" transactions: a full tender offer, a court approved arrangement, and a reverse triangular merger. Pursuant to the Israeli Companies Law 1999 (the "Companies Law"), a person may not acquire more than 90% of the shares or a class of shares in a public company other than by way of a full tender offer addressed to all shareholders of the Target company, and the offer must provide identical terms to all offerees. The full tender offer is deemed accepted, and the buyer able to "squeeze-out" and purchase the shares of remaining minority shareholders who did not accept the offer, only if: (i) the shares held by shareholders of the Target who did not accept the full tender offer represent less than 5% of the issued share capital of the Target; and (ii) more than 50% of the offerees, who do not have a personal interest in accepting the offer, approved the offer. The fact that a full tender offer can be effectively blocked by shareholders holding no more than 5% of the issued share capital of the Target has made this an unpopular alternative for take private transactions, especially when the Target is a tech company, which tends to have a scattered holding structure.

Alternatively, under Sections 350-351 of the Companies Law, a going private transaction can be carried out as an "arrangement" between a company and its shareholders or creditors, subject to the approval of the transaction by each class of creditors and shareholders by the requisite majority vote (generally, 75% of the "value" repre-

sented) and by the court. Originally, this mechanism was intended to address reorganizations with the goal of avoiding the insolvency of the company in question. However, prior to the enactment of the Companies Law, in the absence of a statutory merger procedure, this mechanism was also used for the consummation of mergers. Existing case law and the Israeli Securities Authority (ISA) supports the position that the mechanism may still be used for corporate transactions unrelated to insolvency (except to effect a "hostile" takeover transaction), but it has rarely been used in recent years.

By far the most common method in recent years to take a public company in Israel private has been by way of a reverse triangular merger. The reverse triangular merger structure is not explicitly provided for under the Companies Law, but case law interprets the Companies Law to include the reverse triangular merger as a legitimate technique to acquire a company. In practice, many reverse triangular mergers have been successfully carried out. Moreover, the ISA has also expressed its opinion that a reverse triangular merger is a legitimate structure for a "going private" transaction under the Companies Law.

### *REVERSE TRIANGULAR MERGER ADVANTAGES*

There are several advantages to a reverse triangular merger that help make it the most popular route to effect "going private" transactions. First, unless a reverse triangular merger transaction is treated as an extraordinary merger transaction between a Target company and its controlling shareholder or in which a controlling shareholder has a personal interest (a "Controlling Shareholder Transaction"), the transaction generally only requires approval by a simple majority of the shareholders. This is in contrast to the 95% threshold required under the full tender offer alternative, or the 75% threshold required under the court approved scheme of arrangement. A Controlling Shareholder Transaction would require special approvals by a majority of the minority shareholders actually participating and voting, in addition to an approval by a simple majority of the shareholders.

In addition, as the merger is a transaction among the buyer, a specially established merger sub and the Target company (as opposed to a transaction between the buyer and the selling shareholders), the buyer has the ability to conduct a thorough due diligence review of the Target, with the cooperation of the board of directors of the Target who may be willing to provide non-public information about the Target to the buyer. Because of the fact that the reverse triangular merger is considered as a transaction between the Target company and the purchaser, there is the added benefit that non-public information provided to the purchaser by the board of directors of the Target is exempt from the limitations on "inside information" under the Israeli Securities Law 1968.

**Along with the plethora of take-private transactions in progress or completed in 2016, these statistics may look dire for the TASE, but the TASE is busy undertaking measures to remain a competitive stock exchange.**

### *PARTIAL REVERSE TRIANGULAR MERGER*

A fourth option emerging in the case of "take private" transactions is a "partial" reverse triangular merger, in which the purchaser purchases only the portion of the shares of the Target company held by the public, while the founders and other principal shareholders retain their stake in the Target as minority shareholders.

This structure has the advantage of the purchaser taking the company private while retaining the involvement of the founders and other key employees, and at the same time reducing the initial costs of the transaction. The key disadvantage of this structure is that the shareholders who retain their shares in the Target company (and who are controlling shareholders in the Target before the merger) are deemed to have a personal interest in the transaction and accordingly the transaction would likely require a higher approval threshold of the "majority of the minority".

There is still no case law in Israel specifically providing that such a partial reverse triangular merger structure is valid. Special caution should be taken so that the transaction will not be viewed as providing materially preferential treatment to the founders and

other shareholders who retain their stake in the Target, as compared to the public shareholders who are being bought out, so as to lower the risk that a court would invalidate the transaction.

## NEW TASE LISTINGS

Although 2015 was an outstanding year for exits in Israel, with US$9.02 billion in proceeds from M&As, there were only two IPOs on the TASE in 2015, raising a total of approximately US$150 million. In 2016, as of Q3, the TASE has again seen only two IPOs that have raised, jointly, under US$5.5 million. Those few Israeli companies who want to pursue an IPO often look elsewhere than the TASE. Israeli tech companies, and in the biomed sector in particular, often prefer the NASDAQ – a record 12 Israeli bio/med/pharma companies have completed IPOs on the NASDAQ since 2013 – though some Israeli companies decide to be dual-listed on both the NASDAQ and the TASE (e.g. Compugen, BiondVax, Pluristem Therapeutics).

Along with the plethora of take-private transactions in progress or completed in 2016, these statistics may look dire for the TASE, but the TASE is busy undertaking measures to remain a competitive stock exchange. In June 2016, the ISA released a report summarizing its recommendations on how to ease regulation in an effort to keep the TASE attractive to companies interested in going public. Some of the measures already implemented include provision of relief to newly listed companies from some of the more cumbersome corporate governance and disclosure requirements more generally applicable to companies listed on the TASE (including certain regulations in connection with the remuneration of senior officers), changes in the TASE composites, and provision of relief to small cap companies (including an exemption from the requirement to publish quarterly financial reports).

The TASE is making particular efforts to encourage Israeli tech companies to go public on the TASE. The TASE encourages "R&D companies" to offer shares to the public, with lenient requirements, such as no proof of period of activity or level of shareholders' equity prior to an IPO, and allowing reports to be published in English. To qualify as an "R&D company," a company needs to have invested at least NIS3 million in research and development over the last three years.

Another interesting new measure that the TASE is promoting in 2016 in order to combat sub-optimal trade volumes and pricing, is an analysis project whereby international equity research firms such as Edison Investment Research and Frost & Sullivan will publish impartial financial and scientific analyses for listed Israeli biomed and technology companies, in order to decrease a perceived knowledge barrier between investors and the tech & biomed companies, and thereby encourage proper pricing of investments. ■

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LENZ & STAEHELIN

# Particularities of the Swiss Takeover Law

The predominant means of acquiring control of a Swiss public company is the public takeover (tender) offer. Compared to other jurisdictions, Swiss takeover law provides for several particularities that may be surprising to market participants who are not familiar with the Swiss rules.

It can be fairly assumed that the Swiss M&A year 2016 will enter the statistics as a solid year from a deal value perspective. The deal value for the first three quarters amounts to approx. USD 84 billion (compared to USD 85 billion for the entire 2015). This rise is in large part due to a significant increase in public tender offers. Until November 2016, six public tender offers have been announced (compared to only two in 2015). Particularly noteworthy is the pending public tender offer by China National Chemical Corporation (ChemChina) for SIX-listed Syngenta. The transaction was announced in February after the bid by Monsanto for Syngenta ended unsuccessfully. ChemChina has offered to purchase the Swiss agribusiness in an all-cash deal for a record breaking consideration of USD 43 billion. The transaction will be the biggest overseas acquisition by a Chinese company to date. It also shows a growing trend of Chinese acquisitions abroad, including Switzerland. Worth mentioning are also the offers of China-based HNA Group for Gategroup and of Swedish private equity firm EQT Partners for Kuoni.

The mentioned transactions and other public takeovers of Swiss companies that are expected to be announced or completed by the end of the year (including the tender offers of Italy-based Sempione Retail for Charles Vögele and of AFG Arbonia-Forster-Holding for Looser) are usually structured as public tender offers under the Swiss takeover rules.

In this context, several particularities of the Swiss takeover law should be considered.

## VOLUNTARY OFFERS, MANDATORY OFFERS AND OPTING-OUT

Similar to the laws of the European Union (EU) member states, Swiss law provides for a mandatory offer regime. The mandatory offer duty is triggered whenever a bidder acquires more than 33 ⅓% of the voting rights of the target company. Switzerland introduced the mandatory offer regime already in 1998, several years before the entering into force of the EU Takeover Directive. At that time, the mandatory offer rule was not without controversy and in the legislative process, a typical "Helvetic trade-off" was required. The Swiss takeover rules allow companies to completely opt-out from the mandatory offer regime by providing so in their articles of incorporation. In case of an opt-out no mandatory offer is triggered if a shareholder acquires more than one-third of a target company.

Historically, such opting-outs were typical for small and mid-caps, often family-controlled businesses. To date, still approximately one-fifth of over 260 listed companies have opted out from the man-

datory offer duty. However, with the announcement of the controversial takeover of Sika by Compagnie de Saint-Gobain in December 2014, opting-outs have come into disrepute to some extent and it is expected that the number of issuers with an opting-out will further decrease. Also, in 2015 the Swiss Takeover Board (TOB), which is responsible for ensuring compliance with the Swiss takeover law, has not permitted Schindler, a company with an opting out, to introduce in its articles of incorporation a tailor-made offer duty mainly based on transparency considerations.

**TINO GABERTHÜEL**
PARTNER

## OFFER PRICE

The offer price paid in a Swiss tender offer may consist of cash or securities or a combination thereof. The bidder is free to offer its own shares as consideration in order to realize a merger (with a premium or as a "merger of equals"). Such shares do not have to be listed on a stock exchange. Under certain circumstances, however, a cash alternative must be offered. A cash alternative is in particular required in a mandatory offer or if the bidder has in the twelve months before the tender offer acquired at least 10% of the target's share capital for cash. A cash offer is usually denominated in Swiss Francs (unless the target shares are traded in US Dollar). However, in the ChemChina/Syngenta transaction, the TOB permitted ChemChina's offer to be denominated in US Dollar as a hedging or a financing in Swiss Francs would have hardly been feasible due to the large size of the transaction.

Similar to the EU Takeover Directive, Swiss law provides for a *minimum price rule*. The Swiss minimum price rule goes beyond similar foreign régimes, e.g. Germany's minimum price rule. The price of a mandatory offer, and also of a typical voluntary "change-of-control" offer, must be at least equal to the market price (defined as the 60-day volume weighted average price, 60-day VWAP) or, if higher, the highest price paid by the bidder (or any of its affiliates or persons acting in concert) in the twelve months before the tender offer. The previously existing possibility to pay certain shareholders a premium of up to 33 ⅓% over the offer price was abolished in 2013. The minimum price rule is not applicable if the target company has validly introduced an opting-out. But even if a target company has an opting-out, the *best price rule* remains applicable. Under the best price rule, a bidder must increase the offer price if it acquires shares in the target company during the tender offer or conditional upon completion of the offer at a price above the offer price. In the EQT/Kuoni transaction mentioned above, the TOB had the opportunity to more specifically determine the application of the best price rule in the context of an acquisition of shares with privileged voting rights that were excluded from the public tender offer.

## PROCEDURAL RIGHTS OF (MINORITY) SHAREHOLDERS

As opposed to foreign (e.g. German) regulation, the Swiss takeover law gives minority shareholders holding at least 3% of the voting rights of the target company a right to participate as a party in the proceedings before the TOB and to appeal rulings of the TOB. The 3% stake must be held by the qualified shareholder already at the time of the announcement of the tender offer. As 3% is the lowest threshold of the rules on disclosure of shareholdings, the bidder and the target company will usually know when announcing a transaction whether there are any shareholders who may request party status. As a result of this party right of minority shareholders, the bidder and the target company can, even in a friendly transaction, not fully rely on the ruling of the TOB. However, the fears that the party rights of shareholders that were introduced in 2009 could make takeover proceedings excessively difficult have so far not materialized. It seems that the business model of "predatory shareholders" has not been established in Switzerland.

## SUCCESS RATE OF TAKEOVERS

Voluntary takeover bids can be made subject to a minimum acceptance condition. Typically, the minimum acceptance condition is 66 ⅔% of the

voting rights of the target company (unless the bidder already holds a significant stake in which case a higher acceptance level may be permissible). Friendly offers with a premium of 25% or more have in the past regularly reached this threshold. This permissible acceptance condition is significantly below the 90% threshold that is required for a squeeze-out, which is often a matter of concern for bidders in the planning phase. In practice, however, such concerns are unfounded. Experience shows that tender offers reaching the minimum acceptance level usually also reach the threshold required for a squeeze-out due to the particularities of the Swiss takeover law and the efficiency of the Swiss banking sector. So far, there have been fewer than a handful of situations in which a bidder had to complete its offer but was unable to squeeze-out minority shareholders. These situations usually relate to unfriendly takeovers, to target companies with a significant shareholder unwilling to tender his shares or to transactions where the bidder is not interested in gaining full control over the target.

**The Swiss takeover law provides for several particularities that make it indispensable to engage specialized legal advisors.**

## CONCLUSION

Over the years and after more than 100 takeovers, the Swiss takeover law has proven itself. The Swiss takeover law provides for several particularities that make it indispensable to engage specialized legal advisors.

In addition, the above-mentioned transactions as well as the general history of takeovers for Swiss target companies show that the market for Swiss M&A targets is a level playing field for all potential acquirers (Swiss or foreign), irrespective of the industry and sector concerned or the acquirer's origin. ■

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Tino Gaberthüel regularly advises corporates and individuals on all matters of Swiss business law. He is specialized in domestic and cross-border mergers & acquisitions (M&A), including public tender offers, private equity transactions as well as securities and capital markets law. He also advises on regulatory matters (including internal investigations).

RPC

# Deal Trends in UK M&A

## Brexit, Trump and the plummeting Pound. It's been a turbulent first half to FY17, but what does it all mean for dealmaking in the UK?

In a turbulent year of much geo-political change and uncertainty in the UK it is not surprising that dealmaking activity in the first half of 2016 slowed. Investors have generally responded to the UK's referendum on leaving the European Union with a more cautious approach to growth. The shockwaves that reverberated throughout global financial markets were then exacerbated by Donald Trump winning the US presidential election.

The indications are that Q3 has remained strong and there is a continued appetite to close deals. We will have to wait and see if that trend continues for the rest of the year. Q4 is usually very strong for M&A in the UK.

Looking at the data, there was a 54% increase in the number of deals with a disclosed value of more than £25m which completed in July and August 2016, compared to the same two months in 2015 (51 deals vs 35 deals) (source: PWC).

While the overall value of deals decreased from £11.6bn in 2015 to £7.4bn in 2016, this is down to the completion of three £1bn plus mega deals in the technology, media and telecoms (TMT) sector last year. Although the value of TMT deals was down this summer, the combined deal value across all other sectors increased by £2.5bn year-on-year (source: PWC).

The pound, in its weakened state, has instigated a flurry of dealmaking activity by overseas acquirers. A number of UK assets will remain vulnerable to international takeovers due to the circa 20% discount in the pound. Some recovery in the pound has been seen since the US presidential election and the UK's Autumn statement, but longer term analysis predicts a slow recovery.

When we examine who has been acquiring UK assets, this is being led always by demand from the US, but increasingly so from Asia, namely Chinese and Japanese (see further below). The UK remains a very attractive and open country to acquire growth, established brands and talent.

**Deal Values** - down on a 2015 high, although there is a larger spread of smaller deals. However, there have a been a number of significant deals in the market, with the likes of Softbank's sudden and surprising acquisition of ARM; merger of Hewlett-Packard Enterprise and Micro Focus International to create one of the world's largest infrastructure software companies; and Ctrip's agreement to acquire Skyscanner.

**Sectors** – private equity activity levels and pipelines are looking strong despite deal volumes having declined. Private equity funds have amassed considerable amounts to invest over recent times, and we should see increased dealmaking activity from them in the market. Life sciences and TMT remain active, although deal values are lower than previously. TMT is looking to keep running off the announcements by Google and Facebook to increase staffing levels and investment in the UK. The infrastructure market has remained steady. Brexit is, however,

continuing to have a strong negative impact on deals in the financial services sector. Oil and gas and natural resources also remain in a slump.

**Asian acquirers** - Asian outbound M&A is expected to continue strongly going forwards as businesses look for sources of growth and products and services to add value to the fast-growing middle class. This is being led by China and Japan, both of whom have differing needs for outbound investment.

**NIGEL COLLINS**
PARTNER

**China** - is on a journey of transformation and there is a continued flow of cash outbound across the world. The UK continues to welcome Chinese investment as has been demonstrated when the UK Government gave the go-ahead for a new power station at Hinckley Point. Generally, China is now seen as a more sophisticated acquirer and more capable of closing transactions. However, its government is very concerned with capital outflows and at the time of writing has announced restrictions in an attempt to relieve downward pressure on the renminbi and draining foreign reserves. The State Council is most concerned about outbound M&A worth more than $10bn. Deals of $1bn+ will also be scrutinised to check that they are not outside the investor's core business. Finally, State owned enterprises will not be allowed to invest more than $1bn on a single overseas real estate transaction (source: FT). We will have to see how long these restrictions last and how effective they actually will be as some commentators think the money will find its way to where it needs to be for any acquisitions. A slowdown in the outflow of Chinese investment would have an impact on M&A in the UK and across other geographies.

**Japan** – a country where domestic markets are mature and saturated with very little or no real growth opportunities. There is a continued push to secure growth through outbound M&A. Europe remains a popular destination for Japanese money, and within Europe the UK remains one of the preferred locations. Now that a number of acquisitions of UK businesses by Japanese companies have completed following the Brexit announcement, other Japanese companies will undoubtedly follow suit. Japanese acquirers are generally welcomed as they have a long history of reinvesting profits rather than repatriating them, and growing industries outside of Japan like the automotive sector in the UK.

**Launchpad** – the UK, with its laissez faire attitude, professional services, time zones, English language, talent pool and an abundance of top Universities has been the launchpad into Europe for many global companies. It has been an enviable beneficiary of foreign direct investment. Whether the UK can continue to be a launchpad remains to be seen. Interestingly, as has been demonstrated by Softbank's acquisition of ARM, where the plan of any acquiring corporate is globalisation, Brexit is less of concern.

To add a note of caution, Bankers talk of a host of concerns that could dampen the current buoyancy in the market: impact of Donald Trump taking office, French and German elections next year, terrorism and euro zone growth.

## POTENTIAL IMPACT OF BREXIT ON M&A DEALS

Until the Brexit negotiations are concluded, which some observers feel could take many years, the legal framework in which UK M&A deals are implemented will remain the same. There is a school of thought that some overseas buyers may look to negotiate material adverse change protection in the sale and purchase agreement. This would be in circumstances where there is going to be a long delay between signing and completion, and there is a fear on the side of the buyer that major economic changes like currency fluctuations may have an adverse impact on the economics of the deal by the time it reaches closing.

**Cross border mergers between EEA States** – the current EU level framework that regulates cross border mergers between UK companies and EEA State companies would not be available post Brexit. The anticipation is that these regulations would form part of the Brexit negotiations.

**Takeovers** – it is expected that the regime in

place to deal with public takeovers will remain largely the same. This is on the basis that the UK Takeover Code that gives effect to the EU Takeovers Directive was mostly in place prior to that Directive. There will not be any need for substantial changes. Shared jurisdiction rules, however, will need to be reviewed to the extent that the UK leaves the EEA.

**Private M&A** – the expectation is that the legal framework for domestic and many international transactions will remain the same and subject to English contract law. It remains to be seen whether the popularity of English law for international transactions is effectively challenged by other European states. There are a number of specific areas on M&A transactions that may see some minor changes; one being dispute resolution with possible changes to the enforceability of English judgments in EU member states and vice versa. English judgments would require separate recognition prior to enforcement. Some observers are indicating a greater use of arbitration.

## INDICATIONS OF PROTECTIONISM AND THE ISSUE OF RECIPROCITY

Recently, there have been a number of acquisitions around the world that have been prevented by protectionist minded governments. Theresa May, as the UK's new Prime Minister, however, has already demonstrated with the approval of Hinckley Point, that the UK will remain an open market. It is expected that the openness of the UK to direct foreign investment will continue to differentiate it from its European neighbours when international acquirers are considering investing in Europe.

A number of Chinese acquisitions in particular have been the subject of tension partly stemming from the lack of reciprocity and concern over ownership of key assets. Very interestingly in the M&A world, assets key to a country's future business are now coming into scope of protectionism.

As reported in the FT on 9 August 2016, Germany is a top target in China's search for innovative engineering groups. Midea, a Chinese appliance maker has made an offer to acquire Kuka, an innovative German engineering company, for €4.5 billion. This offer has caused some concern in Germany as Kuka is a successful company in a strategic sector for Germany's digital future. Gunther Oettinger, the EU's digital commissioner, called on other European companies to make a counter offer, but none came forward. Midea now holds around 94% of Kuka's shares. The German government cannot block this acquisition as Ministers can only intervene to prevent a takeover by a non-EU investor when it involves strategic infrastructure such as energy networks, or defence companies. Kuka does not qualify.

In the USA, a few Chinese deals have fallen foul of the Committee on Foreign Investment. Philip's failed to sell its lighting business to a Chinese-led consortium and Tsinghua Unigroup withdrew from a $3.8 billion investment in Western Digital.

Overall, there are certainly challenging times ahead, but for the UK the dealflow continues apace and we remain a very open and welcoming country for investment. ■

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Head of RPC's Japan Desk, Nigel Collins is a senior corporate lawyer with extensive experience and a deep cultural knowledge of Japan and Japanese business.

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