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Sixth Edition

Editors:
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GLOBAL LEGAL INSIGHTS – MERGERS & ACQUISITIONS

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PREFACE

We are pleased to present the sixth edition of *Global Legal Insights – Mergers & Acquisitions*. The book contains 29 country chapters, and is designed to provide general counsel, investment bankers, government agencies and private practice lawyers with a comprehensive insight into the practicalities of M&A by jurisdiction, highlighting market trends and legal developments as well as practical and strategic considerations.

In producing *Global Legal Insights – Mergers & Acquisitions*, the publishers have collected the views and opinions of a group of leading practitioners from around the world in a unique volume. The authors were asked to offer personal views on the most important recent developments in their own jurisdictions, with a free rein to decide the focus of their own chapter. A key benefit of comparative analyses is the possibility that developments in one jurisdiction may inform understanding in another. We hope that this book will prove insightful and stimulating reading.

Michael E. Hatchard & Scott V. Simpson

Skadden, Arps, Slate, Meagher & Flom (UK) LLP

Austria

Michael Kutschera, Florian Khol & Philipp Kapl
BINDER GRÖSSWANG Rechtsanwälte GmbH

Overview[1]

In 2016, Austrian M&A activity saw a slight increase in terms of the number of transactions announced, comprising a total of 354 M&A transactions with Austrian participation, as compared to 344 M&A transactions in 2015. Despite the overall impression of increasing appetite among private equity and venture capital investors, driven by notable private equity transactions (such as the acquisitions of Frauscher Sensortechnik by Greenbriar, Tricentis by Insight Venture Partners and Automic by CA Technologies), the share of financial investor-driven transactions decreased from 9.9% in 2015 (similar to 10.4% in 2014) to only 5.6% in 2016, causing the lion's share of strategic investors-transactions to expand even further.

Transaction volume, on the other hand, more than doubled from €4.7bn in 2015 to €10.7bn in 2016, also exceeding 2014 levels (€10.2bn). With the domestic transaction volume remaining steady over the past years (€900m in 2016 *vs.* €1bn both in 2015 and 2014) but a surge in cross-border M&A activity, Austria continues to remain an attractive market for foreign investors. Both inbound M&A transactions (*i.e.* acquisitions of Austrian targets by foreign investors) and outbound M&A transactions (*i.e.* acquisitions of foreign targets by Austrian investors) rocketed from significantly lower levels in 2015 to €6.7bn and €3.1bn, respectively (as compared to €2.6bn and €1.1bn in the previous year).

In line with the higher overall transaction volume of inbound M&A transactions and similar to previous years, the average deal volume of inbound M&A of €51.7m also exceeds the average transaction volume of outbound M&A (€24.2m) clearly. In terms of the quantity of transactions, the number of domestic M&A transactions increased by 4.3% and outbound M&A transactions by 11.2% as compared to the previous year; inbound M&A transactions decreased by 5.1%.

The most active sector in 2016 for inbound M&A was Austria's real estate & construction sector, leading both in terms of the number of transactions (36) and the total transaction volume (€4.3bn), followed by telecommunication, media & technology (31 transactions with a total transaction volume of €900m). As to outbound M&A, Austrian investors focused on industrials (39 transactions with a total transaction volume of €1.4bn) and telecommunication, media & technology (22 transactions with a total transaction volume of €900m) in 2016.

Consistent with the past, Germany plays a key role for Austrian inbound M&A activity, being involved in 29.5% of the respective transactions, followed at some distance by Switzerland (10.1%) and USA (8.5%). Likewise, Germany remains the top destination for Austrian investors with 34.1% of the targets of Austrian investors located in their northern neighbour state, followed by 6.2% in USA and 4.7% in Italy. In 2016, 62.8% of foreign

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investors in Austrian targets, and 44.2% of the targets of Austrian investors, had their seat in Europe.

Significant deals and highlights

Gas Connect Austria (Allianz Capital Partners, Snam / OMV)

Germany-based private equity firm Allianz Capital Partners (a subsidiary of the listed insurance, banking and asset management conglomerate Allianz) and Italy-based listed natural gas supplier Snam jointly acquired a 49% stake in the Austrian gas distribution network operator Gas Connect Austria from listed OMV for a total cash consideration of €601m through an investment vehicle owned 60%-40% by Allianz Capital Partners and Snam, respectively. For further background details, please refer to the section, "Industry sector focus – Oil & gas".

Conwert Immobilien Invest (Vonovia)

Following a failed bid for Deutsche Wohnen, Vonovia made a voluntary tender offer for Conwert Immobilien Invest, an Austria-based and listed real estate firm, featuring a transaction value of €2.86bn. The offer targeted all outstanding shares of Conwert Immobilien with consideration offered in shares and alternatively in cash. Operational and financial synergies are expected as a result of the transaction.

Heptagon Micro Optics (ams / Temasek Holdings, GGV Capital, Vertex Ventures Israel)

Heptagon Micro Optics, a Singapore-based company providing complete 3D/imaging, illumination and optical sensing solutions for smart devices and internet of things was acquired by ams, a listed Austrian company, for a total consideration of €786m from GGV Capital, Temasek Holdings and certain other investors. The acquisition is expected to facilitate ams' capabilities in sensor fusion and sensor hubs. At the same time, ams' market access in the consumer and smartphone space will enhance Heptagon's customer base and improve its customer relationships. Prior to the transaction, Heptagon experienced a negative yearly revenue rate due to underutilisation of its production capacity.

Magnesita Refratários (RHI / Rhone Capital, GP Investments)

RHI, an Austria-based listed company, acquired a 46% stake in Magnesita Refratários from listed Brazilian private equity firm GP Investments and NY-headquartered Rhone Capital for a total consideration of €208m. Magnesita Refratários is a listed mining firm and producer of refractory components based in Brazil. A mandatory tender offer to acquire the remaining stake in Magnesita Refratários will be launched by RHI following the acquisition of the 46% stake. The transaction will likely reduce capital expenditure requirements and maintenance costs of both RHI and Magnesita Refratários and establish geographical presence on markets in which RHI and Magnesita Refratários lacked production capacity of their own, thus strengthening the competitive position against the Chinese refractory industry.

CA Immo (Immofinanz / O1 Group, Terim)

Immofinanz, the Austrian based and listed real estate corporation, acquired a 26% stake in CA Immo from O1 Group. The subsequent merger of Immofinanz and CA Immo has been put on hold due to a delay in the disposal of Immofinanz' Russian portfolio, troubled by the country's economic situation due to low oil price and international sanctions. However, as the economic situation in Russia begins to ease, Immofinanz hopes for an even higher sale price compared to an earlier sale of the portfolio. Immofinanz plans to launch the bidding process for its five Moscow shopping malls at the beginning of 2017.

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NIKI Luftfahrt (Etihad Airways / Air Berlin)

UAE-based Etihad Airways acquired a 49.8% stake in NIKI Luftfahrt, an Austria-based provider of airline services, from German listed Air Berlin for a consideration of €300m. Following the transaction, NIKI will assume all Airbus 321 aircraft currently operated by Air Berlin and transfer all its Airbus A319 and A320 aircraft to Air Berlin. Further, NIKI will take over Air Berlin's transport agreements relating to certain touristic destinations in Southern Europe and North Africa. Etihad, who will not gain effective control over NIKI, intends to contribute the acquired shares to a new joint venture with TUI and NIKI Privatstiftung.

Frauscher Sensortechnik (Greenbriar Equity Group)

The New York-based Greenbriar Equity Group acquired a majority stake in Frauscher Sensortechnik, one of the world's leading providers of railroad and track technology, based in Austria. With the support of Greenbriar, who will provide the relevant expertise to support Frauscher Sensortechnik's expansion into North America, Frauscher Sensortechnik expects to strengthen its leading position as a provider of innovative inductive sensor technology and spatially resolved acoustic sensor technology, and to achieve further growth by developing new markets. The remaining minority stake is held by the management team of Frauscher Sensortechnik.

Tricentis (Insight Venture Partners)

The international US-based tech private equity investor Insight Venture Partners acquired a majority stake in the Austrian software developer Tricentis from private equity investor Viewpoint Capital Partners as well as other previous shareholders, and subsequently carried out a capital increase. Tricentis is an Austria-based software developer with branches in the USA, Germany, Switzerland, the Netherlands, Poland, UK, Australia and India, specialising in software testing programs to control business risk. The transaction is considered another step forward in the expansion of Insight Venture Partners' policy of investing into fast-growing software technology businesses. Tricentis helps more than 400 companies – including HBO, Toyota, Allianz, BMW, Starbucks, Deutsche Bank, Orange and UBS – achieve software testing automation rates of more than 90%. Its integrated software testing solution, Tricentis Tosca, has been proven to achieve 10 times the test-automation efficiency of tools that employ manual scripting.

Automic Software (CA Technologies / EQT Partners)

CA Technologies, a listed US-based IT management software and solutions company, agreed to acquire the Austrian business process automation services provider Automic Software from Swedish private equity firm EQT Partners for a total consideration of €600m. The rationale behind the acquisition is that Automic Software will add new cloud-enabled automation and orchestration capabilities to CA Technologies' existing portfolio, enabling CA Technology to complement its existing technology investments and to increase its reach into the European market.

Key developments

R&W Insurance

The use of insurance in M&A transactions is gaining popularity among deal professionals in Austria. Influenced by the increasing popularity in Germany and Scandinavia, the number of transactions involving representations and warranties insurance (R&W Insurance) also increased significantly in Austria, especially in large cap transactions, auction sales and PE

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transactions. As exact numbers are not yet available, it will be interesting to see whether the Austrian M&A market has picked up to the standards of continental Europe and the UK. Most popular in auction sales to bridge the gap between the seller and the buyer on what gets indemnified, the length of time the seller will be liable, and, of course, the maximum cap amount that can be recovered by the purchaser, such R&W Insurance is also seen stapled in auction sales, *i.e.* the seller already provides for a specific R&W Insurance in the auction process and the purchaser, to remain competitive, must assume such R&W Insurance during the process and include it in its offer. The little flexibility remaining for the purchaser concerns the insurance amount, as the seller will only accept a very limited (symbolic) cap amount for liability *vis-à-vis* the purchaser.

Business Judgment Rule

Having been recognized in case law and legal doctrine since the beginning of the last decade, the Business Judgment Rule also became statutory law (section 25 para 1a of the Austrian Limited Liability Companies Act and section 84 para 1a of the Austrian Stock Corporation Act) for corporations with effect from January 2016. The Business Judgment Rule – as refined by the Austrian Supreme Court – provides a company's management with a guideline for making a business decision, with the effect that the risk of a company's management becoming liable for such decision *vis-à-vis* the company is significantly decreased if the decision is made: (i) by the respective manager without being guided by extraneous interests; (ii) on an informed basis; (iii) from an *ex ante* point of view apparently for the benefit of the company; and (iv) in the honest/rational belief of the respective manager to act in the best interest of the company (*i.e.* in good faith); decisions violating internal regulations (such as articles of association or by-laws) or mandatory law are not covered. Interestingly, the legal implementation of the Business Judgment Rule in statutory law was triggered by court decisions regarding criminal law (embezzlement/breach of trust, in particular) and is consequently part of a Criminal Code Amendment Act. While the implementation of the Business Judgment Rule has been welcomed by practitioners and scholars and is believed to increase legal certainty for the decision-making of management, its exact ramifications (such as its potential applicability also with respect to companies other than corporations) remain unclear.

Amendment of the Austrian Stock Exchange Act

In mid-2016, the new Market Abuse Regulation (EU) No 596/2014 (MAR) and the Market Abuse Directive 2014/57/EU entered into force, making an amendment of the Austrian Stock Exchange Act necessary. As the MAR is aimed towards full harmonisation, only limited space was left for the Austrian legislator. Amongst other changes, the applicability of the respective legal framework has been expanded to companies whose securities are listed on the Third Market of the Vienna Stock Exchange. The amendment also clarifies that the Austrian Financial Market Authority (FMA), which is the competent national authority for the implementation of the Austrian Stock Exchange Act, requires a court permission to conduct a house raid or access the data of a message transmission.

By virtue of the amendment, administrative penalties have increased dramatically and amount, for individuals, up to €1m for a failure to disclose inside information (*ad-hoc* publicity) and up to €5m for insider dealings and market manipulation, for which even imprisonment can be imposed. On legal entities, fines of up to 15% of the group revenues may be imposed for such violations. Similarly, even individuals who do not qualify as insiders themselves but dispose over inside information may be subject to penalty. Further, FMA will publish identities of individuals being subject to penalties ("naming & shaming").

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However, FMA may refrain from imposing a penalty on individuals if the relevant legal entity has already been penalised, the violation was only marginal, or the violation was neither systematic nor repeated and there are no grounds against refraining from the imposition of a penalty.

The immediate public disclosure of insider information requirement (*ad-hoc* publicity) is now also applicable to transaction processes consisting of different stages, as is usually the case in M&A transactions (*e.g.* execution of a letter of intent, performance of a due diligence, equity commitment in case of transaction financing, signing, closing). Any step in such multi-stage processes shall be deemed to be inside information if, by itself, it satisfies the criteria of inside information. Only under certain circumstances – if (i) the disclosure could damage the issuer's legitimate interests; (ii) the postponement does not contribute towards misleading the public; and (iii) the issuer is in a position to ensure confidentiality – can the publication of inside information be postponed in accordance with the provisions of the MAR and must only be published once the reason for the postponement has expired. In such case, the issuer must notify the FMA of the postponement immediately after disclosure of the inside information and, upon request, explain how the requirements for the postponement of the disclosure were met.

Under the new regime, issuers are responsible for making directors' dealings (*i.e.* managers' transactions) public; in this respect, it is also expected that the FMA will increase the notification threshold for managers' transactions from €5,000 to €20,000.

Amendment of the Austrian Cartel Act

By 27 December 2016, the Austrian legislator was obliged to implement the EU-Directive 2014/104/EU on compensation for cartel damages. Although an act to amend the relevant Austrian Cartel Act has not been passed as of February 2017, the legislator has already circulated a draft of such amendment for expert review. Implementing the relevant EU-Directive, the amendment is supposed to strengthen the positions of cartel victims and to significantly boost private enforcement mechanisms.

In the future, and in addition to persons purchasing directly from cartel members, also persons damaged indirectly by cartel members (such as final customers) will be able to take action against cartel members. With the cartel victims being entitled to raise their claims against any cartel member and cartel members being jointly and severally liable for the unlawful actions of their cartel, the group of potential claimants and defendants is significantly expanded. On the other hand, leniency applicants revealing a cartel enjoy alleviations as well as a preferential treatment, increasing the attractiveness of "bailing out" of an existing cartel.

As to proceedings, the draft amendment features a legal presumption that a horizontal arrangement between competitors has caused damage, with the burden of proof to refute such presumption being with the cartel member(s). In addition, the court may order the disclosure of evidence which is under control of the opponent or a third party upon request of a party. Moreover, the limitation period for asserting respective damage claims will be prolonged to five years from knowledge of the damage and the damaging party; with an absolute limitation of 10 years from the occurrence of the damage.

The overall impression is that the draft amendment is poised to effectively combat cartels, in particular by making it significantly easier for cartel victims to assert damage claims on the one hand, and providing additional benefits to leniency applicants on the other hand. However, the draft amendment of the Austrian Cartel Act closely reflects the wording of the relevant EU-Directive and therefore, questions on the relationship between the new provisions and other Austrian civil law/procedural law concepts will likely arise.

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Amendment of the Austrian Competition Act

In addition to the draft amendment of the Austrian Cartel Act, the Austrian legislator has also circulated a draft amendment of the Austrian Competition Act.

From an M&A perspective, the most significant new aspect of such draft amendment is an additional threshold requiring a merger control filing if the combined aggregate worldwide turnover of all the undertakings concerned is more than €300m and the value of the consideration for the merger amounts to more than €350m, at least €5m of which is attributable to Austria based on local market presence. The legislator's rationale behind this feature is that in some industries – in particular the digital/internet sector – mergers are sometimes driven less by turnover numbers than market power (e.g. by virtue of the amount of data collected).

The suggested "digital threshold" would clearly lead to a shift in paradigms regarding mergers subject to merger control filings. Consequently, it is expected that this suggestion will be further discussed; in particular, in light of ongoing discussions on a European level.

Harmonisation of accounting offences

Prior to 2016, criminal offences involving accounting fraud were regulated by different corporate laws (e.g. Austrian Stock Corporation Act, Austrian Limited Liability Companies Act, Austrian Private Foundations Act, etc.), with the consequence that the details of the relevant provisions deviated; also with respect to applicable penalties. With the aim to harmonise the accounting offences, the respective accounting and corporate law definitions as well as the applicable penalties, these provisions were replaced by the new sections 163a and 163b of the Austrian Criminal Code which are applicable across all legal forms.

Certain tax law amendments

As of 2016, Austrian real estate transfer tax rules changed substantially, in particular in the context of share deals: while before 2016 only the disposition of a 100% interest in a company holding real estate (note: not only a company predominantly holding real estate, but any company – even a company holding comparatively little real estate) triggered real estate transfer tax, under the new regime Austrian real estate transfer tax is levied if at least 95% of the capital in a corporation is transferred to or consolidated in one party (or in a tax group). Further, in case of partnerships, a transfer of at least 95% of shares in the assets to new partners during a five-year period triggers real estate transfer tax. The tax basis in the event of a share transfer with a transfer date after 2015 has also been newly defined and the tax rate has been lowered to 0.5% (from previously 3.5%) for such transfers.

In July 2016, the EU-Directive implementing important measures on base erosion and profit-shifting (BEPS) has been passed at the EU level. One of the new regimes to be implemented is the interest barrier rule (well-known from German tax law) that will most likely replace the current interest limitation rule that Austria adopted in the course of the BEPS initiative: it provides for a non-deductibility of group-internal interest payments if the recipient of the interest is taxed below 10% thereon (generally the nominal rate is decisive, but not in all cases). The interest deductibility is of particular relevance in Austria for share acquisitions, since the Austrian tax group regime allows for a debt-push down of acquisition financing debt, meaning that interest payments on an acquisition debt can be offset against operating income of an Austrian target. Whether this will change with the new interest barrier regime remains to be seen. Austria may only have to implement the new regime as of 2024, but could do so earlier.

Finally, Austrian tax law provides for loss utilisation restrictions if a business change takes place together with a change of the organisational structure (*i.e.* mainly management) in

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the context of a substantial ownership change (note: in principle, a cumulative test, *i.e.* all three criteria must be fulfilled). Recently, a discussion emerged whether indirect ownership changes matter as well despite the law, which explicitly states that only direct ownership changes are relevant. A court held that no disadvantageous change took place in a case of a direct ownership change in which the ultimate owners did not change. However, it is not yet clear what applies if the ultimate ownership changes (with the direct ownership not being affected). In this respect, tax practitioners take the view that only a direct ownership change should matter.

Know Your Customer

A significant trend towards the strengthening of KYC-requirements by Austrian banks is noticeable (also driven by European legislation), with the consequence that obtaining KYC clearance can be increasingly burdensome; in particular in cross-border M&A transactions with fund originating from offshore entities. This has led to sellers requiring from purchasers KYC-clearance by the relevant banks at an earlier stage in the process (mostly at signing), to ensure that the funds to be transferred are properly credited without delays or disruptions at closing.

Industry sector focus

Oil & gas

In October 2015, Austrian listed national oil & gas company OMV (31.5% state-controlled) announced its intention to divest a 49% stake in the gas distribution network operator Gas Connect Austria, receiving interests from various financial and strategic investors – allegedly including amongst others, Russian oil group Gazprom and Russian private equity fund Letterone, Belgium gas transmission operator Fluxys, Australian private equity firm Colonial First State, Australian infrastructure asset manager Macquarie and Borealis, the investment arm of Ontario Municipal Employees Retirement System.

The sale of the 49% stake in Gas Connect Austria, which is active both as a natural gas transmission system operator (TSO) and a distribution system operator (DSO), was a key item of OMV's strategy of restructuring its downstream gas assets due to low oil prices on the one hand, and increasing its manoeuvrability by replenishing its cash position despite maintaining a majority stake in the company on the other hand; a move that has also been associated with OMV's interests in Russian assets. Due to the sensitive nature of the 900km-long natural gas high-pressure pipeline grid operated by Gas Connect Austria, which is considered the backbone of Austria's (and parts of Europe's) gas supply, the transaction also received media coverage and political attention, with prominent politicians publicly objecting to such sale.

Eventually Allianz Capital Partners, a Germany-based private equity firm and investment arm of listed Allianz, and Snam, an Italy-based listed natural gas supplier, teamed up in a consortium to acquire the stake in Gas Connect Austria, with signing of the transaction on 22 September 2016 and closing of the transaction on 15 December 2016. The involvement of Snam at the level of Gas Connect Austria is also believed to further strengthen the relationship between OMV and Snam based on Snam's long-standing 84.5% participation in the Austrian pipeline network operator Trans Austria Gasleitung (with the remaining 15.5% owned by Gas Connect Austria).

Austria's oil, gas & energy sector is a highly regulated industry sector in which E-Control Austria, as the relevant regulatory body, plays a major role. Natural gas transmission system operators and distribution system operators both require an authorisation of

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E-Control Austria; moreover, they are subject to stringent unbundling requirements, *i.e.* must be sufficiently independent from vertically integrated gas undertakings (like the OMV group in the present case). In the course of the implementation of the Third EU Energy Package (from September 2009 onwards), a new market model based on an entry/exit system was introduced in Austria (*i.e.* physical movements of gas are executed via entry and exit points, independent from the actual transport routes). Apart from organisational limitations, the relevant legal framework (Austrian Natural Gas Act) contains amongst others detailed provisions on capacity allocation and transmission system charges, and an approval-requirement for general terms and conditions applicable to transportation/capacity agreements.

The year ahead

Based on solid growth in 2016, overall M&A activity in Austria is likely to further increase in 2017. However, international political developments with still unclear consequences occurred in 2016, in particular, the UK's referendum on withdrawal from the European Union and the US presidential election. Austrian investors eyeing targets in the relevant regions may wait-and-see until they get more visibility on such consequences. Likewise, inbound M&A from such regions is expected to decrease.

However, due to Austrian M&A activity being largely driven by (and depending on) cross-border M&A transactions with Germany, such effects should be fairly limited.

* * *

Endnote

1. Data presented in this section is based on the EY M&A Index Austria – Market Analysis for the Year 2016 (dated January 2017).

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Overview of the market and the country

In the last couple of years, the Bolivian mergers and acquisitions market, which for a considerable amount of time was limited to very few deals principally structured abroad with effects in the country, has seen some significant developments that have revived the market and made the M&A practice relevant again.

Authorities and legislation

The legislation governing mergers is dispersed. In general terms, mergers of Bolivian corporations are mainly regulated by the Bolivian Commercial Code, which requires that Bolivian companies involved in a merger give notice to their creditors and shareholders, and allows them to object to the merger process.

In the case of Bolivian companies that have outstanding instruments issued in public securities markets, they must inform the markets and the Supervisory Authority of the Financial System (ASFI) of any relevant change regarding the company, including mergers, acquisitions and spin-offs.

There are also a number of specific regulations applicable to different regulated industries, as merger control is imposed on certain sectors and industries in Bolivia. As a result, regulations that pertain to mergers can be found in the Electricity Law, the Telecommunications Law, the Hydrocarbons Law, the Banks and Financial Institutions Law, the Securities Law and the Insurance Law. These specific regulations are administered and enforced by the supervisory and control authorities for each sector. Therefore, any merger within the electricity industry in Bolivia, for example, will have to be notified and sometimes approved by the Supervisory and Control Authority for Electricity prior to the merger taking place; to the extent the operator, subject to the merger, has instruments issued and traded in public markets, then it must also inform the Supervisory Authority of the Financial System (ASFI).

Foreign exchange rules and controls in Bolivia are minimal. Currently there are taxes on, but no restrictions to, the entry or exit of capital, or the remittal of dividends, interests and royalties for the transfer of technology or other commercial concepts. Foreign investments and loans into Bolivia, as well as payments to foreign investors, must be reported to the Bolivian Central Bank, but there are no prior approvals or restrictions to foreign investment.

In addition, there is freedom to hold and deal in foreign currencies, there are close-to-market exchange rates that can be easily and safely accessed through regulated exchange, and the law allows the remittal abroad of foreign currency with few restrictions. However, there is a growing public policy towards the "Bolivianization" of transactions in Bolivia. As a result, there is a Financial Transaction Tax on any operation with foreign currency

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involving Bolivian financial institutions. This tax has recently been raised to 0.20% from 0.15%, and it is expected to be increased again in the next years. In addition, there is a tax on the exchange of foreign currency, and there is an obligation to inform of the origin and destination of currency or account movements that exceed US$ 10,000.

Principal mechanics of acquisition

As to the principal mechanics of an acquisition at present, it is important to bear in mind that the number of publicly traded firms in Bolivia is minimal. Most companies are either limited liability partnerships or stock corporations, and are closely held. Furthermore, the structure of most corporations in Bolivia generally involves a principal who owns a majority of the corporation's stock (unlike other countries in the world where dispersed ownership is common). For the purposes of this analysis, we are going to refer to the Bolivian corporation structure as a 'concentrated ownership' structure. In this structure, the dominant shareholder usually owns a sufficient amount of shares to allow him or her to appoint all directors of the board, or at least a majority of them. As a result, the possibility of hostile acquisitions of companies is minimal (or, at least, different in its essence) because acquisitions must generally be consented to and recommended by the majority shareholder of the target, and the concentrated structure leaves little room for hostile takeover attempts through proxy fights or tender offers.

The transfer of stock or share participations in corporations is generally unrestricted and straightforward, requiring only registration in the company books with no prior filing. Transfer of participation in limited liability partnerships is more cumbersome, as it requires that documentation evidencing the existence and legal representation of the acquirer be legalised in Bolivia and thereafter filed before the Registry of Commerce.

Mergers and acquisitions between large international companies that hold assets in Bolivia generally do not trigger regulatory scrutiny, unless they take place in a regulated sector. As a result – and unless the acquisition involves the merger of two Bolivian companies – most acquisitions can proceed without regulatory filings and approvals. In many cases, an acquisition is completed by acquiring interests in holding companies that may be several levels above the target with assets in Bolivia. This form of acquisition may be rapid and outside the scrutiny of certain regulators.

Further, joint ventures that do not result in a merger or change of ownership of the relevant regulated company typically do not fall under the scrutiny of merger control. However, joint ventures that involve regulated companies are subject to some review and could be opposed by the relevant regulator to the extent that they could be considered contrary to antitrust or competition policies.

Asset purchase deals, as opposite to stock purchase deals, are also common. This method avoids certain tax and labour liabilities in the underlying target. However, this 'cherry picking' – which requires adequate identification of the productive assets that are of interest – may take more time than a stock purchase and may involve a tax impact on the value of the assets being acquired.

Overview of market and key sectors

As mentioned before, the Bolivian M&A market has revived in the last few years. Bolivia is still a small market in comparison to most of its neighbours in Latin America, but the growth perspectives are encouraging.

So, why has the level of activity resurged during the last years? It is hard to ascribe the increased level of activity to a single factor. In all likelihood, it is the result of a series

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of developments and events in the economic, legal and political arenas. Among these several factors, one should include the continuous and sustained growth of Bolivian GDP during the last years, the enactment of a new investment promotion law, and the fast-paced development of the city of Santa Cruz. All these points are further developed below in this report.

It is also hard to point out specific key sectors of development. M&A transactions have ranged from mining companies to hospitality to telecoms and media. Nevertheless, it may be possible to single out the banking industry as a key sector for recent M&A activity, as this activity has surged from a specific event, the economic distress of certain smaller financial institutions called "*mutuales*" in Bolivia. This is also covered below.

Most M&A activity in Bolivia takes place in private transactions; public M&A transactions (i.e. through the Bolivian Stock Market) are rare, but there are some notable exceptions. In December of 2014, CIMSA (part of the Doria Medina family group) sold its controlling shares in the largest Bolivian cement company, Sociedad Boliviana de Cemento (SOBOCE), for US$ 300m, and listed the sale on the Bolivian Stock Exchange. The stock was acquired by the Peruvian company "Consorcio Cementero del Sur", and this transaction is recorded as the largest in the history of the Bolivian Stock Exchange.

Significant deals and highlights

One of the most significant deals took place in the cement industry. Sociedad Boliviana de Cemento (SOBOCE) is the leading cement company in Bolivia, and one of the largest companies of the country. Samuel Doria Medina and his family were the controlling shareholders in this company. At the end of 2014 and beginning of 2015, Doria Medina sold his shares in the company to the Peruvian company "Consorcio Cementero del Sur", which amounted to around 50% of the market capital of the company. The remaining shares were the subject of arbitration between Doria Medina, Consorcio Cementero del Sur, and the Mexican company Grupo Cementos de Chihuahua.

This transaction was made through the Bolivian Stock Exchange, and is recorded as the largest in the history of the Bolivian Stock Exchange.

Other important deals took place in the banking sector. The financial institution "Mutual La Paz" was undergoing economic distress during 2016 and, in May, the Bolivian comptroller of banking institutions (ASFI) intervened the bank, fearing that it would go into bankruptcy. There was also a general panic of a bank rush, as other financial entities of similar characteristics (*mutuales*) could also be under risk. As a result of this, the bank "Mercantil Santa Cruz" bought the client and deposits portfolio of the distressed Mutual La Paz.

In October of 2016, Mercantil Santa Cruz started a merger process with another financial entity, bank "Los Andes ProCredit". The combined entities will have close to 20% of market share over the financial industry of Bolivia. This transaction was approved by the comptroller of financial institutions (ASFI) in December of 2016.

There were also many cases where the M&A activities of foreign giants have had effects on the companies and assets of those companies in Bolivia. In these cases, the acquisition is completed by acquiring interests in holding companies that may be several levels above the target with assets in Bolivia. For example, the mergers of American Airlines and US Airways, or the merger of AB InBev and SABMiller, had regulatory repercussions in Bolivia.

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Key developments

Some important developments in Bolivian legislation have impacted, and will continue to propel changes in, the mergers and acquisitions market during the next couple of years. At least one of these legislative developments is still at the proposal stage, but it is expected to be enacted during 2017.

Investment promotion law and related norms

The first relevant development in the Bolivian legislation is the approval of a new investment promotion law on April 5, 2014 in order to establish a general legal framework for the promotion of investments in Bolivia. Up to that point, the framework for investment in Bolivia had been on hold, because the previous investment law of Bolivia, which was enacted in 1990, had been largely made inapplicable by the Bolivian constitution of 2009 and the political reforms of the government of Evo Morales. So, until 2014, the legal framework applicable to investments in Bolivia was uncertain.

The new law regulates not only foreign investments, but also domestic and public investments. The law follows the same political and economic principles set out in the Constitution and, as a result, it gives greater importance to Bolivian State participation – particularly with regard to the exploitation of natural resources. The law focuses on investments that: 1) promote economic and social growth; 2) generate employment; and 3) contribute to the eradication of poverty, and reduce inequality.

There are several sections of the new investment law that are unclear and are far from ideal for increasing the flow of investment to the country (for example, the regulation of international arbitration as a means of solving investment disputes is largely rejected by the law). Nevertheless, the issuance of the new investment law has provided a certain degree of certainty to the market, which was lacking since the previous law seemed to lose validity in 2009.

The most relevant aspect of the investment promotion law on this subject is that any acquisition or merger that involves a change in control or a foreign direct investment or loan to a Bolivian Company must now be registered before the Bolivian Central Bank. The Registration before the Bolivian Central Bank involves the periodic filing of certain forms and should be performed after the acquisition or merger has been completed.

Project of a new antitrust law

As of now, there are no regulations in Bolivia applicable to non-regulated industries. This means that, at this moment, an M&A transaction that does not involve a regulated industry would not have to comply with any particular requirements in order to be completed, in regard to merger control. However, there is a proposal for a "general" antitrust law, which will develop merger control regulations. This new law would apply to all non-regulated industries and is currently under consideration by the Bolivian senate. It is likely that this law will be enacted at some point during this year.

The content of the draft law is, unfortunately, very broad and unspecific. Most of the relevant sections of the law are reserved to a regulatory supreme decree to be issued later by the executive branch, and which will contain the rules of application of the law. Therefore, it is not possible at this point to analyse at large the impact that the law may have on mergers. In any case, it seems obvious that the implementation of the new merger control law will significantly impact the M&A practice, probably impose further requirements for the completion of a merger or acquisition, and even impose restrictions thereon.

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Increased level of activity of the regulator

The third novelty is the increased level of activity of the enterprise supervision and regulation entity, *Autoridad de Supervisión de Empresas* ("AEMP"). This entity is in charge of regulating Bolivian companies in regard to corporate governance, restructuring, and antitrust. It is expected that AEMP will become a more active participant and enforcer of corporate governance and merger control regulations in the future (in the same way that it has gradually become a more active participant in the field of antitrust law during the past five years). Because of its scope of regulatory authority, this entity may play an important role in the Bolivian M&A market in the future.

It is hard to know, however, what is going to be the impact of the increasing level of activity of the regulator in the M&A market. It is logical to think that the increased level of regulation (by both the new law and the involvement of AEMP) will impose more obligations on the companies, and this could adversely affect the market. It is also obvious that the increased involvement of the regulator is due to the increased activity of the market, as a reaction to it. The effects of the involvement of the regulator will be seen in the long-run.

The years ahead

There are mixed signals regarding the M&A market for the following years. M&A thrives in stable and predictable environments. Although Bolivia has continued to be politically and economically stable and predictable over the past decade, its "socialist" economic orientation has, however, created somewhat of a hostile investment environment for certain industries. Such is the case with Hydrocarbons (where the State has taken a much larger role) and Mining (where transfers of ownership have been restricted), and which are traditionally the largest productive sectors of the Bolivian Economy. Notwithstanding the above, certain events and legislative alterations may change this scenario and positively impact the investment market, even in complicated and regulated sectors as those mentioned above.

In general terms, we consider that it is likely that the M&A market will continue to grow and expand in coming years. It is important to remark that the next presidential elections will take place in 2019, but the political panorama of Bolivia is certainly unclear, as president Evo Morales (currently serving his third term as president) has been denied the possibility of running again for office for a third term. Yet his political party has publicly announced that it is looking at ways to circumvent the constitutionally imposed restriction and present Mr. Morales for a re-re-election. So, a certain political friction is to be expected as the 2019 election comes closer.

On the other hand, a change in the government might be beneficial for M&A markets. The legal and economic panorama of the country under the left-leaning government of Evo Morales is not very favourable to investment and business development. Over the last decade, Bolivia has undergone a shift in economic orientation that has resulted in the "nationalisation" of over 15 companies since 2006. The great majority of these "nationalisations" affected former state-owned companies that were privatised during the 1990s as a form of recuperating the companies and assets that originally belonged to the Bolivian State. In this sense, the new investment promotion law is intended to bring clarity and certainty to the investors and the market, signalling that the nationalisations are over and that the new laws of the country are solid. It is still unclear whether the markets are going to agree with the signals sent by the Bolivian government, and will increase the flow of capital to the country.

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The economic perspectives of the country also seem uncertain. The annual growth rate of Bolivian GDP was, for several years, higher than 5%, and it relied heavily on gas and minerals. The low prices of these commodities have hit the Bolivian economy, and the growth rate of GDP has started to slow down its pace. Notwithstanding, it continues to be one of the highest in Latin America, at around 4.4% according to official government reports.

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Bulgaria

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Legal background

General and special legislation

The main legislative act setting out the legal framework for M&A transactions in Bulgaria is the Commerce Act (State Gazette Issue 48 of 1991, as amended), which contains the general rules for sales of shares, sales of businesses as going concerns and company reorganisations. The general civil law rules, regulating the validity and forms of the contracts, the rules for performance and the sanctions for the non-performance of transactions, which are set out in the Obligations and Contracts Act (State Gazette Issue 275 of 1950, as amended) would also apply to contractual aspects of the M&A transaction which are not subject to any special regulation in the Commerce Act.

Public companies are heavily regulated and any M&A transaction involving public companies is subject to specific regulatory requirements set out in the Public Offering of Securities Act (State Gazette Issue 114 of 1999, as amended).

M&A transactions that relate to state-owned and municipality-owned shares, or separate parts of the property of companies with more than 50% equity interest owned by the state or municipality, are regulated by a special procedure for privatisation under the Privatisation and Post-Privatisation Control Act (State Gazette Issue 26 of 2002).

In specific regulated sectors such as banking, insurance and social security, M&A transactions are subject to special regulation and close scrutiny, as provided for in the Credit Institutions Act (State Gazette Issue 59 of 2006, as amended), the Insurance Code (State Gazette Issue 102 of 2015, as amended), and the Social Security Code (State Gazette Issue 110 of 1999, as amended).

Each M&A transaction has its employment law aspects and these are regulated primarily by the Labour Code (State Gazette Issue 26 of 1986), which sets out the requirements for notifying employees and establishes protective mechanisms to safeguard workplaces in case of transfer of shares or on-going concerns, etc.

Various other Acts may affect an M&A transaction, depending on the nature of the deal and the sector of the economy in which it is to be carried out, like the Personal Data Protection Act, the Environment Protection Act, the Foods Act, the Markets of Financial Instruments Act (State Gazette Issue 52 of 2007, as amended), the Companies with Special Investment Purposes Act (State Gazette Issue 46 of 2003, as amended), the Collective Investment Schemes and Other Entities for Collective Investment Act (State Gazette Issue 77 of 2011, as amended), etc.

Taxation

The tax aspects of an M&A deal would depend primarily on: (i) the Bulgarian Corporate

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Income Tax Act (State Gazette Issue 105 of 2006, as amended); (ii) the more than 60 bilateral double-taxation treaties to which Bulgaria is a party; and (iii) the VAT Act (State Gazette Issue 63 of 2006, as amended), regulating the VAT treatment of the transfer of on-going concerns, mergers and other types of corporate reorganisation, etc. The Bulgarian Corporate Income Tax Act ('the CITA') provides for special rules on tax treatment in cases of reorganisation, transfer of business as a going concern and the taxation of capital gains. The Local Taxes and Fees Act may also affect certain aspects of an M&A deal like the taxation applicable to cancellation of receivables (often, M&A deals are accompanied by various debt restructuring elements).

- *Taxation of capital gains and dividends*

The CITA provides for a 10% tax payable on the capital gains if a foreign legal entity or individual disposes of shares held in a Bulgarian company. The tax is levied on the positive difference between the documented acquisition price and the documented sale price. Bulgaria is a signatory to a number of double tax treaties that may provide for a lower rate of tax on the capital gains, or for a complete tax exemption (e.g., the tax treaties with Austria, Netherlands, Greece, etc.). In order to benefit from the lower tax rate, the beneficiary owner of the shares must obtain clearance from the Bulgarian revenue authorities. Clearance can be obtained before the deadline for payment of the general 10% tax or following its payment, in which case the amount overpaid will be refunded.

Capital gains from sale of shares at a regulated Bulgarian market and, in most cases, at an EU or EEA regulated market, are exempt from taxation.

M&A transactions are often associated with payment of dividend by the target company to its former owner. The dividends are subject to 5% taxation, provided however, that the dividends payable to companies from other EU Member States, or from states that are parties to the Agreement on the European Economic Area, are tax-exempt. The residents of non-EU countries may benefit from more favourable tax treatment under a double-taxation treaty to which Bulgaria and their country of tax-residence are signatories. The clearance procedure is identical to that mentioned above.

Bulgarian tax residents (individuals) who are selling their shares have to include in their overall annual tax income, which is subject to 10% tax, an amount equal to the positive difference between the profit realised and the loss incurred during the financial year determined for each concrete transaction.

Bulgarian legal entities are also not subject to a separate tax with respect to capital gains from the sale of shares. Instead the capital gains will be included in their annual tax result, which is subject to 10% corporate tax.

- *Taxation of mergers*

Under the CITA, companies and permanent establishments which cease to exist after the reorganisation (e.g., merger into another company or new company) are subject to 10% corporate tax for the last tax period; in other words, the period from the beginning of the calendar year until the date of the registration of the reorganisation in the Commercial Register, which date is considered for tax purposes as the reorganisation date.

After the reorganisation, the newly established or acquiring company shall submit a tax return regarding the corporate tax for the last tax period of the merging company within a period of 30 days following the reorganisation date. The corporate tax shall be paid within the same period, after deducting the advance contributions made.

Merger control

The primary instrument laying down the Bulgarian merger control law is the Protection of

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Competition Act ('the PCA'), State Gazette Issue 102 of 2008, as amended. The act follows the relevant European Union law acts and determines the status of the Bulgarian Commission for Protection of the Competition ('the CPC'), its rights to grant or refuse concentration clearances, as well as the range of transactions that are subject to such clearance.

One of the tasks of the CPC is to assess the concentrations and to clear or to prohibit these, based on whether they may significantly impede competition, as a result of the creation or strengthening of a dominant position.

In line with European law, a concentration is defined in the PCA as a merger of two or more previously independent undertakings or the acquisition, by a person or persons, already controlling one or more undertakings, of direct or indirect control of the whole or part(s) of another undertaking, or the creation of a joint venture, performing on a lasting basis all of the functions of an autonomous economic entity.

The first type of concentration covers 'legal mergers' where two or more undertakings merge to create a new legal entity, the former legal entities ceasing to exist. It also covers the takeover by one legal entity of the legal personality of another by infusion, whereby the latter ceases to exist and the former acquires through universal succession all its rights and obligations.

The second type of transaction caught by Bulgarian merger control law is the acquisition of control. Within the meaning of the PCA, control is constituted by rights, contracts or any other means that, either separately or in combination, and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence on an undertaking, in particular by acquiring ownership or the right to use the entirety or part of its assets; or the possibility of exercising rights, including on the basis of a contract, that provide a possibility for decisive influence on the composition, voting or decisions of the organs of the undertaking.

The jurisdictional thresholds determine whether a concentration should be notified to the CPC and clearance be obtained, before it is implemented.

The CPC has jurisdiction to review concentrations only where they do not have a 'Community dimension', or where even though such concentrations have a Community dimension, the case has been referred to the CPC according to the rules of the EU Merger Regulation.

A transaction that does not have a Community dimension will be subject to mandatory advance notification and clearance by the CPC where: (1) the combined aggregate Bulgarian turnover of the undertakings concerned exceeds 25 million levs (1.96 Bulgarian levs = 1 EUR) in the latest complete financial year; and (2) the turnover of each of at least two of the undertakings concerned in the territory of Bulgaria during the previous financial year exceeds 3 million levs; or (3) the turnover of the target company in the territory of Bulgaria exceeds 3 million levs.

A concentration is likely to be cleared where it will not lead to the creation or strengthening of a dominant position as a result of which effective competition would be significantly impeded. The CPC may clear a concentration, even where it does lead to the creation or strengthening of dominance, where it aims at modernising the relevant economic activity, improving market structures or better meeting the interests of consumers, and where overall the positive effect outweighs any negative influence on competition.

The parties may offer and negotiate remedies that would bring the effect of the merger in line with the above rules, which remedies, when accepted by the CPC and included in its decision, will become obligatory conditions attached to the clearance.

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At the end of merger review the CPC may: (1) declare that the transaction does not represent a notifiable concentration; (2) clear the transaction; (3) issue a clearance subject to conditions and obligations; or (4) prohibit the concentration.

Where the thresholds are met, the filing with the Commission is mandatory. It should be performed upon the execution of the agreement on the transaction or the launch of the public offer, except in certain cases where the parties have managed to demonstrate their intention to accomplish a notifiable concentration, even before these events. If the parties have failed to notify a transaction prior to its implementation, they are subject to fines of up to 10% of their aggregate turnover for the previous financial year.

Fines in an amount of up to 10% of the annual turnover can also be imposed if: a) the concentration is completed under conditions and in a manner that differs from the ones notified to the CPC and on the basis of which its clearance decision was issued, including upon failure to honour commitments and obligations imposed; b) the concentration is completed in violation of an express prohibition of the CPC; or c) the concentration is completed in violation of the general suspension obligation that applies prior to a clearance decision.

In addition, the CPC is entitled to impose a sanction of up to 1% of the total turnover for the preceding financial year in cases of: a) failure to cooperate with the concentration investigation; b) delay in the provision of information or the provision of incomplete, incorrect, untrue or misleading information; or c) failure to notify the CPC of the performance of its decision in the term specified in it (if the decision provides for such an obligation).

The CPC may also impose periodic sanctions of up to 5% of the average daily total turnover for the preceding financial year for each day of failure to comply with conditions and obligations attached to the clearance decision, and up to 1% of the average daily total turnover for the preceding financial year for each day of failure to provide complete, true and non-misleading information upon demand.

Employees

The Labour Code is the main applicable Bulgarian law, which regulates employment issues in cases of M&A transactions. The Labour Code complies with the European Acquired Rights Directive regarding the transfer of employees in case of reorganisation of the employer, providing explicitly that the employment relationship will not be terminated in case of change of the employer due to:

(i) Merger of enterprises by the formation of a new enterprise (merger).

(ii) Merger by acquisition of one enterprise by another (merger by acquisition).

(iii) Distribution of the operations of one enterprise among two or more enterprises (split up).

(iv) Passing of a separate part of one enterprise to another (spin-off).

(v) Change of the legal form of the enterprise (e.g., from LLC to JSC).

(vi) Change of the ownership of the enterprise or a separate part thereof (transfer of a going concern).

(vii) Assignment or transfer of business from one enterprise to another, including transfer of tangible assets (transfer of business).

(viii) Rent, lease, or concession of the enterprise or of a separate part thereof.

Prior to effecting the M&A transaction, the transferring and the acquiring enterprises must inform the trade union representative and employee representatives of each enterprise of the change and the scheduled date of the transfer; the reasons for the change; the possible legal, economic and social consequences of the change for the employees; and the measures to

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be undertaken with respect to the employees, including the performance of the obligations arising from employment relationships existing as at the date of the transfer. The transferring enterprise must submit this information within a period of at least two months prior to effecting the change. The acquiring enterprise must submit this information in due course, however no later than at least two months before its employees are directly affected by the change in the employment conditions.

If one of the employers has planned changes with respect to the employees, timely discussions must be held and efforts made to reach an agreement with the trade union and the employee representatives regarding these measures. If there are no trade unions and appointed employee representatives in the respective enterprise, the information must be submitted to the employees.

In the above cases of transfer of a business, the rights and obligations of the transferring enterprise, prior to the change, arising from employment relationships existing as at the date of the transfer, are transferred to the acquiring enterprise. The acquiring enterprise is bound to take on the employee obligations which have originated before the change, in the case of a merger or joining of enterprises and a change of the legal form of the enterprise. In the other cases, the acquiring enterprise and the transferring enterprise are jointly liable for the obligations to employees before the change.

The Labour Code does not require explicit employee's consent for effecting the M&A transaction, however the employees are entitled to terminate their employment contracts without notice in case that after such transfer, the working conditions with the new employer materially deteriorate.

Offshore companies legislation

The Act on Economic and Financial Relations with Companies Registered in Preferential Tax Treatment Jurisdictions, the Parties Controlled by Them and Their Beneficial Owners (the "Offshore Companies Act") entered into force on 1 January 2014 and provides for certain restrictions on companies registered in offshore jurisdictions (hereinafter "offshore companies") and the parties controlled by them to carry out certain business activities.

The definition of "control" includes, in general, holding of more than 50% of the voting rights in the general shareholders' meeting or in the management bodies of the other company.

The offshore jurisdictions are any state/territory wherewith Bulgaria does not have an effective double taxation treaty and wherein the income tax or corporate tax or the substitute taxes on any income are lower by more than 60% than the income tax or corporation tax on the said income under the Bulgarian tax law. The Minister of Finance is competent to publish a list of the offshore jurisdictions. The last one was published in June 2016 and includes 37 jurisdictions and territories.

The acquisition of participation in: (i) credit institutions; (ii) insurance, reinsurance or insurance brokerage companies; (iii) pension insurance companies; (iv) investment intermediaries; (v) mobile, radio and television operators; (vi) collective investment schemes or other undertakings for collective investments; and (vii) payment institutions, is subject, in some instances, to a special permission issued for the specific transaction, and such permission will be rejected for any offshore company or the parties controlled by them.

Types of M&A transactions

The most common types of M&A transactions used in Bulgarian legal practice are the following:

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(i) the acquisition of a majority or all of the shares or stocks of a company – the acquirer would assume control over the target by acquiring the majority of its voting rights and the right to appoint the Board members;

(ii) the transfer as a going concern of one entity to another – the transferor shall transfer all or part of its assets, liabilities and goodwill as a changing pool to the acquirer through a single transaction;

(iii) the transfer of all the assets, receivables and contracts piece by piece by one company to another – the transferor shall transfer all or some of its assets and contracts via a series of transactions; normally this option is used in case of uncertainty about undisclosed or hidden liabilities on the transferor's side;

(iv) merger by way of acquisition (one or more entities are absorbed into another entity and the absorbed entities cease to exist) or by way of incorporation (two or more entities combine to establish a new one, and all of the combined entities cease to exist);

(v) demerger by way of acquisition – a portion of the assets and liabilities of an entity are split off and pass on to another entity; and

(vi) the entering into of various contractual arrangements leading to the establishment of joint ventures, consortia or similar unincorporated/contractual structures for joint businesses.

Timeline and waiting periods

The time for completing an M&A transaction depends mainly on the form chosen. Generally, mergers and demergers are completed within a period of eight to ten (less in some specific cases) months (including the waiting period for the concentration clearance and regulatory permits). The procedures for transfer of going concerns are slightly shorter, including where associated with concentration clearance and regulatory permits. The Commerce Act provides for less complicated procedures in terms of mergers and demergers, in case such combinations are made between daughter companies or a mother and a daughter company, and such daughter companies have one shareholder only. In such cases a merger or demerger may be completed within three to four months.

It must be noted that after the M&A transaction in the form of a transfer of a going concern or a merger is registered with the Commercial Register, a six-month period starts to run within which the assets of the acquired business shall be managed separately. No special actions are needed to be performed when this term expires.

The combinations involving companies from regulated industries are normally subject to regulatory permits (banking, insurance, investment brokerage, etc.).

Disclosure of information

The information that shall be made public depends primarily on the type of M&A transaction as well as on the legal form of the participants. In certain cases, there is no requirement for public announcement (e.g., acquisition of less than 100% of shares in a private joint-stock company in cases where no concentration clearance is triggered). In other cases, the parties may have to disclose material amounts of information to the general public, the regulators or the CPC.

By way of example, in the case of a planned transformation of non-publicly traded companies, the public will be informed about the planned merger or demerger by way of acquisition through advance announcement in the Commercial Register of the merger documents and the invitation for the general meeting on which the transformation decision would be passed. Given that the Commercial Register is public, any person (not

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just the shareholders) may collect information about all of the details with respect to the transformation, such as its form, the participants therein, the proposed exchange of shares, the amount of cash payments, if any have been envisaged, and the time period within which any payments must be made, etc.

Each person acquiring 5% or more of the shares in a publicly traded company should make an announcement. An announcement is also required in case of acquisition (direct or indirect) of financial instruments giving the right to acquire shares in a publicly traded company and financial instruments with similar economic effect. A similar requirement applies with respect to subsequent acquisitions where the total amount of the shares and/or financial instruments would exceed 10%, 15% and other percentages divisible by five. In the case of acquisition of ⅓ of the voting capital (assuming no shareholder is holding more than 50%) or more of a publicly traded company, the acquirer should launch a tender offer to the minority shareholders. The minimum content of the tender offer is determined by law and includes, *inter alia*, information about the acquirer, its business plans for the future, plans with respect to the employees, offer to acquire the minority shares, an indication of the price at which this will be done, etc. A notice about the tender offer and the text of the tender offer are to be published in at least two national daily newspapers.

The information disclosed to the CPC usually covers a wide range of commercially sensitive information, therefore the parties may indicate in their filings the data that they consider to be covered by commercial secrecy. The CPC may then disclose only the non-confidential information to the public via announcements on its official website.

For the purposes of obtaining a regulatory permit (if required), the applicant may also need to disclose to the regulator a material amount of information, including on their business plans; however, as a general rule, this information will not be made public.

Financing of the M&A transactions

Banking finance remains an important source of financing of M&A transactions, although the requirements with respect to the applicants and the provided security have materially hardened in recent years since the start of the financial crisis. Acquirers belonging to stable economic groups, or who are able to provide sound collateral, enjoy better conditions in terms of interest rates and fees. In many cases, the debt financing is raised at the level of the foreign parent company. It may then be extended to the local acquirer, in the form of either a loan or capital.

Banks and financial institutions provide the option to arrange or co-finance syndicated loans for customers. Loan syndication is used for risk diversification and for securing compliance with the large exposure rules contained in the Credit Institutions Act. At the same time, this tendency can make the deals more complex and extend the period needed for their negotiation and completion.

It is common for the credits extended to investment companies to be refinanced after the completion of the transaction as an element of the corporate and financial reorganisation of the target group.

Bulgarian law prohibits 'financial assistance'. Bulgarian joint-stock companies are precluded from providing loans or granting collateral securing the acquisition of their own shares by a third party. This restriction will not apply to transactions entered into by banks or financial institutions in the ordinary course of business provided that, following the completion of the transaction, their net assets value continues to be within the thresholds specified by the law. The prohibition of financial assistance is not applicable to the acquisition of limited liability

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companies, which are the other typical target company in M&A transactions.

The other main source of financing of M&A transactions is a loan from a foreign holding company to its local subsidiary (usually acting as a typical SPV) that is particularly created to effect the acquisition. These loans are often capitalised (in full or partly) by increasing the share capital of the local subsidiary in order to make the SPV comply with existing thin capitalisation rules, or in order to minimise the interest expenses and associated withholding tax.

Significant deals and highlights

M&A activity in 2016 was primarily in the sectors of Media and Telecommunications & IT; Real Estate (Hotels, Retail Stores, Malls, and Logistic Centres); Manufacturing; Retail; and Banking & Finance. The investments under the JEREMIE initiative continue to be active through private equity funds, which focus is co-investment in small and medium-sized Bulgarian enterprises.

The most significant deals of the year 2016 in terms of volume were:

(i) acquisition of Bulgarian Telecommunication Company by a consortium organised by Spas Russev (Bulgarian investor) for a price of €330m;

(ii) acquisition of Alpha Bank – Bulgaria Branch by Eurobank Bulgaria (hybrid equity + debt acquisition where the value was not publicly announced, but this is by far the largest deal in the sector);

(iii) acquisition of TBI Bank by 4finance Holding (Latvian investor) against €69m;

(iv) acquisition by IHH Healthcare (Malaysian–Japanese joint venture) of Tokuda Hospital Sofia against €65m, and of 33% in City Clinic against €50–55m;

(v) acquisition by Revetas Capital (London Investment Fund) of Sofia Airport Centre against €50–60m;

(vi) acquisition by Avestus Capital Partners (Irish Investment Fund) of 50% in Mall Plovdiv against €50m;

(vii) acquisition by Energy MT (controlled by a Bulgarian investor) of solar parks with over 20 MW capacity against €35m; and

(viii) acquisition by TGI Middle East FZE (Dubai) of 12.21% in Bulgartabac (largest Bulgarian tobacco processing company) against €31.5m.

Key developments

The principal trends and key development for 2016 could be summarised as follows:

(i) domestic players played a significant role in M&A transactions in 2016;

(ii) small-scale acquisitions concerning primarily small-to-medium enterprises continued to determine the M&A market in terms of number of deals;

(iii) synergies driving acquisitions, i.e. foreign strategic companies acquiring local companies to provide access to cheap resources and affordable labour;

(iv) "classic" M&A transactions where a large strategic investor is attracted by a successful, developed company with potential for synergies and future development were rare; and

(v) de-investment of foreign investments given the unstable political situation, poor administration and court system, unpredictability of the business sector, small size of the market.

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Industry sector focus

The 2016 M&A activity shows that the M&A deals are focused on the sectors of Media and Telecommunications & IT; Real Estate (Hotels, Retail Stores, Malls, and Logistic Centres); Manufacturing; Retail; and Banking & Finance. Inbound investments still prevail in respect of the large M&A deals.

The year ahead

Although the level of activity on the M&A market in 2016 is still low, expectations for its growth in coming years are optimistic, including based on indications for arousing the interest of foreign investors.

The banks will continue to play an important role in M&A, not as financing institutions but as sellers. Indeed, both Bulgarian and foreign creditors have been seeking to restructure and reorganise their defaulting debtors in order to revive their businesses; however, there have been examples of banks starting to enforce their collaterals and we may expect this trend to continue throughout 2017. During 2014, one of the largest Bulgarian banks – Corporate Commercial Bank AD – had significant financial difficulties and the Bulgarian National Bank started insolvency proceedings against it. Given its participation, whether direct or not, in various businesses, the liquidation of its bankruptcy estate will lead to a number of transactions.

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Canada

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Overview

Canadian markets were subject to more stable and positive forces in 2016 than in the previous year. Oil prices rose slowly but steadily throughout the year, rebounding from a 14-year low early in 2016.[1] The Canadian dollar also achieved an annual gain by the end of 2016 for the first time since 2012.[2] Against this backdrop, Canadian M&A activity in 2016 surpassed the deal value and count records set in 2015 to become the most active year in Canadian history by deal count, and the second-largest ever by value.[3]

By the end of 2016, announced deal count in the Canadian market reached 3,100 transactions, the highest number on record.[4] The aggregate value of deals reached Cdn$400bn, surpassing 2015's total and second only to the peak of 2007.[5] As was the case in the previous year, foreign acquisitions by Canadian buyers were the dominant force behind 2016's strong performance. Outbound deals reached their highest level on record, 9% higher than the previous high, established in 2015.[6] These results were powered by a handful of mega-deals involving non-Canadian targets, including TransCanada Corp.'s (TransCanada) US$13bn acquisition of Columbia Pipeline Group, Inc. (Columbia Pipeline)[7] and Enbridge Inc.'s (Enbridge) US$28bn acquisition of Spectra Energy Corp. (Spectra Energy).[8] Canadian pension funds and institutional investors also contributed to the outbound deal volume.

While the energy sector performed poorly in 2015 due to the decline in oil prices and resulting valuation gap for assets, 2016 saw a resurgence of M&A activity in the sector. Energy and power accounted for over 40% of M&A activity in 2016 – compared to only 22% in 2015 – and was by far the most active sector by deal value.[9] Within the energy sector, pipeline deals were dominant, making up more than 70% of the US$81bn in Canadian energy deals.[10] With domestic growth for pipeline companies stunted by delays in building projects such as Keystone XL and the Northern Gateway, foreign acquisitions, particularly of U.S. targets, continued to represent attractive alternative growth opportunities, despite a still relatively weak Canadian dollar.

While blockbuster outbound deals like the TransCanada and Enbridge acquisitions garnered significant attention in the energy sector, inbound transactions also made headlines, including Exxon Mobil Corporation's (Exxon Mobil) acquisition of InterOil Corporation (InterOil). As the U.S. economy gains momentum, a low Canadian dollar, low interest rates, and abundance of credit should keep Canadian companies as attractive targets for foreign buyers.[11]

Utilities companies also had a banner year in 2016, achieving a record high of more than US$30bn worth of deals. The largest of these was Fortis Inc.'s (Fortis) US$11.3bn acquisition of Michigan-based ITC Holdings Corp. (ITC), another significant purchase

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of a non-Canadian target.[12] The transaction established Fortis as one of the top 15 North American regulated investor-owned utilities companies by enterprise value. Finally, the agriculture sector also experienced some significant transactions, with the announcement of the combination of Agrium Inc. (Agrium) and Potash Corporation of Saskatchewan Inc. (Potash), whose combined *pro forma* enterprise value would be US$36bn, generating headlines during the fourth quarter.[13]

Significant deals and highlights

Outbound M&A

High-value outbound transactions in the energy sector defined Canadian M&A in 2016. TransCanada's US$13bn acquisition of Columbia Pipeline, and Enbridge's US$28bn acquisition of Spectra Energy, were two of the largest deals of the year.

As in prior years, Canadian pension funds continued to be active buyers of foreign targets. Ontario Teachers' Pension Plan and OMERS Private Markets led a consortium that agreed to acquire London City Airport for US$2.8bn.[14] The Canada Pension Plan Investment Board (CPPIB) purchased a 40% stake in Glencore Agricultural Products from Glencore plc for US$2.5bn.[15] CPPIB, Brookfield Asset Management Group and the British Columbia Investment Management Corp. joined forces to acquire Asciano Limited, an Australian railway freight and shipping operator, for AU$12bn.[16]

Although the U.S. was the target country of choice for Canadian buyers, 2016 saw a number of acquisitions further afield by pension funds as well as large institutional investors with significant asset bases. In September, a consortium led by Brookfield Infrastructure Partners LP acquired a 90% controlling stake in Nova Transportadora do Sudeste S.A., a system of natural gas transmission assets in Brazil, for approximately US$5.2bn.[17] Earlier in the year, Brookfield Renewable Energy Partners LP purchased a 57.6% stake in Isagen S.A., Columbia's largest hydropower plant, from the Columbian government for US$2bn.[18] Onex Corporation also announced its proposed acquisition of Parkdean Resorts, the UK's largest operator of caravan holiday parks, for £1.35bn.[19]

Canadian companies across a wide range of other sectors also sought expansion abroad in 2016. Canadian Imperial Bank of Commerce (CIBC) announced its planned acquisition of PrivateBancorp, Inc. and its Chicago-based subsidiary, The PrivateBank, early in the year.[20] With a value of US$4.9bn, the transaction would be the largest in CIBC's history, and represents a major foray into the mid-sized financial services market in the U.S. for one of Canada's key financial institutions. In December, PrivateBancorp, Inc.'s stockholder vote was delayed due to negative recommendations from proxy advisers stemming from valuation concerns. A new date for the vote is expected to be set in early 2017, and investors on both sides of the border will be watching to see if the acquisition can close on its original terms or whether a more generous offer will emerge from CIBC.[21]

Alimentation Couche-Tard Inc. (Couche-Tard) also announced the largest deal in its history with an all-cash acquisition of CST Brands, Inc. (CST) for US$4.4bn. Couche-Tard is Canada's biggest convenience store operator and, even prior to this transaction, stood as the biggest independent convenience store operator in the U.S., measured by number of company-operated stores. Its acquisition of CST further expands its presence in Eastern Canada, the American South, as well as New York and Georgia.[22]

The engineering firm Stantec Inc. (Stantec) completed its acquisition of Colorado-based MWH Global, Inc. in a transaction valued at approximately US$793m, including debt.[23] The transaction amounted to a further pivot away from oil and gas for Stantec, and was intended

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to help strengthen Stantec's position in the global water market, as well as expanding the reach of its engineering consulting business in the U.S.

Energy, mining, and utilities

Enbridge and Spectra Energy's stock-for-stock merger transaction, valued at US$28bn, is the largest outbound Canadian acquisition in history. The merger, which combines Enbridge's oil pipelines with Spectra Energy's natural gas pipeline system, would create the largest energy infrastructure company in North America and one of the largest globally.[24]

TransCanada's US$13bn acquisition of Columbia Pipeline is further evidence of the international expansion opportunities available to Canadian companies. The acquisition, the largest in TransCanada's history, set the stage for TransCanada to offer US$848m to buy the remaining equity in Columbia Pipeline Partners LP, the limited partnership affiliate of the acquired Columbia Pipeline unit.[25] This subsequent acquisition would provide TransCanada with an even greater interest in a pipeline network that extends from New York to the Gulf of Mexico, along with storage and related midstream assets.[26]

Fortis undertook a large-scale foray into the U.S. electric transmission system with its acquisition of ITC, which ranks as the largest deal in its history. With natural gas and renewable power primed to be important sources of energy going forward, Fortis believes its acquisition leaves its well-positioned for the future.[27]

Another notable deal in the energy sector is the proposed purchase of InterOil by Exxon Mobil Corporation for more than Cdn$2.5bn.[28] The transaction was halted in November when the Court of Appeal of Yukon overturned a lower court's approval of the plan of arrangement implementing the transaction. The Court of Appeal ruled in favour of Philippe Mulacek, the founder, former chairman/director, and second-largest shareholder of InterOil, who objected to the fairness of the proposed transaction.[29] As a result, a re-worked version of the transaction remains in progress.

Other sector highlights

The largest and one of the most significant all-Canadian deals of 2016 is the pending merger of Agrium and Potash. Announced in September 2016, the combined entity will be the world's largest producer of potash, second-largest producer of nitrogen fertilizer, and largest crop-nutrient supplier.[30] The new company will have operations in 18 countries, more than 20,000 employees worldwide, and an enterprise value of US$36bn.[31]

Although a decreasing number of hostile bids have been launched in Canada in recent years, in January 2016, Sprott Asset Management LP, together with Sprott Physical Gold Trust, succeeded in its hostile bid to acquire all of the outstanding units of Central GoldTrust for units of Sprott Physical Gold Trust.[32] The transaction is valued at over Cdn$1bn.[33]

Also early in the year, Georgian Partners joined Norwest Venture Partners in a large strategic investment in Medgate, a Canadian-based global provider of SaaS-based Environmental, Health and Safety (EHS) software.[34]

A number of foreign private equity firms made significant investments in Canadian companies in 2016. Thoma Brovo, LLC acquired TRADER Corporation, which provides Canada's largest digital automotive marketplace, for approximately Cdn$1.575bn.[35] Baring Private Equity Asia also acquired a 35% stake in TELUS International, providing the company with Cdn$600m to apply towards the expansion and advancement of its networks.[36]

In another significant in-bound deal, Vail Resorts, Inc. acquired Whistler Blackcomb Holdings, Inc. for Cdn$1.4bn.[37] The acquisition is the first foray into Canada by the Colorado-based Vail Resorts, which operates across the U.S. and in Australia. The deal

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will support Whistler Blackbomb's $345m redevelopment plans to build new facilities to support its business year-round.[38]

In the telecommunications space, BCE Inc. (Bell) took a number of steps in 2016 to expand its presence in the Canadian market. In May, it announced that it would acquire all of the issued and outstanding common shares of Manitoba Telecom Services Inc. for approximately Cdn$3.9bn.[39] Bell will invest Cdn$1bn in capital over five years to expand its broadband networks and services throughout Manitoba, capturing new opportunities for unprecedented broadband communications investment, innovation and growth in both urban and rural areas in Manitoba.[40]

Bell also acquired the equity it did not already own in Q9 Networks Inc. (Q9) from Ontario Teachers' Pension Plan, Providence Equity Partners and Madison Dearborn Partners.[41] The four entities acquired Q9 together in 2012, with Bell then holding a 35.4% stake in the Toronto-based data centre operator. The transaction to buy out its investment partners was valued at approximately Cdn$675m.[42]

Corus Entertainment Inc.'s (Corus) acquisition of Shaw Media Inc. for Cdn$2.65bn was a significant strategic transaction for the Toronto-based media company.[43] The acquisition more than doubled Corus' size, expanding its combined portfolio of specialty television services, conventional television channels, radio stations, digital assets, and a global content business.[44] The deal greatly broadened the scale of Corus' business and its reach in the market for television programming, especially those for kids, women, and families.[45]

Texan company Waste Connections Inc. completed its merger with Progressive Waste Solutions Ltd., a Toronto-based waste management company, in an all-stock transaction valued at approximately Cdn$1.3bn.[46]

In September, CPPIB acquired, from Oxford Properties Group, a 50% interest in a portfolio of high-quality office properties in downtown Toronto and Calgary at a purchase price of Cdn$1.175bn.[47]

In the retail space, the Rexall Pharmacy Group Ltd. pharmacy chain was bought by U.S. health-services company McKesson Corp. for Cdn$2.9bn.[48] The large-scale deal brought Competition Bureau oversight and, as a result, McKesson, the largest wholesaler of pharmaceutical products in Canada, agreed to sell 28 drugstores as part of obtaining approval to buy the pharmacy chain. McKesson also agreed to restrict the exchange of commercially sensitive information between its wholesale and Rexall retail business in order to minimise the impact on competition at the retail level.[49]

Key developments

Federal government welcomes new foreign investment

In a bid to encourage greater foreign investment into Canada, the federal government committed to spending Cdn$218m over the next five years to create an "Invest in Canada Hub". The hub will allow foreign investors to deal with federal, provincial, territorial and municipal governments through a single window, streamlining the process of navigating through policies and regulations of multiple levels of government.[50]

The government also announced that it intends to relax certain foreign investment restrictions, including (with some exceptions) accelerating to 2017 the scheduled increase of the review threshold under the *Investment Canada Act* (ICA) from Cdn$800m to Cdn$1bn, two years sooner than expected. To conform with its obligations under the Canada-European Union Comprehensive Economic and Trade Agreement (CETA), the government

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will also implement an even larger increase of the ICA review threshold to Cdn$1.5bn for investors that qualify as "trade agreement investors" (i.e., EU member states and countries with "most favoured nation" provisions with Canada).[51]

Furthermore, the Canadian federal government released new guidelines on national security reviews under the ICA in order to enhance transparency for potential foreign investors. The guidelines will provide investors with more information about the types of transactions that may require a national security review and the factors considered by the government when assessing national security risk.[52]

Infrastructure spending

In advance of the 2017 budget, the Canadian government outlined a number of key federal government infrastructure priorities. Of interest to potential funding recipients, developers and investors, the finance minister proposed an additional investment of Cdn$81bn in infrastructure over 11 years, beginning in 2016-2017. While the 2016 budget allocated a total of Cdn$11.9bn across public transit, green infrastructure and social infrastructures, the proposed additional investment will see allocations increase over the next 11 years to Cdn$25.3bn for public transit, Cdn$21.9bn for green infrastructure, Cdn$21.9bn for social infrastructure, Cdn$10.1bn for transportation that supports international trade, and Cdn$2bn for projects that support Canada's rural and northern communities.[53]

To finance the plan, the federal government further proposed to create a new Canada Infrastructure Bank, which will be injected with at least Cdn$35bn in seed capital. The bank will seek to identify and deliver projects that will provide economic, social and environmental returns and facilitate private capital investment.[54]

These investments in Canadian infrastructure will create significant opportunities for both domestic and foreign investors, who may look to capitalise on new projects in Canada and make strategic acquisitions in complementary industries, including construction and services.

Takeover bid regime

Canada's take-over bid regime underwent some significant changes in 2016. Amendments to the Canadian regime proposed by the Canadian Securities Administrators came into force on May 9, 2016. The new regime is set out in National Instrument 62-104 – *Take-Over Bid and Issuer Bids* (NI 62-104), which has been adopted in all Canadian jurisdictions. Under the new regime, take-over bids are required to remain open for acceptance for at least 105 days, subject to a target company's ability to permit the tender period to be reduced to a minimum of 35 days.[55] As a result, target companies have been provided with additional time to consider alternatives to a hostile bid; under the prior rules, with a universal 35-day minimum tender period, hostile bidders expected to obtain a decision from a provincial securities regulator to cease trade a target's shareholder rights plan, and permit a bid to proceed, within 60 to 90 days of the bid's launch.

Additionally, under the new regime, all bids must satisfy a minimum tender condition of at least 50% of the outstanding securities of the class that are subject to the bid, not including those held by the bidder. Moreover, once the minimum tender condition is satisfied, the bid must be extended for a mandatory 10-day period, which ensures that shareholders have the opportunity to assess whether a bid is successful before tendering.[56] These changes have shifted some of the power from bidders to target boards, increasing the incentive for a bidder to negotiate with the target board rather than launch a hostile bid. As an early indication of the change in incentives for bidders under the new rules, 2016 saw only six hostile bids, compared to eight in 2015, nine in 2014, 11 in 2013, and a high of 13 in 2011.[57]

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Plans of arrangements

Mergers and acquisitions in Canada are commonly effected by a court-supervised, statutory plan of arrangement, in which a court is asked to grant a final order approving the arrangement upon satisfaction that it is "fair and reasonable". Typically, arrangements are approved without opposition. However, in 2016, plans of arrangements faced heightened judicial scrutiny.

The Yukon Court of Appeal's decision in *InterOil Corporation v. Mulacek* created uncertainty in a previously predictable process by unanimously setting aside an order of the Supreme Court of Yukon approving the plan of arrangement providing for the acquisition of InterOil by Exxon Mobil. Despite the arrangement having obtained significant shareholder support at a duly called meeting of InterOil shareholders, the court concluded that the transaction was not fair and reasonable. The decision stated that court approval is "required by the *Business Corporations Act* (Yukon) to ensure that the decision of the shareholders was fair and reasonable in the sense of being based on information and advice that was adequate, objective and not undermined by conflicts of interest". The court identified numerous governance, disclosure and procedural deficiencies which, it suggested, called into question the adequacy of the shareholders' approval.

In particular, the court found that certain members of target management who were involved in the negotiations were conflicted as they stood to receive significant benefits from the arrangement. More importantly, the court held that the fairness opinion obtained by InterOil in respect of the arrangement was not independent since the fee received by the financial advisor providing the opinion was contingent on the success of the arrangement. The court was also concerned that since the fairness opinion did not attribute value to the contingency payment that formed part of the offer, the InterOil board had not engaged in a thorough review of the transaction. The court's discussion regarding the fairness opinion process is at odds with current Canadian market practice in M&A transactions; market practice in 2017 will be the first indication whether this decision will have an impact going forward.

Industry sector focus

Canada's technology sector is currently experiencing a rapid expansion. Deal volume rose by more than 30% in the past year, and average deal size has been growing in several emerging areas in the technology sector over the past three years, including a 24% increase in information and communication technology, 17% increase in life sciences, and a 260% increase in agribusiness. Taking into account both deal volume and total capital invested, the growth rate in investment in Canada's technology sector over the past three to five years has been approximately triple that of the U.S., a more mature market.[58]

Tech startups are emerging in a number of spaces at an increasing rate, transforming business in life sciences, financial, manufacturing, artificial intelligence/machine learning, legal, and clean energy. Mobile app development has seen particular growth, as simple, user-friendly, and immediately accessible interface with businesses has become critical to customer satisfaction and experience.

In 2015, the sector was directly responsible for around Cdn$117bn, or 7.1%, of Canada's economic output, surpassing the financial service and insurance industry's contribution.[59] While U.S. President Donald J. Trump's labour protectionist and anti-immigration stances may curtail the entrance of skilled foreign workers into the American technology sector, the Canadian federal government's proposal to reduce processing time for visas and work permits to two weeks, and to create a new temporary working permit allowing foreign

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workers into the country for 30 days a year, could make Canada an increasingly attractive market for talented and specialised tech workers.[60]

These conditions provide for the possibility of continued growth in the technology sector and an abundance of opportunities for both inbound acquisitions and outward expansions. Continued M&A activity is expected in this sector in 2017.

The year ahead

Outlook for Canadian M&A activity in 2017 remains positive. A recent survey of more than 1,700 senior executives in 45 countries, including 52 Canadian senior executives, reported optimism in Canada, with 57% of the Canadian respondents expecting to actively pursue acquisitions in the next 12 months, reflecting a deal-making increase in 2017.[61] A significant percentage of the Canadian executives indicated having two or more deals in their company's M&A pipeline, with approximately half having five or more deals planned.[62] Divestitures are expected to play a major part in deal-making in 2017, with many executive respondents in a separate survey noting that they plan to shed businesses in 2017.[63]

The survey data also indicated that Canada is the fourth top destination where international respondents are most likely to pursue an acquisition in the next 12 months, behind only the U.S., China, and Germany.[64] This is the first time that Canada has ranked in the top five since 2013, when oil prices and the Canadian dollar were at or near their peaks. Another survey of 1,000 U.S. corporate and private equity executives in the Fall of 2016 showed that Canada continues to be the top foreign acquisitions market for U.S. companies, with 40% of respondents citing it as a target market, up from 22% in 2015.[65] This growth in interest is likely due to U.S. energy and resource companies having the strongest appetite for international deals, and 56% of these companies are looking to Canada for opportunities.[66] The renewed interest in Canada signals the potential for greater inbound activity in 2017.

Although oil prices and the Canadian dollar are unlikely to return to their highs from several years ago, the 2016 M&A market demonstrated that low commodity prices and a search for growth and diversification can themselves generate a rise in deal-making activity for sectors such as energy. Nevertheless, conditions have begun to improve for oil and gas, as OPEC's agreement in November 2016 to cut production levels propelled oil prices to an 18-month high in early 2017. Although there was an increase in court-monitored restructurings and other insolvency proceedings for oil and gas companies in 2016, the energy industry overall is expected to become more stable going forward and continue its M&A resurgence in 2017. With the governments of Alberta and Ontario actively encouraging development of alternative energy, M&A and financing opportunities in those sectors are also expected to grow.

Infrastructure has recently become a dominant theme of Canadian M&A, as investors are looking to diversify and expand their holdings with alternative assets. In 2016, nine of the 20 largest deals in Canada were for infrastructure-related assets, including Enbridge's US$28bn acquisition of Spectra Energy.[67]

The Canadian government's planned investment in infrastructure is a positive indication for domestic infrastructure opportunities going forward. With pension funds expanding their investments abroad to include opportunistic infrastructure projects – those that must be newly built or are in need of capital improvements – global infrastructure M&A will also continue to benefit from Canadian involvement.[68] President Trump has pledged to invest US $1trn in infrastructures in the U.S. over the next decade, and CPPIB, one of the world's biggest infrastructure investors, has publicly stated that it will be keeping a "close eye" on

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the new U.S. administration's infrastructure plan.[69] These developments may further drive outbound M&A activity in 2017, particularly into the U.S.

However, not all potential policy developments in the U.S., if realised, would be positive for Canadian M&A. President Trump has proposed U.S. tax reform that involves a number of proposed changes to the U.S. corporate tax system, including a drastic reduction of the 35% federal corporate tax to 15% and a deemed repatriation of corporate profits held offshore at a one-time tax rate of 10%. If implemented, the corporate tax reduction would weaken Canada's relative historical rate advantage. The repatriation rate would also reduce, though not eliminate, the advantage enjoyed by Canadian multinationals that may generally repatriate foreign business earnings without the imposition of tax in Canada.[70] President Trump's proposal to significantly reduce tax regulation could also diminish the relative advantage enjoyed by Canadian businesses, as U.S. companies may be able to structure transactions in more tax-efficient ways.

Beyond tax reform, the future of cross-border trade between Canada and the U.S. is also uncertain, as President Trump has steadfastly promised to renegotiate the *North American Free Trade Agreement* (NAFTA). Canada and the U.S. are the world's largest trading partners, with bilateral trade between the countries exceeding Cdn$2.4bn per day.[71] With an immensely high level of economic integration, sudden changes in the trading relationship between the two countries are likely to have an impact on NAFTA trade, including in the agribusiness and forestry sectors.

Nevertheless, as a new era of American politics has only just begun, it remains to be seen whether or not these changes and their effects on Canadian M&A will materialise. Eyes will be on the Canadian federal government, the provincial governments, and the Prime Minister to see how they engage with and respond to developments in the U.S. to ensure Canada's continued competitiveness.

In all, given the positive outlook of market players, recovering strength of the Canadian energy sector and beneficial policy developments in Canada, M&A activity seems poised to flourish in 2017.

* * *

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Cayman Islands

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Overview

The Cayman Islands' global appeal means it services clients from all corners of the globe, thereby offering a hedge against the full brunt of economic fluctuations which ordinarily affect a single jurisdiction. Whilst M&A activity has decreased throughout 2016 on a worldwide basis by 22%,[1] Cayman Islands M&A activity remained steady.

During 2015 and the first six months of 2016, 15,842[2] exempted companies and 4,971[3] exempted limited partnerships were incorporated or formed (as relevant). The continued use and attraction of Cayman Islands entities is not surprising, as the nature of capital has changed dramatically in the last few years, with investments increasingly being made on an international scale. Investors are at ease moving their capital from one jurisdiction to another to achieve the highest returns. The more international capital becomes, the more likely Cayman Islands entities are used to facilitate the investment of such capital due to the tax neutrality afforded, and the sophisticated and stable nature of the jurisdiction.

The Cayman Islands has historically been, and continues to be, successful in attracting funds (both hedge funds and private equity funds) as well as structured finance issuers. Over time, the Cayman Islands has become recognised as a jurisdiction that is central to M&A transactions, particularly cross-border M&A transactions in downstream private equity transactions.

As noted above, with global M&A decreasing in 2016 as compared to 2015, the need for strategic global structuring solutions has increased. Given that Cayman Islands exempted limited partnerships are the vehicle of choice for offshore private equity funds, the private equity sector has embraced the use of Cayman Islands vehicles as holding companies, joint venture vehicles and listing vehicles for M&A deals. In light of the increase in private equity-backed M&A, the Cayman Islands has benefited from a number of deals involving Cayman Islands vehicles. Furthermore, the recent introduction in July 2016 of a Cayman Islands Limited Liability Company, or "LLC", should further supplement the attractiveness of the jurisdiction for clients familiar with the benefits of such vehicles in onshore jurisdictions such as Delaware.

Despite the volatility and uncertainty in the global equity markets, a key factor in the increase in private equity-backed M&A deals is the relative resiliency of the debt markets. According to Thomson Reuters, global syndicated lending for the first nine months 2016 reached US$2.9trn.[4] Loans in the Americas accounted for 57% of global loan volume during the first nine months 2016. With greater access to loans particularly in the US, private equity funds have the capital available to complete their buyout transactions, thereby increasing the number of private equity-backed M&A deals. Not only is the Cayman Islands

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a jurisdiction favoured by private equity houses, it is a jurisdiction that is recognised to be creditor-friendly and therefore favoured by leverage providers. Accordingly, the use of Cayman Islands vehicles is expected to increase, with such buoyant private equity-backed M&A activity and the associated leveraged loans to fund such activity.

Reasons why the Cayman Islands are a preferred jurisdiction to facilitate M&A activity

The Cayman Islands is the destination of choice for the offshore structures which run parallel to onshore private equity structures. This is in large part due to the fact that it delivers the ability to raise capital efficiently, in a tax-neutral environment. It is common for a Cayman Islands entity to be used in international M&A transactions, whether it is to act as a holding vehicle for a bidco in an acquisition context, to act as a joint venture vehicle, or to act as the issuer to be listed on stock exchanges. The reasons for doing so are varied and can include any of the following:

- *Simplicity and speed of incorporation* – incorporation can usually be completed within 24 hours (using an express service) following completion of relevant know-your-client ("KYC") and anti-money-laundering ("AML") requirements.
- *Major international financial and banking centre* – the Cayman Islands is a major international financial and banking centre and has many leading international banks, trust companies, accounting firms, law firms and other such service providers.
- *Well established legal system and flexible corporate governance* – the Cayman Islands are administered as a British Overseas Territory, but have a significant degree of internal self-government. The Cayman Islands have a combined common law and statute-based legal system. English common law is of persuasive authority and the courts of the Cayman Islands are of good repute. Corporate governance is based on such common law and statute-based legal systems, with the flexibility to take into account the different needs of the parties, whether it is for a listing vehicle, bidco or joint venture vehicle.
- *No direct or indirect taxation* – exempted companies and LLCs are free from any form of income tax, capital gains tax or corporation tax, and no withholding tax is imposed by the Cayman Islands on any cash flows. Exempted companies are eligible to apply for an undertaking from the Cayman government to the effect that they will remain tax-free for a period of 20 years (which can be extended to 30 years for exempted companies, or to 50 years for LLCs, where the term of the transaction requires this) in the event of any legislative changes relating to taxation matters.
- *No exchange controls* – the Cayman Islands has no exchange control or currency regulations.
- *Corporate documents not publicly available* – the constitutional documents, the identity of the shareholders and directors of an exempted company are not available to the public and, additionally, the identities of the shareholders are not known by any governmental authority in the Cayman Islands (except in the case of certain regulated entities).
- *Compliance* – there are stringent compliance and KYC procedures in place to target money laundering.
- *Ability to merge or consolidate with a non-Cayman Islands company* – the Cayman Islands Companies Law permits an exempted company or LLC to merge or consolidate with Cayman Islands and/or overseas companies. See below for greater detail on the statutory merger regime.

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- *Reporting* – annual reporting requirements are minimal and consist only of a statement, signed by the company secretary or a director, that the company has conducted its operations mainly outside the Cayman Islands and has complied with the provisions of the Companies Law.
- *Directors* – there are no requirements that directors of an exempted company or managers of an LLC be resident in the Cayman Islands.
- *Regulatory regime* – the Cayman Islands has a flexible regulatory regime in order to stay at the forefront of offshore financial centres and to encourage further investment through the Cayman Islands. An example of this is the introduction of the new Cayman Islands LLC (see below).
- *Time zone and geographical proximity* – the Cayman Islands is favoured as an offshore jurisdiction by the US, given its location in the same time zone and its geographical proximity.

Deals and highlights

Take-private transactions

"Take-private" deals are being driven by private equity and/or management of listed companies in the belief that they can increase the value of the company once it is de-listed and no longer subject to the increased reporting and regulatory costs associated with a listing.

In some cases, management has teamed up with private equity houses to effect the buyout of the relevant company, which raises issues of director duties and conflicts of interest. In such cases, where the target is a Cayman Islands company, Walkers has been involved in advising on such matters, whether it is from the perspective of the acquirer, the target, or the special committee of non-conflicted directors that may be formed to consider the buyout proposal.

The duties that govern the actions of the directors of a target company are not codified in the Cayman Islands, and so are set out in the common law as it has been developed, in the Commonwealth courts in particular. The abiding general principle is that the directors of a Cayman company owe their duties to the company and not to its shareholders. It is likely in a management buyout scenario that the Cayman courts will focus carefully on the following areas when considering the discharge by the company's directors of their fiduciary duties: (i) directors are not precluded by Cayman law from voting on, or prosecuting, a transaction in which they have a personal interest provided that the nature of that interest is disclosed, and any company information held by the directors in that capacity and which is material to the consideration and approval of the proposed transaction by shareholders is disclosed to them; and (ii) it will be important that any valuation of the company forming the basis of any offer to shareholders under the proposed transaction is supportable by reference to independent, informed third party advice.

The following are some high-profile take-private transactions involving Cayman Islands companies:

- Bohai Leasing and its take-private acquisition of NYSE-listed Avolon Holdings.
- Morgan Stanley and Credit Suisse in connection with the leveraged buyout of Goodpack Ltd by IBC Capital Ltd., the largest ever buyout of a Singapore-listed company by a private equity fund.
- Consortium led by Blackstone, in its US$625m privatisation of Pactera Technology International Limited.

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- Acquity Group Limited, in connection with the US$316m take-private acquisition of NYSE-listed e-commerce and digital marketing company Acquity Group Limited by consulting firm Accenture PLC.
- China Fire & Security Group, Inc., in its US$265.5m take-private acquisition of NASDAQ-listed China Fire & Security Group, Inc. China Fire & Security Group, Inc. is a leading total solution provider of industrial fire protection systems in China.
- Giant Interactive, in connection with the takeover of NYSE-listed Chinese online game developer Giant Interactive, with a total value of approximately US$2.9bn.
- International Mining Machinery Holdings Limited, in connection with the going private acquisition by Joy Global Asia Limited, a wholly owned subsidiary of Joy Global Inc.

Strategic corporate acquisitions

Strategic corporate acquisitions are also on the rise, in light of the buoyant state of the global economy:

- Uber China and its 2016 merger with Didi Chuxing.
- Petroamerica Oil Corp. and the acquisition of all of its issued and outstanding shares by Gran Tierra Energy Inc.
- Funds managed by Blackstone in respect of the sale of Center Parcs, a UK-based holiday village company, to a fund managed by Brookfield Property Partners.
- Home Loan Servicing Solutions on its US$1.2bn acquisition by New Residential Investment.
- Valeant Pharmaceuticals International, Inc. and its acquisition of Mercury (Cayman) Holdings, the holding company of Amoun Pharmaceutical, for approximately US$800m.
- Atlantica Hotels International Ltd., the holding company for Atlantica Hotels International (Brasil) Ltd, the largest privately held hospitality company in South America, in its sale to Quantum Strategic Partners Ltd (an affiliate of Soros).
- The Carlyle Group and Warburg Pincus, a global private equity firm, and the acquisition of DBRS, the fourth-largest global credit rating agency.
- Tiger Media, Inc., a Shanghai-based multi-platform media company, in its acquisition of The Best One, Inc., parent company of US-based data solutions provider Interactive Data, LLC.
- Baring Private Equity Asia in connection with its acquisition of Vistra Group, a global provider of trust, fiduciary and fund administration services.
- Accenture/Acquity, in connection with the US$316m take-private acquisition of NYSE-listed e-commerce and digital marking company Acquity Group Limited by consulting firm Accenture PLC.
- Alibaba Group, in its US$586m acquisition of an 18% stake in China's largest internet portal and media website Sina Corp's microblogging service, Weibo.
- Baidu, in connection with its US$306m acquisition of Qunar, one of China's oldest and biggest online travel agents.
- Lombard International Assurance, and the acquisition of the Luxembourg-based wealth management business of Lombard International Assurance and Switzerland-based Insurance Development Holdings AG from Guernsey-based Friends Life Group Limited.
- Formation Capital, LLC, and the $763m acquisition of NHP Group, a property company which held 275 properties located throughout the UK.

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M&A activity in the domestic market of the Cayman Islands

Cayman Islands entities are commonly used in offshore international M&A transactions, and the focus of the Cayman Islands tends to be on activities offshore rather than onshore in the Cayman Islands. However, within the domestic market of the Cayman Islands itself, M&A activity has been on the rise with the consolidation of the financial services industry, such industry being one of the main pillars of the economy of the Cayman Islands. Recent notable transactions include the acquisition by Mitsubishi UFJ Financial Group of UBS' Alternative Fund Services business in the Cayman Islands, and Intertrust's acquisition of Elian Group's fiduciary business.

Merger regime as a means of acquisition

One area of particular growth involving Cayman Islands companies has been the utilisation of the Cayman merger statute as a preferred method for acquisitions. In the M&A arena, it is the merger and consolidation provisions of the Cayman Islands Companies Law (based on the statutory merger regime of Delaware) which have been used as the acquisition method of choice in a plethora of transactions upon which Walkers has advised. It is surprising to note that, prior to 2009, the Cayman Islands did not have a statutory merger regime. When first introduced, it was perhaps not envisaged that it would be used as an alternative to a scheme of arrangement or tender offer as a means of effecting a takeover.

Limited Liability Company – a new Cayman Islands vehicle

In light of the popularity of the use of the Delaware limited liability company, the government of the Cayman Islands has introduced a new Cayman Islands vehicle similar to such entity, also called a Limited Liability Company (the "**LLC**"). The LLC Law is based on the Delaware LLC Law and became operational in mid-July 2016.

An LLC is similar to a Delaware LLC. It is a body corporate with separate legal personality and requires at least one member. The liability of a member to make contributions to the LLC are limited to such amount set out in the LLC Agreement (unless otherwise agreed by the member). Registration of the LLC may be effected by the payment of a fee and filing of a certificate of formation with the Registrar of Limited Liability Companies in the Cayman Islands (the "**Registrar**"). The LLC Agreement is not required to be filed with the Registrar.

There is a focus on giving the members the flexibility to agree the governance of the LLC. Members are free to agree the internal workings of the LLC amongst themselves via the LLC Agreement. This allows the members to agree mechanisms such as capital accounts and capital commitments, allocations of profits and losses, allocations of distributions, voting methods (including negative consents) and classes of interests. The management of the LLC shall vest in its members acting by a majority in number unless the LLC Agreement provides for the management of the LLC by one or more managers, in which case, the management of the LLC shall vest in the managers. The LLC Agreement may provide for classes of managers having such rights, powers and duties for the relevant class as specified therein.

The LLC addresses the needs of clients who wish to have a body corporate that has the characteristics of a partnership in terms of capital accounts and capital commitments. The LLC is seen as a hybrid between an exempted Cayman Islands company and a Cayman Islands exempted limited partnership. As a Cayman Islands exempted limited partnership does not have separate legal personality, an LLC fills such gap, as it has separate legal personality but also has the partnership concepts of capital accounts and capital commitments.

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A Cayman Islands company has certain restrictions on return of capital and is required to maintain its capital, so distributions made by a Cayman company are not as flexible as those of a partnership. Accordingly, an LLC also fills such gap where a client may be looking for a corporate entity but want flexibility in its distributions. Since their introduction, LLCs have been formed mainly to act as general partners of Partnerships, holdings companies and joint venture vehicles.

Industry sector focus

Private equity

We have continued to act on numerous downstream private equity fund transactions from a variety of industry sectors. These deals are being closed where the opportunities arise on a case-by-case basis without any particular trend towards an industry sector (outside of energy and power, and the intellectual property and information technology sectors as described above).

Telecommunications, intellectual property and information technology

The boom in Silicon Valley has resulted in a very busy M&A world in telecommunications, IP and IT. Companies that specialise in software solutions, cloud-based services, information technology services and social media are becoming attractive targets as they start establishing their revenue streams. Private equity houses are on the lookout for value opportunities, whilst management are focusing on extracting value from their companies.

Energy and power

Despite the declines in commodity prices in recent years, the energy and power sector remains active. Certain companies look to acquire undervalued assets and establish cost efficiencies through consolidation during volatile times, while other producers in need of cash to service debt may seek to divest of certain non-core assets. Although valuations may have decreased for many energy companies, their assets can still be objectively valued, in a world where valuation concerns and jitters abound.

Due to its capital-intensive nature, many companies have looked to refinance existing debt obligations. Technology providers who service the energy and power sector have found themselves an object of desire as the search for cost-effective production techniques and downstream efficiencies continues.

Real estate

Generally, real estate M&A transactions require the use of onshore vehicles, therefore Cayman Islands vehicles are not generally used as holding companies for real estate. Having said this, given that many real estate funds are Cayman Islands exempted limited partnerships, it is common for a Cayman Islands partnership to grant guarantees or sponsor support in M&A transactions in which its real estate holding subsidiaries are involved.

Infrastructure and projects

We have been involved in a number of large infrastructure projects; however it is difficult to discern any upward trend. These projects have a long shelf life, and many have not yet progressed to finalisation.

The year ahead

It's currently difficult to predict the trends for 2017 for the North America market, although we expect there may be a short lull in the intensity of M&A activity as the macro-economic policies of the new U.S. administration become clearer. Whatever direction is taken, we

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anticipate a need for Cayman Islands entities to structure investments either in or from the United States. The Asian markets are predicted to remain strong and we expect the growth of Cayman Islands entities in that region to continue.

We expect that global volatility in the equity and debt markets, as well as the low oil price environment, will result in a continued appetite for private market opportunities and deal flow globally.

* * *

Endnotes

1. As reported in *Mergers & Acquisitions Review*, Financial Advisors, First Nine Months 2016, Thomson Reuters.
2. Cayman Islands Register of Companies.
3. Cayman Islands Register of Partnerships.
4. As reported in *Global Syndicated Loans Review*, Managing Underwriters, First Nine Months 2015, Page 1, Thomson Reuters.

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China

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Overview

The M&A market in 2016 tended to be more stable than that of the booming year 2015 due to the reform of state-owned enterprises, integration of giant companies, and stricter supervision from the government. Based on researches carried out by CV Source, as of December 31st, 2016, there were altogether 8,380 M&A transactions announced, among which, 4,010 transactions were duly completed in China, though this was down 23.41% from last year. 6,642 deals in total were disclosed and a total consideration amount of US$ 540.62bn achieved, respectively at a decreasing rate of 31.19% and 31.52%.

According to the data shown and reported, the absolute number of transactions, the absolute transaction size and the average amount all decreased compared to those of 2015, which demonstrated a steep decline of the Chinese financial market.

In relation to M&A, the new and significant rules and regulations are as follows:

- On September 20th, 2016, the China Banking Regulatory Commission ("**CBRC**") printed and distributed *the State Council's Opinions on Promoting the Sustained and Healthy Development of Investment* ("**the Opinions**"); on the basis of the *Guidelines on the Risk Management of M&A Loans of Commercial Banks* issued in 2015, the Opinions further encouraged banks and other financing institutions to conduct loan business for M&A, therefore promoting the financial service of M&A offered by venture companies through strengthening risk-pricing and controlling capabilities. Industry players considered the Opinions to be a sign to further liberate M&A deals in the market so that they might be more competitive, in an attempt to encourage M&A activities.
- On September 9th, 2016, the China Securities Regulatory Commission ("**CSRC**") modified and re-issued *the Management Measures for Material Assets Reorganization of Listed Companies*. This new regulation aimed at controlling the relevant mechanism of financing and back door listing, meanwhile improving the quality of listed companies by M&A. These modifications included: (i) changing the clause, "since the date of the change of controlling power (indefinite duration)", into "within 60 days after the change of controlling power"; (ii) the actual controller who can transfer shares should be the controller who has held shares for more than three years; and (iii) back door listing companies cannot raise supporting funds, whereas non-back door listing reorganisation can still do so.
- By December 23rd, 2016, the China Securities Regulatory Commission ("**CSRC**") had reviewed 270 M&A deals of listed companies. Among those deals, 23 were voted down, causing the veto rate to increase by 6% from 2015. All these failed deals released

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the signal that the disclosure of validity of M&A funds had become important, and the operation of capital should be subject to the update of the industry, so that speculative M&A would be banned.

Significant deals and highlights

China Yangtze Power Co. acquired 100% of Three Gorges Jinsha River Chuanyun Hydropower Development Co.

Among the closed M&A deals in 2016, China Yangtze Power's buyout of Chuanyun Hydropower was the largest in size as it contained a total amount of consideration of RMB 79.735bn. In order to acquire a 100% stake of Three Gorges Jinsha River Chuanyun Hydropower Development Corporation, on November 6th, 2015, China Yangtze Power Co. (600900.SH) proposed to issue: 1.74 billion stocks (at a price of RMB 12.08 per share), plus RMB 34.774bn in cash to China Three Gorges Corporation; 0.88 billion stocks plus RMB 1.325bn in cash to Sichuan Energy Investment Corporation; and 0.88 billion stocks plus RMB 1.325bn in cash to Yunnan Energy Investment Corporation. On April 1st, 2016, the transaction was accomplished. This deal enabled the business scale of Yangtze Power to be expanded and ensured that its leading position in the industry was consolidated. Besides, Yangtze Power achieved control of four cascade hydropower stations under a unified management system, which boosted the whole power generating capacity and realised the sustainable development.

Oneness Group merged with Alibaba Group, becoming its wholly owned subsidiary

On November 6th, 2015 Chinese video giant company Oneness Group announced its merger plan with Alibaba Group. On April 6th, 2016 Oneness Group became a wholly-owned subsidiary of Alibaba Group. According to the merger agreement, this privatisation transaction should be completed at a price of US$ 27.6 per ADS (American Depository Share). The total amount of transaction consideration is US$ 4.77bn. This deal marked an important note that Oneness was officially delisted from the stock market and completed its privatisation, bringing more opportunities for its businesses to grow and develop.

Perfect World Co.: backdoor listing via Perfect World Pictures Co.

On January 6th, 2016, Perfect World Pictures announced its restructuring plan of the buyout of Perfect World Corporation with a total consideration amount of RMB 12bn. Upon closing of the deal, Perfect World Co. achieved the back door listing in the A-share market. Before this transaction, Perfect World Co. was listed in NASDAQ but its stock price was substantially undervalued, as its value was much lower than that of other video game companies listed in the A-share market. This buyout deal made Perfect World return to the A-share market, further consolidating the company's leading position in the industry. Also, cooperation between the online video game industry and motion picture & television industry would highly promote the position of listed companies in the relevant industries.

Giant Interactive Group. Inc.: backdoor listing via Century Cruises

On October 9th, 2015, Century Cruises made an announcement that it had signed *The Framework Agreement of Material Assets Reorganization* with Giant Interactive Group and its actual controller Shi Yuzhu, proposing to buy out Giant Interactive Group through private placement. According to the reorganisation scheme, Century Cruises would issue 0.443 billion shares to Giant Interactive Group at the price of RMB 29.58 per share. On May 30th, 2016, the transaction was finally completed. 100% of Giant Interactive Group's equity was transferred to Century Cruises with a total estimated value of RMB 13.1bn,

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meaning that the buyout deal had enabled Giant Interactive Group to return to the A-share market. Giant Interactive Group was once the biggest Chinese private enterprise listed on NASDAQ. However, since the Chinese video game industry languished in the American capital market, Giant Interactive Group finally chose to delist itself from NASDAQ and to achieve privatisation on July 21st, 2014. Such a backdoor listing deal would probably make the stock value of the company substantially rise again in the market and further consolidate the company's leading position in the internet industry.

Key developments

On January 16th, 2016, the president of the China Securities Regulatory Commission, Xiao Gang, issued an article, *the Talk about Promoting the Reform of Regulations and Risk Control to Boost the Stable and Healthy Development of the Capital Market* (the **"Talk"**). One of the purposes of the Talk was to achieve the reform of state-owned enterprises through M&A. To perfect the mechanism of M&A in capital market, it became more important to erase the barriers to cross-industry, cross-region and cross-ownership.

Throughout 2016, M&A became the most important method of reforming state-owned enterprises in the domestic market of China. Through M&As, the allocation of resources from state-owned enterprises became more effective and efficient, because M&As ensured state-owned enterprises with similar modes in similar business sectors merged into "one" giant enterprise in that industry. Such a process aimed at solving the problems of excess capacity and improving the efficiency of resources allocation. In the global market, outbound M&As were becoming the most important method of industry update for Chinese domestic enterprises. The year of 2016 was an "accelerating" year of outbound M&As for Chinese enterprises. Increasingly more Chinese enterprises entered the global market by acquiring overseas companies. Chinese domestic companies can have access to advanced foreign technology for updating the industrial structure via these outbound M&As. In the next five years, SOEs' reorganisation, transformation and asset conformity will unquestionably become the main driving force as far as mega M&As are concerned.

Industry sector focus

In 2016, the merger market in China involved predominantly 23 industries, including IT, the Internet, Biotechnology/Medical-Health, Financing, Manufacturing and other industries.

Regarding the number of merger cases, after recent years of explosive growth, emerging industries including the Internet, IT and Medical-Health industries, were ranked at the top. The Internet and IT industries recorded respectively 529 M&A cases and 515 M&A cases in 2016, accounting for 14.20% and 13.83% of the entire market for the year. The third industry in M&A was Manufacturing, which accounted for 13.07%. Relying on profitability, huge market demands as well as potential of the industry, Biotechnology and Medical-Health also became a heat counter in the China capital market. As for the traditional industries, however, the development rate of real estate and construction were shown to be relatively slow.

In terms of transaction amounts in 2016, the top three industries went to the Financing, Energy and Manufacturing industries, respectively with US$ 39.117bn, US$ 25.649bn and US$ 18.080bn. Especially China Yangtze Power Co.'s M&A case, with a transaction amount of RMB 79.735bn, became the largest closed M&A deal in scale, thus increasing M&A transaction amounts in the Financing industry and bringing it to the second place.

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The year ahead

M&A expectations in 2017: China Securities Regulatory Commission will further supervise M&As of listed companies

Facing the over-financing problems that occurred in 2016, the China Securities Regulatory Commission will carry out several mechanisms to inhibit excessive financing and adjust financial structures in 2017. Specifically, CSRC will perfect the on-site inspection system for the financing funds of listed companies, urge sponsor institutions to double-check the refinancing project of listed companies, and solve the imbalance between private placement and other financing means. Learning from the failed M&A deals released in 2016, disclosing the validity of M&A funds will become more important, and operating capital will be under much stricter supervision, so speculative M&As will be banned in the future. Meanwhile, with the registration system of company listing coming into force, the number of backdoor listing companies will decrease gradually.

M&A will play an important role in state-owned enterprises' reorganisation, transformation and integration

Excess capacity and vicious competition have occurred in many industries throughout the past few years. Many companies were not able to survive due to dispersed competition among manufacturing, steel and energy industries. Therefore, in the year 2017, large-scale M&A activities will play an important role in SOEs' reorganisation. Through M&A, there will be more mixed-ownership companies in the capital market, reallocating the resources of SOEs and making them more competitive, and thereby giving full play to the vitality and influence of SOEs. There may be three types of M&As involved in SOEs' reorganisation: one in industries with severe overcapacity to increase industrial concentration; one in overlapping investment industries; and one in upstream and downstream enterprises.

More M&A deals will take place in some emerging and technological industries

In 2017, more and more M&A deals are expected to take place in some industries apart from the traditional ones. Emerging and tech-related industries like energy conservation, environmental protection and the internet, which enjoy a high degree of marketisation and a great potential for development, will be the core markets for M&A deals to boom and flourish. Meanwhile, the technological industries in turn may also activate the development of manufacturing and engineering industries. For reference, *the program of Made in China 2025* ("**the Program**") was published in May 2015. The Program explicitly pointed out that new products of industrial robots and special purpose robots shall be actively developed in the area of machinery, electronics, automobiles, the national defence industry, chemical engineering and light industry; service robots will also be developed in the area of health care, family service, education and recreation. With support, many A-share listed companies are taking the development of robots into planning, and accelerating the industry shakeout through M&A.

PE+Listed companies prevailing

In the future, buyout funds which are jointly established by PE and listed companies in the limited partnership will lead the industrial integration of listed companies and promote the established layout by carrying out investment, M&A, and integration.

* * *

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France

Coralie Oger
FTPA

Overview

While 2015 was a record year for mergers and acquisitions in France, 2016 slowed down and results were postponed for the first three quarters of the year. Major deals, involving French companies, failed in 2016. In the telecoms sector, Altice failed to acquire SFR while in pharmaceuticals, Sanofi was surpassed by Pfizer in the acquisition of Medivation (these deals alone represented a total value of €15bn).

According to Thomson Reuters, worldwide M&A activity totalled $2.4trn during the first nine months of 2016, representing a 22% decrease from comparable 2015 levels and the slowest period for worldwide deal making in the last three years.

Sixty-five deals with a value greater than $5bn were announced during the period. Their combined value went down by 40% compared to 2015 levels.

Overall, 32,551 worldwide deals were announced during the first nine months of 2016 (a 3% decrease compared to last year).

However, in October 2016, US companies were very active, making it the busiest month ever for domestic M&A.

In 2016, M&A activity decreased in France by 9%. The volume of deals with French involvement amounted to $155.7bn (€148.5bn), whereas in 2015, the volume of transactions amounted to $171.7bn.

French companies have been on the offensive, since acquisitions made by French companies abroad amounted to $40.8bn (€36.28bn), whereas inbound M&A deals involving a French target and a foreign acquirer decreased by 18%.

The French leveraged buy-out (LBO) market increased by 6% during the first semester of 2016, with 123 transactions. The biggest LBO was specialty chemicals maker ATOTECH which was acquired by the Carlyle Group from TOTAL for an amount of €2.876bn.

Only two large cap (over €1bn) LBO transactions were recorded in 2016, which is lower than the previous year (four large cap LBO transactions over €1bn).

We anticipate that the market should be more active. Nevertheless, some factors may have an impact on M&A trends for 2017, in particular the concern around Brexit, the decisions to be taken by the new President of the United States, and the elections in France and Germany. In this context, it is difficult to imagine that M&A activity in 2017 will surpass the financial year 2015 which was a record year for mergers and acquisitions.

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Significant deals and highlights

Acquisition of 25% of Crédit Agricole SA stake by SACAM Mutualisation

On February 17th, 2016, SACAM Mutalisation, comprised of 39 regional banks, planned the repurchase of 25% of Crédit Agricole SA's stake for €18bn ($20.06bn). It remains the largest French involvement deal announced for 2016.

The operation was completed on August 3rd, 2016.

SACAM Mutualisation financed the operation through a capital increase subscribed by the Regional bank, which in turn was financed by a loan of €11bn granted by Crédit Agricole SA.

Acquisition of RTE (100% affiliate of EDF) by Caisse des Dépôts et Consignations and CNP Assurances

EDF, the owner of all shares of Réseau de Transport d'Electricité, signed a binding agreement on December 14th, 2016, with Caisse des Dépôts (CDC) and CNP Assurances for the sale of 49.9% of RTE's capital, i.e. 29.9% for CDC and 20% for CNP Assurances, at a price of €8.2bn (higher than the first public investor's proposal, resulting in a valuation of €7bn).

The closing of the transaction will be announced in the coming weeks after the approval of the anti-trust authorities.

Acquisition of Areva NP by EDF

On November 15th, 2015, energy giants EDF and Areva agreed to create a company called NEW NP (a wholly-owned subsidiary of Areva NP) to gather all the assets of the transferred business, with the exception of the EPR contracts in Finland, together with several contracts relating to the Le Creusot factory where forgings and castings are made for the energy market. These two sets of contracts remain within the scope of Areva NP.

The sale of NEW NP falls within a more global plan of "refunding the French nuclear industry", according to the Minister of Economy and Finance. The nuclear group wants to refocus on fuel cycle services.

This will result in a recapitalisation of a total amount of €5bn, for which the consent of the European Commission is expected. The closing of this transaction will occur during the second semester of 2017.

Transfer of Safran Identity & Security by Safran

Safran announced on September 30th, 2016 the sale of Safran Identity & Security to Advent International for €2.425bn. Advent has expressed its intention to merge it afterwards with Oberthur technologies (whose capital is mainly detained by Advent).

For Safran, this transaction is part of a more global strategy to refocus its businesses exclusively on the aeronautics and defence sectors. This strategy is evidenced by the sale of its US subsidiary Morpho Detection Inc., specialised in the detection of dangerous products, to the British group Smiths for $710m (€632m).

The closing of the transaction is expected in the course of 2017, after obtaining the authorisation of the employee representative bodies, together with the anti-trust and regulatory authorities in Europe and the United States.

Acquisition of Foncière de Paris by Eurosic

Following the clearance from the *Autorité des Marchés Financiers* (AMF) on April 26th, 2016, real estate investment group Eurosic launched a public exchange offer for the Foncière de Paris shares.

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Two competitive offers were launched by Eurosic and Gecina.

At the end of the offer period, 1.4 million of Foncière de Paris shares were contributed to Gecina's offer (approximately 14% of the capital), knowing that the offer was conditional on the acquisition of more than 50% of the share capital and voting rights of Foncière de Paris.

Eurosic reached this threshold with an offer for 5.2 million shares representing 50.1% of the share capital of Foncière de Paris, and 0.5 million of those belonging to OSRA FDP. Eurosic will therefore increase its stake from 26.64% to 76.70% of the share capital of Foncière de Paris.

On July 29th, 2016, Gecina requested that the AMF withdraw its conformity decision for fraud. On August 10th, 2016, the AMF dismissed the request.

Therefore, Gecina brought the matter to the Court of Appeal of Paris on January 12th, 2017, which denied the request regarding the withdrawal of the AMF conformity decision against the operation.

Key developments

New regulation: "Loi Sapin 2"

A law dated December 9th, 2016 n°2016-1691 on transparency, the fight against corruption and the modernisation of economic life, known as Sapin 2, was published in the French *Journal Officiel*.

- *Key provisions of the Law relating to anti-corruption measures*

  Creation of the *Agence Française Anticorruption*

  The Law known as Sapin 2 created the "*Agence Française Anticorruption*", a national agency charged with detecting and preventing corruption in both the public and private sectors.

  The *Agence Française Anticorruption* has the following broad duties:

  - The first duty consists in administrative coordination, centralisation and dissemination of information in order to prevent and detect corrupt acts.
  - The second duty is to publish recommendations to help French public agencies and administration detect corrupt acts and to oversee the quality and efficiency of the related procedures adopted by such public agencies and administration.
  - The third duty is to provide advice to private entities, publish anti-corruption guidelines and follow the implementation of internal compliance programmes.

  Agence Française Anticorruption shall also have investigation and enforcement powers.

  Implementation of anti-corruption policies

  Under this new Law known as Sapin 2, chief executive officers and managers of any company (i) having its registered office in France and having more than 500 employees or belonging to a group with more than 500 employees and whose parent company has its registered office located in France, and (ii) having more than €100m in revenue (on a stand-alone entity or consolidated group basis) are required to implement internal anti-corruption policies. The implementation of internal anti-corruption policies may apply to (i) French companies that are subsidiaries of foreign groups, and (ii) foreign subsidiaries of, and companies controlled by, French parent companies. Subsidiaries

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and affiliates of an entity subject to the implementation of internal anti-corruption policies will be considered in compliance with this new Law if the parent company implements the necessary anti-corruption measures and applies them on a consolidated basis.

This new Law requires the preparation and the implementation, before June 1st, 2017, of:

(i) an internal code of conduct defining and showing prohibited conducts with respect to corruption or influence peddling. That code must be integrated within the company's internal rules (*réglement intérieur*) (or equivalent) and, thus, may be subject to an obligation to consult the company's employee representatives ("*représentants du personnel*");

(ii) an internal whistleblowing procedure;

(iii) a risk-mapping, which should be periodically updated, in order to identify, analyse and evaluate the company's risk of exposure to external solicitation for corruption;

(iv) a process for assessing the risk-mapping for clients, suppliers and intermediaries;

(v) an internal or external accounting control designed to ensure the accuracy of the company's accounting data and to prevent or detect any corruption or influence-peddling facts in the company's accounting data;

(vi) training programmes for managers and staff in this matter; and

(vii) an internal disciplinary regime for employees who violate the company's internal code of conduct.

In case of failure to implement these requirements, the *Agence Française Anticorruption* may: (i) order the company or its representatives to modify their internal compliance procedures within a period of three years maximum; and (ii) order an administrative fine of a maximum amount of €200,000 for individuals and €1m for legal entities. In addition, the new Law provides that, in certain circumstances, legal entities may be subject to criminal sanctions, to be imposed by criminal courts and consisting of an order to implement, under the supervision of the *Agence Française Anticorruption*, anti-corruption policies as described above.

It shall also be noted that this new Law that seeks to combat corruption and influence-peddling involving government officials by (i) a French citizen, (ii) a French resident, or (iii) a person carrying out all or part of its economic activity in France, will be subject to French criminal law and sanctions even if the acts are committed outside of France.

- *Whistleblower protection*

Whistleblowers are defined under the law as "*any individual who reveals or reports, disinterestedly and in good faith, a crime or an offender; a serious and obvious breach of an international commitment duly ratified or approved by France, of an unilateral act of an international organization issued on the basis of such commitment, or of a law or regulation; or a serious threat or harm to the public interest, of which he/she has had personal knowledge*". Such whistleblowers are granted additional protections under this new Law, known as Sapin 2. The whistleblower may be entitled to benefit from criminal immunity in certain circumstances. In addition, specific protection is granted against any discriminatory measures of the employers in the workplace. In order to make the protection efficient, sanctions are provided against those who wish to punish the whistleblower.

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- *Key provisions of the Law relating to transparency*

  Strengthening of the repression of market abuse

  The dissemination of false information on the market may be sanctioned by the AMF when the release is made in connection with a public offering of financial securities.

  The Law known as Sapin 2 now allows the AMF to also sanction a person who has committed such breach, or "any other breach" that adversely affects the protection of investors, the proper functioning of the markets or any other breach of the duties relating to the fight against money laundering and the financing of terrorism, such as breach relating to the offer subject to participatory financing.

  In the event of a breach of certain information requirements, the AMF may make a public declaration specifying the identity of the person concerned and the nature of the breach.

  This possibility is extended to any market abuse referred in article L. 621-15, II of the French Monetary and Financial code.

  Criminal sanctions incurred in the case of market abuse are strengthened and may amount to 15% of the turnover on an annual basis, consolidated or unconsolidated, as the case may be. All breaches may be graduated depending on seriousness, financial capacity, and repeat violations.

  Adoption of a binding Say on Pay

  The Law known as Sapin 2 introduced a binding vote of shareholders related to the remuneration of executive directors.

  The new provisions only apply to companies whose securities are admitted to trading on a regulated market.

  These measures apply to the remuneration of the following officers: Chief Executive Officers; General Managing Directors; Deputy General Managing Directors of a *Société Anonyme* with a Board of Directors; Members of the Management Board or Sole Managing Director; and Members of the Supervisory Board of a *Société Anonyme* with a management board and a supervisory board.

  The Law known as Sapin 2 requires two votes of the shareholders on the remuneration of executive directors.

  - Pre-vote (*ex-ante*)

    According to the new Article L. 225-32-2 of the French Commercial code, a resolution must be submitted at least on an annual basis to the shareholders during the Annual Shareholders' General Meeting to approve the principles and criteria for determining and allocating the fixed, variable and exceptional components of the total compensation and any benefits granted to the Management for the execution of their duties.

    A report attached to the management report must present the draft resolutions drawn up by the board of directors or supervisory board. This report should detail the elements of remuneration and specify that the payment of variable and exceptional remuneration elements is subject to the approval of the shareholders.

    In case of refusal of approval of the resolution, the principles and the criteria previously approved shall continue to apply. If no criteria and principle have been approved or if no remuneration has been granted during the previous financial year, the remuneration shall be determined based on the existing practices applied within the company.

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- *A posteriori* vote (*ex-post*)

  Additionally, the Law known as Sapin 2 introduced an *ex-post* control procedure for shareholders. Such procedure will apply from the end of the financial year following the first financial year ending after December 9th, 2016 (new article L. 225-100 of the French Commercial code). If a company ends its financial year on December 31st, 2016, the *ex-post* control procedure shall be implemented for the first time during the Annual Shareholders' General Meeting to be held in 2018.

  By separate resolutions, the Annual Shareholders' General Meeting shall vote on the remuneration paid to the Management during the previous financial year. This vote is binding but takes place after the allocation of remuneration, with the exception of variable and exceptional elements of the remuneration (the payment of which is conditional on the approval of the Annual Shareholders' General Meeting).

  In the event of a negative vote, the fixed elements of the remuneration will remain in the hands of the Management, but the variable and exceptional elements of the remuneration shall not be paid to the Management.

Absorption of a company holding double voting rights

The Law known as Sapin 2 expressly provides that, in the event of a merger or spin-off, double voting rights in third companies granted to the absorbed or spin-off company are maintained for the benefit of the absorbing or beneficiary company.

Simplification of the content of reports published by listed companies

The government is authorised until December 9th, 2017 to make an order to simplify, reorganise and modernise all or part of the information provided by listed companies in the Chairman's report of the board of directors on governance, internal control and risk management.

The reform of contract law

The objectives of the reform of the French Civil code published on February 11th, 2016 are notably the simplification, modernisation and, ultimately, attractiveness of French contract law. The reform will come into force as from October 1st, 2016.

The reform of the French Civil code codifies in particular a number of principles that have been created by case law, with the aim to improve legal certainty.

- *The strengthened security of pre-contractual relationships*

  Good faith

  Under the former French Civil code, the duty to act in good faith was only required during the performance of the contract. The reform extended the duty to act in good faith during the negotiation and the conclusion of the contract (articles 1104 and 1112 of the new French Civil code).

  Some authors claim that this could lead to an increase in the number of disputes but as explained below, the reform codified principles that were applied before the French Courts.

  Consequently, a potential purchaser of a company can be found liable if it acts in bad faith during the negotiation process. For example, it enters into negotiation to get information on the other party.

  In this case, the potential purchaser shall be compelled to compensate the damage incurred by the other party, including the loss of opportunity to contract with another partner or the expenses incurred for negotiations.

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Nevertheless, it is expressly provided that the benefits expected from the conclusion of the contract cannot be compensated.

Duty to inform

Once again, the reform merely codified the French case law regarding the duty to inform. Indeed, the French Supreme Court (*Cour de cassation*) imposed upon the seller an obligation to inform the purchaser of any important information that may have an impact on the decision of the purchaser. In other words, the seller may be held liable for withholding any information he or she knows to be detrimental to the buyer.

Article 1112-1 of the French Civil code provides that the parties will not be entitled to limit or exclude this duty, and this duty does not apply to the estimation of the value of the contract ("*valeur de la prestation*").

Confidentiality

This duty was never formally upheld in the phase of negotiations by the French Civil code before the 2016 reform.

As from October 1st, 2016, even if the parties did not formally sign a confidential agreement, they must keep confidential all information transmitted during negotiations, under article 1112-2 of the French Civil code. However, a formal confidentiality agreement is always recommended in order to define the scope of duty of both parties.

The principle can also be applied to all documents communicated in a data room.

- *The enhanced flexibility of the performance of contracts*

  An important step was taken by the 2016 reform, by upholding the opportunity for the parties to reduce the agreed price in the contract in two situations:

  Hardship (*imprévision*)

  Before 2016, the theory of hardship (*imprévision*) has been rejected under French Civil Law and was only admitted in public law when an unforeseeable change of circumstances occurred after the signing of the contract, rendering its performance either impossible or excessively expensive for one of the parties.

  Article 1195 of the new French Civil code now provides a right to renegotiate the contract, where there is a change of circumstances unforeseen at the time of conclusion of the contract, which makes performance excessively onerous for a party, and provided such party has not accepted to bear the risk.

  If the other party refuses the renegotiations or the renegotiations fail, the parties might decide to terminate the contract or ask the court to adapt it. A sole party may also request the termination of the contract or ask a revision of the contract before the judge if the parties fail to reach agreement within a reasonable timeframe.

  The diminution of the price due to non-performance or partial performance

  According to article 1223 of the new French Civil code, when a party performs the contract partially or in a manner inconsistent with the requirements of the contract, the co-contractor can ask for a proportional diminution of the price or for reimbursement.

- *Specific performance*

  The non-defaulting party may, at its sole discretion, require the specific performance of a contract ("*exécution forcée*"), but subject to prior notice. The non-defaulting party will be entitled to either (i) require the defaulting party to perform the contract, as long as this is not impossible and there is no important disproportion between the

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cost of performance for the defaulting party and the interest for the non-defaulting party, or (ii) elect to perform the contract itself or have it performed by a third party. The defaulting party shall bear the costs in all the above-mentioned solutions.

- *Unilateral promises*

  The reform modified the current case law with respect to the unilateral promises and gives, as of October 1st, 2016, full effect to a unilateral promise to enter into a specified contract. Accordingly, the revocation of the offer during the period granted to the beneficiary for exercising its option will not change the situation and the other party will be entitled to enforce the contract.

- *Assignment of debt*

  One of the other contributions of the reform must be noted, because of its originality in French law: the assignment of debt. Under article 1327 of the new French Civil code, the assignment of debt is allowed, provided that the creditor agreed to the assignment and was notified of such assignment.

2017 Finance law

The 2017 Finance law n° 2016-1917 dated December 29th, 2016 modifies the tax regime for the free shares.

Indeed, article L. 225-197-1 of the French Commercial code allows the allocation of free shares to the company's employees and directors. For listed companies, the allocation is extended to the employees and directors of the parent company, the sister-company and subsidiary whereas for unlisted companies, only the employees of the company's subsidiaries can benefit from this allocation.

The Macron law dated August 6th, 2015, had already modified the tax regime of the acquisition gain made on those free shares by taxing them as capital gains, allowing the benefit from the rebate for the length of holding the shares, when they were previously taxed before Macron law dated August 6th, 2015 as salaries and wages.

The 2017 Finance law modified once more the tax regime of the free shares. The fraction of the acquisition gain exceeding €300,000 per year will be taxed as salaries and wages and the fraction of the acquisition gain inferior to €300,000 will be taxed as a capital gain.

Consequently, the taxation of the amount exceeding €300,000 is similar to the regime in effect prior to the Macron law.

The employer's contribution is increased from 20% to 30%. Provisions related to the exemption of the employer's contribution for small and medium size companies have not been modified.

These new regulations are applicable to the acquisition gain related to free shares allocated and authorised by a general meeting dated after December 30th, 2016. For general meetings that occurred between August 6th, 2015 and December 30th, 2016, the acquisition gain is uniformly taxed as a capital gain.

Industry sector focus

It is striking how the focus of M&A activities has transferred from industrials and materials, in 2015, to finance and real estate, in 2016.

Finance

With deals totalling $27.7bn and a market share of 17.8%, the financial sector was a huge contributor of the total amount of the M&A transactions in France for 2016. Observers

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have noted that this major sector has hugely contributed to the relatively good data for 2016.

The largest financial transaction was the repurchase of 25% of Crédit Agricole SA stake by SACAM. However, some observers can argue that this internal deal (the purchase was financed through an increase of share capital plus a loan of €11bn guaranteed by Crédit Agricole) distorts the 2016 data and does not reflect the reality of M&A operations. Without this major operation, the total value of M&A deals in 2016 would have been reduced by 21% compared to 2015.

Real estate

This was one of the key sectors for French M&A deals in 2016. While other sectors were very active in 2015 and went down in 2016 (amongst them the telecommunications sector), real estate deals increased gradually and recorded the third-biggest value in terms of M&A transactions. With a total value of €18.7bn, French M&A was dominated by the offer of Foncière de Paris by Eurosic representing, alone, a total amount of €2.6bn.

The emergence of M&A transactions in real estate is not specific to France. European operations in 2016 were also dominated by real estate and finance, representing respectively 18.7% and 12.7% of the M&A total deals in Europe.

Energy and power

The sector increased exponentially in 2016 and its total value was multiplied by four compared to 2015 with, however, a lower number of deals than the other dominant fields in 2016. This is mostly due to the strategy of reviving the French nuclear industry and to the acquisition of Areva by EDF.

Telecommunications

This sector must be highlighted since it suffered a major crisis in 2016, compared to 2015 (with respectively a total value of €2.7bn and €18.6bn). This downfall is mostly due to the aborted transaction between SFR and Altice which was denied by the AMF.

However, persistent rumours have circulated that French group Iliad was interested in acquiring the English operator O2, which could revive the sector in 2017.

The year ahead

With the adoption of Brexit and the election of President Trump in 2016, 2017 seems uncertain and observers wonder whether it can be a good year for making deals. Indeed, the political uncertainty and the lack of visibility regarding both markets encourage investors to act cautiously.

However, the French market seems not to follow this trend and the beginning of the year has been very reassuring, with the announcements of historic M&A deals, but it should slow down due to the elections.

Essilor and Luxottica have confirmed their merger on January 16th, 2017. This operation will create a world leader specialised in corrective lenses and spectacle frames, with a €15bn turnover amounting to 15% of the world market.

Simultaneously, 2017 will see the birth of another major player in the aeronautical equipment sector. Indeed, Safran has launched a friendly takeover on Zodiac Aerospace, which is expected to be finalised at the end of 2017. This should be followed by a merger in 2018, thus creating the third world leader in aeronautical equipment, right behind General Electric and United Technologies.

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These types of operations will be facilitated by the low business rates for companies plus the large amount of cash flows available in Europe.

The increase in the total amount of French M&A transactions might also come from foreign investors, amongst whom Chinese investors have shown a real interest in acquiring entertainment companies.

* * *

Sources

- This article is based on reports in the financial press, specialist reports, company and financial websites (Thomson Reuters, CF News, etc.).

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Germany

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Overview

The following article provides an overview of the M&A landscape in Germany during 2016. This article will address key market trends, transactions as well as key legal practice developments in the German M&A market. An overview of the German tax regime as applicable to M&A transactions is also included.

Despite external influences such as the Brexit referendum in June and the U.S. presidential election in November, the German M&A market remained strong. Particularly noteworthy is certainly the bid made by Bayer AG regarding the acquisition of Monsanto Co. for about US$66bn, the largest foreign investment made by a German company to date as well as the second-largest M&A transaction globally.

Volume and value of transactions

According to the ZEW-ZEPHYR M&A Index issued by the Centre for European Economic Research (ZEW) and Bureau van Dijk (BvD), the volume of mergers and acquisitions involving German entities during the course of 2016 has reached a record number.

It is also worth noting that the acquisition of German companies has been its strongest from German buyers, representing almost 60% of all current transactions, while the number of buyers from within the Eurozone represents 14%, and of buyers outside the Eurozone represents 26%, of the transactions.

The value per deal within the German domestic market has increased by about 27%. Even though deals with foreign buyers increased about 18% in comparison with 2015, the value per deal in this case has decreased.

The US, Switzerland, France, China and Great Britain are responsible for more than half of all deals made by foreign investors involving German targets. The US in particular is responsible for 18% of such deals.

Significant deals and highlights

As previously mentioned, the largest deal with German participation (German target or German purchaser) was undoubtedly the takeover offer made by Bayer AG to Monsanto Co. If the deal receives regulatory approval from the authorities it will become not only the largest German foreign investment (thus outdoing the one made by Daimler in the US$43bn acquisition of Chrysler) but also the biggest all-cash buyout in history, beating the US$60bn deal between Anheuser-Busch and InBev.

Another highlight deal involving German participation was the announcement made by Praxair Inc. of its intention to merge with Linde AG and thus create the world's largest

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industrial gas company. With an approximate value of US$43bn, if this transaction goes through, it will also be considered as one of the most valuable mergers of 2016.

With a value of approximately US$14bn, another significant deal is the planned merger of the London Stock Exchange Grp PLC with the Deutsche Börse AG which, if approved, will create Europe's largest exchange operator.

Investments by Chinese investors have soared this year. In the first half of 2016 alone, Chinese investment in Germany exceeded the combined total for the previous five years. Nonetheless, Germany policymakers, but also the US government, to the extent that German entities have operations in the US, have pledged to place Chinese investments under heightened scrutiny, and thus it seems unlikely that the level of growth of Chinese investments that was seen this year will be reached again in the near future.

Special mention of Chinese investments should be made in relation to the acquisition of robot builder KUKA AG by the Chinese manufacturer of electronic devices Midea Group Co.Ltd. with a value of €4.1bn (largest Chinese direct investment in Germany to date), as well as the acquisition made by China's largest hydropower operator China Three Gorges Corporation of WindMW GmbH with an approximate value of €1.7bn. The acquisition of EEW Energy from Waste GmbH by the state-controlled energy conglomerate Beijing Enterprises Holdings Ltd., with an approximate value of €1.7bn, is also worth mentioning. On the other hand, the intended acquisition of Aixtron AG by a Chinese investor was aborted when the US government objected to the transaction, citing reasons of national security.

A significant deal in the chemicals/pharmaceuticals industry was Boehringer Ingelheim GmbH's US$12bn acquisition of Merial SAS, Sanofi's veterinary medicine business.

Other deals worth mentioning are the US$6.4bn acquisition of IDC Salud Holding SL, Spain's largest private hospital operator, by Helios Kliniken GmbH, and the US$4.9bn acquisition of Hamburg Sudamerikanische Dampfschifffahrts-Gesellschaft KG by Maersk Line A/S, the world's largest container shipping company.

Private equity

Volume of private equity deals in Germany experienced a small decrease of about 2% during 2016, however it is worth noting that the value of private equity deals saw an increase of approximately 16% during the same year.

Significant deals in the private equity sector include the US$3.9bn acquisition of Vattenfall Europe Generation AG and Vattenfall Europe Mining AG by PPF Group NV, the US$3.6bn acquisition of OfficeFirst Immobilien AG & Co. KG by The Blackstone Group LP (Europe's largest property deal in 2016), and EQT Partners AB's US$1.5bn acquisition of Billinger Real Estate Solutions GmbH and Billinger Efficiency GmbH.

Key legal practice developments

New transparency rules

Five years after its entry into force, the Transparency Directive (2004/109/EG) was examined by the European Commission. This examination resulted in the Amendment Directive to the Transparency Directive (2013/50/EU, the "Amending Directive"). The Amending Directive was implemented in Germany on 20 November 2015, thereby tightening the rules imposed on market participants regarding the disclosure and notification of major holdings in listed companies, and stepping up the sanctions.

The new disclosure regime applies to investors that are direct or indirect shareholders or hold financial instruments relating to German issuers that are admitted to trade their shares

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on an organised market in the European Union (e.g. the General or Prime Standard of the Frankfurt Stock Exchange).

As a result of the above change in law, investors will need to take the following into consideration:

- Upon reaching or crossing certain voting rights thresholds (starting at 3%), the investor must notify both the issuer and simultaneously the German Federal Financial Supervisory Authority ("BaFin") of its new holding within four trading days at the latest. As a consequence, the notification period starts on the trading day rather than the settlement date (date when transfer of shares was completed).
- Shareholders are required to constantly monitor changes to the voting rights of an issuer.
- In order to simplify notification, a new standard mandatory notification form has been developed.
- Voting rights notification obligations have been extended to holders of instruments creating an economic interest in an issuer's shares.
- Notification of cash-settled instruments will have to be made on a delta-adjusted basis and thus a constant monitoring of changes in the delta will be required.
- Sanctions for violations of disclosure obligations have been tightened (they go beyond what is required by the Amending Directive) including, among others, an increase in fines as well as an extended loss of shareholder rights.
- Any administrative action or sanction imposed by BaFin in relation to a violation of a voting right notification must be published on BaFin's website (naming and shaming).

Market Abuse Regulation

On 3 July 2016 the new EU Regulation 596/2014 against market abuse ("Market Abuse Regulation") came into effect.

The Market Abuse Regulation affects all EU jurisdictions and, in the particular case of Germany, it implements additional national rules in the areas of *ad hoc* disclosure, insider law, disclosure of directors' dealings and market manipulation. The Market Abuse Regulation also provides for stricter sanctions when violating the rules.

Some of the major changes introduced with the Market Abuse Regulation are the following:

- Expansion of the scope of application set by the German Securities Trading Act, including not only issuers that trade in the regular market but also those issuers that are traded in eligible OTC segments.
- *Ad hoc* disclosures must specify the date and time of the report and must be maintained for five years in the company's website and register. Exemption regarding the postponement of *ad hoc* disclosure is strengthened.
- The template of insider lists by issuers previously provided by BaFin has been replaced by one issued by the European Securities and Markets Authority ("ESMA"), expanding the amount of information required.
- The terminology of directors' dealings has been expanded (e.g. gifts or inheritance of shares are now considered also directors' dealings). New templates provided by ESMA need to be used, expanding current practice, and directors' dealings are prohibited during a period of 30 days before the publication of issuers' interim or annual financial reports.

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- Administrative fines and criminal penalties for market abuse have increased significantly. Type and nature of a violation, together with the identity of the person that made such breach, will be published by BaFin for a five-year period (naming and shaming).

Tax[1]

- *Taxation and important taxes in an M&A process*

From an M&A perspective, the most important taxes are income taxes, including Corporate Income Tax, (CIT), Trade Tax (TT), Value Added Tax (VAT) and Real Estate Transfer Taxes (RETT) if real estate property is concerned. Regarding income tax, a number of specific rules such as thin capitalisation rules, or change in ownership rules for tax losses carried forward, have to be taken into account besides the Reorganisation of Companies Tax Act (RCTA) and the Foreign Tax Act (FTA). Although German tax law distinguishes between several different types of income, in this article we only address business income as this is the most important income source from an M&A perspective, although especially Private Equity/Venture Capital Funds normally do not derive business income.

- *Tax rates and general taxation principles of companies*

The general income tax rate for natural persons is progressive. The highest tax bracket is 45%. Additionally a solidarity surcharge of 5.5% on top of the tax applies; thus, the overall tax rate is up to 47.475%. The income tax rates apply to income derived at the personal level of natural persons and to income derived from partners in partnerships, as partnerships are regarded as transparent for income taxation purposes. Thus, any income derived on the level of a partnership will be attributed proportionally to the partners and taxed on the partner's level. Correspondingly, profit distributions (withdrawals of profit) are non-taxable events in a partnership. If a shareholder (natural person or partnership) derives business income dividend payments from and capital gains in connection with corporations, 40% of that income is tax-exempt; the assessment basis is therefore only 60% of the income.

Corporations (like limited liability companies (GmbH), stock corporations (AG) and also trusts (*Stiftungen*)) are regarded as non-transparent for tax purposes. A corporation itself is therefore regarded as income taxpayer. Corporations are subject to CIT at a flat rate of 15% and also to the solidarity surcharge of 5.5% on the CIT (altogether the income tax rate is 15.825%). However, as corporations are not transparent, profit distributions (dividend payments) are taxable as income on the level of the shareholders. Moreover, the corporation is obliged to withhold and pay to the fiscal authorities a withholding tax of 25% plus solidarity surcharge of 5.5% (altogether 26.375%), which the shareholder is allowed to set-off in his/her tax return, or to apply for a refund if the shareholder is itself a corporation.

For corporations, a participation exemption for dividend payments and capital gains exists if a corporation is a shareholder of another corporation. The tax exemption is 95% (the assessment basis is therefore only 5% of the profit). However, regarding dividend payments, the 95% exemption is only granted if the directly held participation quota in the company is at least 10% at the beginning of the calendar year.

- *Trade tax*

Whereas regarding income tax – including CIT – a distinction is made between corporations and partnerships, for TT purposes, corporations and partnerships alike are treated as taxpayers. Thus, not only corporations but also partnerships are subject to TT.

TT is based on a 19th century idea that the business as such is taxable. Thus, to determine the TT, additions and reductions from the profit have to be made. For instance, lease

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payments have to be added to the profit as well as interest payments. On the other hand, profit distributions which have been taken into account for TT on the level of the subsidiary, will be taken out of the TT assessment basis on the shareholder's or partner's level.

TT is (together with VAT) one of the taxes for which also the buyer in an asset deal is liable even if the tax relates to periods prior to the closing date.

- *Loss carried forward*

In case of a loss, for income tax (including CIT) and TT purposes, the loss can be carried forward and set off with profits derived in the future. With the exception of TT losses, a loss can also be carried backward for one year. However, there are limitations regarding the set-off per fiscal year. A loss carry-forward can be set off against profits up to €1m without limitations. Above that, only 60% of the profits can be set off against losses carried forward per year.

As regards income and partnerships, in general a loss carried forward will be taken into account on the partner's level to be set off with other income (in general) or to be carried forward. However, if a partner's liability is limited, e.g., for the limited partner in a limited partnership, and the accumulated loss derived is in the amount of the equity contributed (or higher), in general the loss is trapped on the partnership level and will not be attributed to the partner. In such an event, the loss can be set off only against profits and capital gains deriving from the respective partnership.

- *Change in ownership rule*

A loss carried forward for CIT and TT purposes may be extinguished in part or in full if a change in ownership of a corporation takes place. The decisive quota is over 25% change in ownership for a partial extinguishing in the respective quota, and 50% change in ownership for a total extinguishment of the losses carried forward. However, the loss carried forward will not be lost if hidden reserves exist in a sufficient amount. The same applies for the TT loss carried forward of a partnership. For restructuring measures, it has to be taken into account that in general, a capital increase will be treated also as a change in ownership for the aforementioned purposes to the extent the participation quota changes.

- *Thin Capitalisation Rule (Interest Barrier Rule)*

Germany's current Thin Capitalisation Rule (a/k/a Interest Barrier Rule) is based on the premise that international groups shift profits from German companies to companies abroad by granting interest-bearing loans to the German companies, therefore the rule is designated to limit the tax deduction of interest paid by a company. The Thin Capitalisation Rule does not apply if: (i) the difference between interest earned and interest paid is less than €3m; (ii) the business is not part of a group; or (iii), if the business is part of a group, the equity ratio of the respective business is equal to or higher than the equity ratio of the group. If the aforementioned criteria are not met, the interest paid can only be deducted for taxation purposes in the amount of interest earned and – if exceeding – in the amount of the "clearable EBITDA". Clearable EBITDA is defined as 30% of the profit, modified by some additions and some subtractions. Clearable EBITDA that is not used can be carried forward for the purpose of the Thin Capitalisation Rule. The rules for determining the equity ratio are especially complex, and a detailed database of all group companies is necessary.

The Thin Capitalisation Rule has recently been considered as possibly unconstitutional by the German Fiscal High Court. The German Fiscal High Court has therefore submitted the question to the German Constitutional Court for final resolution.

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- *Reorganisation of Companies Tax Act*

Under the RCTA, most reorganisations can be made tax-neutral unless, from an economic point of view, a sale or a similar transaction is intended rather than a reorganisation. Correspondingly, the RCTA contains a number of control periods that may not be violated by the parties in a reorganisation to benefit from tax neutrality. Moreover, very often an ongoing German taxation right is one of the requirements to be met for obtaining the tax neutrality. As the RCTA is in line with the EU merger directive (Directive of the Council from 23 July 1990, 90/434/EEC, on a common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States), in general also cross-border reorganisations within the EU can be tax-neutral under special requirements. Some of the measures dealt within the RCTA will be considered not as measures under the Reorganisation of Companies Act (RCA) but e.g. as a capital increase in kind.

- *Value Added Tax*

As within the EU there is – based on an EU directive – a common system of VAT; in general, the VAT rules are the same in every EU Member State. There is only a little space for a few and small national deviations. VAT is one of most important taxes concerning the revenues derived by the state. And VAT is also a very formal tax, which means that very often, it is decisive that formal requirements are met to be able to deduct income VAT.

However, the transfer of shares as well as an asset deal, if the business is sold as a whole, is generally VAT-exempt. Nevertheless, VAT is important for the buyer in an asset deal, as it is one of the taxes for which the buyer is liable even if relating to pre-closing periods.

- *Going abroad and Foreign Tax Act*

In general, income tax is still national and, consequently, shifting business or transferring single assets abroad will trigger exit tax. Conversely, doing business will lead to taxation in Germany. However, Germany has concluded almost 100 double taxation treaties regarding income tax and thus, very often the German taxation rules will be modified (fully or partly overruled) by the regulations of the respective double taxation treaties. With few exemptions, Germany applies the exemption method (and not the credit method) in its treaties in order to avoid double taxation.

As is the case in most industrialised countries, Germany has quite sophisticated rules for Controlled Foreign Companies (cfc-rules) and if the income of such a cfc is considered as passive income, the income for taxation purposes will be attributed proportionally to German shareholders. Thus, when structuring a business by using companies abroad, cfc rules should be considered.

Moreover, Germany does have Transfer Pricing Rules (TP), including rules to tax the transfer of a function as a whole when being transferred abroad (exit tax). TP should be taken into account when doing business in Germany.

Industry sector focus

Industrial production, retail and consumer and technology sectors were the most attractive sectors for foreign investment in German targets in 2016. Pursuant to M&A data from ThomsonReuters, Mergermarket and Preqin, the number of deals concerning German targets amounted to 188 in the industrial production sector, 142 in the retail and consumer sector (it lost its first place from 2015), 141 in the technology sector, 59 in the healthcare sector, and 55 in the materials sector. These sectors were followed by the real estate sector

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with 54 deals; the technology, media and telecom sectors with 41 deals; and other sectors (energy telecommunication, transport and financial services), with 76.

The year ahead

The German Council of Economic Experts (GCEE) in its annual forecast expects a positive overall macroeconomic development in the near future. Real gross domestic product in Germany is expected to grow by 1.3% in 2017. For the euro area, a growth of 1.4% is expected.[2]

The GCEE also states that further growth of the global economy is exposed to numerous risks including geopolitical risks and political uncertainty in Europe, not least to the Brexit referendum. Furthermore, international financial markets could face turbulence and China is in the throes of a difficult transformation.[3]

Even though the German labour market has performed well, problems like low wages, unemployment and integration of new works continue to challenge it.

The number of asylum seekers has dropped considerably, but labour market integration is the most decisive factor in the long-term costs of refugee migration. Notwithstanding higher public consumption and costs related to refugee migration, high revenues from taxes and social contributions generated by the strong economy have created a fiscal space for the next few years.

Even though the effects of Brexit, the US election, as well as the popular sentiment in jurisdictions around the world against globalisation and its effects remain to be seen, prospects of M&A activity in Germany remain positive given the stability of its economy as well as the liquidity of its market.

* * *

Endnotes

1. We thank our tax partner Heiko Wunderlich for his contribution to this Article.
2. Annual Economic Report, 2016/2017 – German Council of Economic Experts, Executive Summary (see recital 1).
3. Annual Economic Report, 2016/2017 – German Council of Economic Experts, Executive Summary (see recital 2).

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Hong Kong

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Overview

The M&A market in Hong Kong started positively in 2016, taking advantage of some of the opportunities emerging from an unsettled end to 2015. However, that did not last long. Although there was a huge increase in PRC outbound M&A in 2016 (much of which passed through Hong Kong) and the total (annual) outbound M&A transaction value for 2015 was exceeded by the first half of 2016 (up 163% by the end of the third quarter), overall M&A targeting China and Hong Kong was down 19.5% (by value) for the first three quarters of 2016. This was largely due to the lack of "megadeals" during that period, but was exacerbated by the uncertainties in global markets, caused first by the results of the Brexit referendum and then by the surprise US election result. At the time of writing, commentators and M&A professionals are still struggling to determine the impact of the election outcome on China, and on Asia in general. Hong Kong's position will be significantly dependent on that outcome.

In the second half of 2015, Hong Kong suffered the disruption of the "Umbrella Movement" and "Occupy Central" protests. In the second half of 2016, Hong Kong experienced protests in connection with Beijing's intervention relating to a "mini-constitutional crisis" caused by "improper oath-taking" by two elected law-makers. The protests quickly settled down, but the intervention by Beijing has led some to query whether, and for how long, the rule of law as we currently know it will continue in Hong Kong.

Nonetheless, Hong Kong still remains the jurisdiction of choice for transactions into or out of Mainland China and there are still significant opportunities for investment into, and out of, China via Hong Kong. As a general rule, investments into China tend to be private M&A investments, often using a combination of Hong Kong and offshore vehicles to acquire large, but often non-controlling stakes, in PRC businesses in need of capital or expertise. Chinese outbound investments can take a myriad of forms, but frequently utilise Hong Kong holding companies or, if capital-raising is required, Hong Kong listed companies.

This connection between Hong Kong and Mainland China means that Hong Kong's fortunes are closely tied to what happens in Mainland China. Regulatory changes in China, and the announcement of further proposed changes, continue to cause uncertainty for companies looking to invest into China and recently, there have been further announcements affecting PRC-based companies looking to undertake M&A activity outside of Mainland China. In particular, China announced restrictions on acquisitions of non-core businesses by PRC companies in November. A week later it announced further restrictions on remitting currency, which are being reported as causing significant issues for businesses seeking to pay dividends to foreign shareholders.

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Despite the questionable success of the Shanghai-Hong Kong StockConnect arrangements, a second such arrangement came into effect on 5 December, linking the Shenzhen and Hong Kong Exchanges. It is yet to be seen what impact those arrangements will have.

Over the coming year, we can expect to see a number of competing trends. The Yuan Renminbi (RMB) has continued to fall against the US dollar. As a result, it is expected that a number of PRC companies will continue to seek to replace their US$ denominated loans with RMB denominated loans, or repay them and seek to raise further capital via the mainland markets. Similarly, US listed Chinese businesses are continuing to delist, and either go private or re-list in China. This, coupled with the new restrictions referred to above, is likely to continue to impede those companies' ability to pursue offshore investment. On the other hand, the flight of capital from the mainland continues, that capital needs to be invested somewhere, and that creates opportunities offshore. Much of that capital can be expected to pass through Hong Kong.

There is also speculation that Brexit may result in an increase in trade between the UK in Asia, and that may result in an increase in in-bound M&A activity in the region, including Hong Kong. However, that is likely to be dependent on how the Brexit negotiations proceed and whether it will be necessary for UK trade to pivot to Asia.

Significant deals and highlights

Unfortunately for Hong Kong, although there was a reasonable level of small and mid-market M&A in Hong Kong, most significant transactions in 2016 were mainland China transactions and there were no Hong Kong-based "mega deals" to speak of in 2016.

One transaction of significance in Hong Kong was the sale of New World Telecommunications to HKBN, which was announced at the start of 2016. Although the sale price of HK$ 650m (approximately US$83m) was not in the megadeal arena, the transaction was significant as it represents a further exit by long-term players from the Hong Kong telecoms market. It also required approval from the Competition Commission, and this was the first time the Commission had been asked to consider such a request (it granted the approval).

Key developments

The HK-Shanghai Stock Connect was launched in November 2014, but produced a lower-than-expected turnover and did not close the price gap between Hong Kong listed "H-Shares" and Shanghai listed "A-Shares". Notwithstanding the questionable success of HK-Shanghai Stock Connect, HK-Shenzhen Stock Connect was launched on 5 December. It is yet to be seen how it will perform.

The effect of the new Hong Kong Companies Ordinance that commenced in 2014 continued to be seen throughout the course of 2016. Whilst the ordinance did not result in fundamental changes to the regulation of companies in Hong Kong, it simplified and improved a number of corporate regulatory matters, and brought Hong Kong law more into line with changes that have been made over the last decade or more in other common law jurisdictions. One improvement that had an impact in 2015, which continued in 2016, was the streamlining of the capital reduction regime in Hong Kong. This has transformed what was previously a lengthy court process into a relatively straightforward non-court process, in most instances. Whilst the regime is still more cumbersome than that of most offshore jurisdictions, the liberalisation of the scheme in Hong Kong has had two noticeable practical impacts: first of all, companies that have had unnecessary capital tied up in Hong Kong companies have started to free up that capital; secondly, it has

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made the use of Hong Kong incorporated companies as acquisition vehicles in M&A and joint venture transactions more attractive – especially in circumstances where, although a capital reduction is not planned, it is anticipated that it may be something that could be required during the life of the venture.

The Competition Ordinance which was enacted in 2012, finally came into force in December 2015. For the first time Hong Kong has a broad-based, non-sector-specific, competition regime and 2016 was its first full year of operation.

The regime largely adopts the European First and Second Conduct rules. However, the Competition Ordinance does not contain a non-sector-specific merger regime. Instead, the merger regime only applies to transactions involving the telecommunications sector (and this was relevant for the HKBN transaction mentioned above). However, that has not meant that the ordinance has not impacted on M&A activity.

On the contrary, the potential operation of the first conduct rule (which, *inter alia*, prohibits arrangements between competitors which do restrict, or have the purpose of restricting, competition in Hong Kong) has created uncertainty for a number of potential joint ventures. Unlike the European regime, the Hong Kong regime is a court-based, adversarial regime where the role of the Competition Commission is to issue block exemptions, investigate and (potentially) bring proceedings before the newly formed Competition Tribunal (similar to jurisdictions such as the US and Australia). Whilst the Commission has published high-level guidelines on its interpretation of the ordinance and how it intends to apply it, these guidelines do not have any legally determinative effect, and it is likely to be some time before the Commission issues block exemptions or the Tribunal starts providing judgments. This impacts on the certainty around non-compete provisions (which are standard in most joint ventures) and issues around access to information and control of pricing. Understandably, companies are reluctant to approach the Commission prior to forming a joint venture to seek the Commission's view on whether the proposed arrangements would comply with the ordinance, especially where there is no formal mechanism for the Commission to grant clearance or approval.

A key focus of the Competition Commission in 2016 has been trade associations, and the Commission identified more than 20 associations whose public practices appeared to put them at high risk of breaching the new competition law. The Commission also cleared the HKBN acquisition (see above).

2016 also provided an opportunity to observe the likely process for block exemption applications when the Hong Kong Shipping Association applied to the Commission for a block exemption in relation to certain liner shipping agreements. The Commission carried out public consultations between January and March 2016, following which it advised that it proposed to grant the exemption, but then engaged in a further consultation process due to end in December, demonstrating how lengthy the block exemption application process could be.

Although it did not have any noticeable impact on M&A activity, the Contracts (Rights of Third Parties) Ordinance came into operation at the beginning of 2016. In essence, the ordinance brings Hong Kong into line with a number of common law jurisdictions and enables third parties to enforce benefits conferred on them under contracts to which they are not a party (except where the effects of the legislation are excluded).

Given Hong Kong's close connection with both inbound and outbound investment in Mainland China, M&A activities in 2016 have also been significantly impacted by regulatory developments in China and there have been a number of developments that have led to uncertainties, particularly in connection with China inbound investment.

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The recent announcement seeking to curtail outbound M&A activity is likely to have a negative impact on PRC outbound M&A and, therefore M&A activity passing through Hong Kong, however at the time of writing the full details of these proposals and the likely impact were still unknown. Furthermore, the recently announced restrictions on the repatriation of currency are already having a noticeable impact on dividend distribution which will likely further discourage inbound investment.

Circular 698 (which imposed a particular corporate income tax regime in connection with the sale of interests in offshore entities that operated on-shore businesses in China) was replaced with SAT Notice 7 in February 2015, and this led to significant uncertainty throughout 2015. SAT Notice 7 purports to create a PRC tax reporting and withholding obligation for purchasers of offshore companies with businesses in China (i.e. indirect acquisitions of PRC businesses). Not surprisingly, the quantum of the seller's tax liability (or indeed the existence of such liability at all) in connection with an offshore transaction is often a matter of dispute or uncertainty, and so the amount to be withheld is often unclear. Furthermore, sellers will usually insist on being responsible for any taxes and will resist any withholding of the purchase price. As a result, SAT Notice 7 creates potential taxation risks for purchasers that would not exist in most jurisdictions. The impact of this was largely ameliorated through 2016 by the relatively low volume of PRC inbound M&A and there is not yet an accepted market practice for dealing with this issue.

The proposed new Foreign Investment Law released by the Ministry of Commerce of the People's Republic of China (MOFCOM) in 2015 remains in draft form and still has a long way to go before it becomes law. If it comes into effect in its current form, it will simplify and consolidate a number of disparate strands of Chinese foreign investment law. However, a key aspect of the proposed new law is how "VIE structures" will be viewed by the regulator, particularly in restricted sectors. VIE (or variable interest entity) structures are a common mechanism used for investments by offshore companies into PRC businesses. They are frequently used to navigate foreign ownership and control issues in certain restricted industries (such as telecoms, internet, media and real estate) and have been used for such a long time in prominent companies that the market has come to accept them as legitimate (for example, Alibaba used a VIE structure to enable its listing on the NYSE). The draft laws would represent a significant paradigm shift towards substance over form and whilst this may ultimately create more certainty (and a more logical outcome), there are significant unknowns at the moment.

For a start, the impact on existing VIE structures is far from clear and there is the potential for well established structures to be held to be invalid. There is also no clarity on the contents of the "negative list" (which would determine which sectors would be subject to the tighter foreign ownership and control sectors). There also needs to be clarity around what constitutes "control", especially in the private equity space where clawbacks and veto rights are the norm, but could potentially be considered to constitute "control" for the purposes of the foreign ownership and control restrictions. This uncertainty has had a number of results: Firstly, some foreign companies with existing investments involving VIE structures have become nervous and have been weighing their options for exiting those investments before the new regime takes effect; at the same time, foreign companies have been nervous to invest in those existing structures (the ultimate result of this combination may be sales by foreign investors to PRC buyers at prices that are lower than perhaps the foreign investors may have previously anticipated); and there has been a noticeable fall in investments by foreign investors into sectors which are, or are likely to be, subject to the negative list.

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As a step towards implementing the new Foreign Investment Law in October 2016, MOFCOM published a number of amendments to the current law governing the use of Foreign Invested Enterprises ("FIEs"). The key change was to introduce a new "negative list". MOFCOM approval is no longer required to establish an FIE (only notification is required), unless the business is in a sector that is listed on the negative list. Unfortunately the negative list that was published in October contains all of the sectors which were either "restricted" or "prohibited" under the previous regime. It is expected that other items will be removed from the list and this will, hopefully, have the effect of allowing further foreign investment.

Finally, in connection with China inbound investments, investors have continued to be affected by the uncertainties in connection with merger clearance under the PRC Anti-Monopoly Law, which is still viewed (fairly or otherwise) as a tool for the implementation of state policy, often only incidentally connected with an objective competition analysis.

One further area that has continued to develop in the M&A space in Hong Kong, and the region more generally, is the use and acceptance of transaction insurance. Whilst transaction insurance (also often referred to as "warranty and indemnity insurance") has always been a product used in the region by PE firms who are familiar with its use from other jurisdictions in which they operate, it is becoming increasingly popular in non-PE related transactions. A number of insurers established transaction insurance operations in Hong Kong through the course of 2016, and it seems that there is more than enough of an appetite for their products to support a number of new entrants.

Industry sector focus

Hong Kong has traditionally had a strong financial sector focus, which has supported both inbound and outbound investment in connection with Mainland China, as well as other parts of the Asia-Pacific region, and this is likely to continue.

However, a number of participants in the financial services sector are now revisiting their participation in a number of investments which are either seen as "non-core", or where they hold minority stakes that are seen as too small or too costly to maintain. One example in 2016 was Barclays' sale of its Asian cash equities business. More announcements are expected to follow. This will undoubtedly lead to further (and significant) M&A activity in this sector, with banks in the region which have strong balance sheets (including PRC banks) the likely buyers. PRC banks with strong balance sheets are also likely to continue to use Hong Kong as a springboard for their further expansion offshore.

Infrastructure opportunities in Asia will continue to be a source of M&A for Hong Kong companies, and Hong Kong is likely to continue to be a base for such transactions throughout the region.

The year ahead

The year ahead is likely to be uncertain for M&A in Hong Kong.

The PRC government has struggled to ascertain how to manage (or whether to manage) the Chinese stock markets and this is likely to continue to lead to uncertainty for capital raisings in Mainland China. This may result in an opportunity for Hong Kong, which presents a more stable market. However, Hong Kong will not be immune from the global market volatility.

The impact of the US election result on trades in the region is uncertain. One potential outcome of the US's position on the Transpacific Partnership (which excludes China) is that

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alternative trade arrangements in the region (which do involve China) may have an increased importance. This outcome, especially if coupled with the trade barriers being espoused by President-elect Trump at the time of writing, may result in an increase in intra-Asia trade and M&A activity, but a reduction in Asian inbound activity (at least from the US).

On the other hand, if Brexit does lead UK trade to pivot to Asia, then that may result in a moderate increase in inbound activity from the UK.

The continued volatility in China and the various regulatory uncertainties described above are likely to result in Mainland China becoming a less attractive destination for investment than it has been in recent years. Whilst there will no doubt continue to be investment opportunities in China (and many of these will rely heavily on M&A in Hong Kong), many of these investments may be more marginal than they were previously, or have increased transaction risk due to some of the regulatory uncertainties described above. As a result, investors may need to take a more robust approach to their PRC investments (perhaps putting smaller stakes at risk) or take a longer-term view and be willing to ride out several tough years or be willing to have dividends locked up for a period. Those who are unwilling to do so may look to other jurisdictions in Asia (and South East Asia in particular) that were previously less attractive than China. As a result, it is likely that China inbound-based M&A in Hong Kong may be weaker in 2017. However, Hong Kong will likely continue to be used as a base for China outbound investments or capital raisings for PRC businesses.

M&A activity in the financial services sector can be expected to continue and there is likely to be a continuation of disposals by European banks of non-core, or less profitable, aspects of their businesses in Hong Kong. As already mentioned, the likely buyers will be banks or financial institutions with strong balance sheets and an existing focus on Asia (including PRC banks). We are also likely to see an increase in investment in fintech. This will likely be a combination of financial investments from PE firms, as well as strategic acquisitions by financial institutions, looking to make strategic acquisitions of fintech products which are beneficial to their business. We may also see insurers continue to build their Hong Kong-based practices as a base for doing business in Asia, given the European market remains relatively flat.

In the energy and resources sector, the low oil price will likely make a number of existing projects either non-viable or at least very costly to existing owners. This is likely to result in a desire to either divest completely or look for additional partners to share the burden. This may appeal to PRC energy SOEs, who are likely to be less focused on the immediate or medium-term viability of a particular project and more focused on resource security (especially in relation to energy). If this is the case, there may be some interesting M&A transactions in this space, many of which are likely to involve Hong Kong-based acquirers (e.g. subsidiaries of PRC SOEs) or Hong Kong-sourced funding.

There is likely to continue to be a hiatus on PRC inbound investments in restricted sectors, at least until a number of items are removed from the negative list and, possibly, not until the new foreign ownership laws are fully understood, and this will impact on M&A in Hong Kong, which has traditionally been the base for such transactions. It is possible that investors may look elsewhere in the region for opportunities in these sectors.

Finally, there will continue to be uncertainty around the formation of joint ventures in Hong Kong between participants in the same sector. Most noticeably, this may affect the property and construction and the logistics sectors, where such ventures have been common in the past. It is likely to take some time before the Competition Commission provides sufficient guidance to enable these activities to recommence with any certainty.

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India

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Overview

The mergers and acquisitions ("**M&A**") activities in India in the year 2016 hit a record high of over US$64bn worth of deals, surpassing all previous records set since 2001. India contributed almost 8.8% of the total M&A in the Asia-Pacific region. Inbound activity also surged to approximately US$ 30bn in 2016 from US$ 19bn in 2015. Such heightened M&A activity could be attributed to the Government's drive to revamp the legal and regulatory landscape of the country. In addition to the above, the norms relating to Foreign Direct Investment have been relaxed further, which is one of the main factors that led to an increase of approximately 62% in the inbound activity in 2016 as compared to 2015. Domestic M&A also picked up after experiencing a drop of 58% in 2015 as compared to 2014. In fact, domestic and outbound M&A activity drove the M&A space in 2016. Private Equity ("**PE**"), on the other hand, declined almost by half compared to 2015.

The first half of 2016 experienced a slow-down in the M&A market in India due to general inactivity in the Asia Pacific region. The first half of 2016 recorded M&A worth US$ 17bn which was nearly 26% less than in the same period in 2015. However, the deal-making has seen an upward trajectory since October 2016, which seems to have continued in the first quarter of 2017.

Legal framework

The following governs the regulatory framework of M&A in India:

- *Law governing companies*

The law governing companies in India was substantially overhauled by the Parliament of India in the year 2013 after earlier versions of the amendment bills failed to find favour with the lawmakers of the country. The Companies Act, 2013 ("**2013 Act**"), after much deliberation, was passed by the Parliament of India and notified in the Official Gazette in August 2013. The Ministry of Corporate Affairs ("**MCA**") had, in the year 2015, notified around 283 sections that came into force, with the corresponding sections in the erstwhile Companies Act, 1956 ("**1956 Act**") being repealed.

To date, most of the provisions of the 1956 Act have been replaced by the provisions under the 2013 Act as notified by the MCA. A special criterion for Producer Companies (i.e. companies with objects involving farmers' produce) has been laid down in Chapter IX A of the 1956 Act, which survives the repeal of the Act.

- *National Company Law Tribunal ("**NCLT**") and National Company Law Appellate Tribunal ("**NCLAT**")*

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The second half of 2016 witnessed an iconic change in relation to corporate re-structuring in India. The National Company Law Tribunal ("**NCLT**") and National Company Law Appellate Tribunal ("**NCLAT**") have been constituted under the new 2013 Act to provide for a single-window clearance mechanism for corporate restructuring activities. In relation to this, with effect from 15th December 2016, the MCA transferred all the proceedings relating to the compromise arrangements and reconstruction of companies under the 1956 Act, pending with the State High Courts of the country, to the jurisdictional NCLTs. The NCLT/NCLAT has now taken over the powers of the State High Courts for corporate restructuring.

- *Compromises, arrangements and amalgamations*

The new provisions under the 2013 Act concerning schemes of mergers, amalgamations, demerger, compromise or arrangement amongst the companies, their shareholders and/or creditors were enforced towards the end of 2016. However, provisions under the 2013 Act contemplating merger or amalgamation of an Indian company with a foreign company are yet to be notified. While the new provisions relating to amalgamations and demergers have been largely based on the earlier process under the 1956 Act, the intention of the legislature appears to be to shorten the time period for completing amalgamations and/or demergers. Also, the current provisions have been revamped to include seeking comments and inputs from authorities regulating the sector where the M&A activity is envisaged.

The provisions relating to the compromise, arrangement and amalgamation of companies under the 2013 Act provide for a fast-track route for certain companies. M&A between two unrelated small companies (companies which do not have a paid-up share capital of more than INR 5m), and between a holding company and its wholly owned subsidiary, are possible without approaching the NCLT.

Furthermore, the new provisions under the 2013 Act put an embargo on shareholders holding less than 10% of the shareholding or creditors having an outstanding debt of less than 5% of the overall debt, as per the latest audited balance sheet, from objecting to the compromise, arrangement or amalgamation – which is intended to keep frivolous objections at bay. Additionally, the provisions relating to compromises, arrangements and amalgamations are also aimed at providing transparency to the entire procedure as it also contemplates the requirement of obtaining a valuation report from registered valuers, a certificate on accounting treatment from the statutory auditors for private and public companies.

For streamlining the procedure relating to compromises, arrangements and amalgamations under the 2013 Act, the MCA, in December 2016, notified the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 which specifically provide for the procedure to be followed by the NCLT/NCLAT in cases involving compromises, arrangements or amalgamations.

- *Reduction of share capital*

Rules relating to the reduction of the share capital of companies under the 2013 Act have also come into force. The National Company Law Tribunal (Procedure for Reduction of Share Capital of Company) Rules, 2016 were also notified in December, 2016 which provides the entire procedure for the reduction of share capital of companies. A company desirous of restructuring its capital can make an application to the NCLT in the manner prescribed under the Rules.

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Takeover Code and Listing Agreement

The Securities and Exchange Board of India ("**SEBI**") regulates M&A transactions involving entities listed on recognised stock exchanges in India. Listed public companies, unlike unlisted companies, are required to be in compliance with applicable SEBI laws and the listing regulations. The Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 (in short − Takeover Code) regulates both the direct and indirect acquisition of shares, voting rights and control in listed companies that are traded over the stock market.

SEBI has also notified the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 ("**Listing Regulations**") which have replaced the erstwhile Listing Agreements (entered into by a company with a recognised stock exchange). This holds importance when the company listed on the stock exchange(s) is involved in a merger. Until now, the requirement for executing a Listing Agreement with stock exchanges in respect of equity shares, Indian Depository Receipts, non-convertible debt securities etc., were specified under different regulations. All obligations under different Listing Agreements have now been consolidated under the Listing Regulations. Entities are now required to execute a fresh Uniform Listing Agreement with stock exchange(s), in the format prescribed by SEBI in this regard.

Laws regulating Foreign Direct Investment

The Foreign Exchange Management Act, 1999 ("**FEMA**"), and the rules and regulations made thereunder, regulate foreign exchange transactions. The Reserve Bank of India is responsible for the formulation and enforcement of foreign exchange regulations. Foreign direct investment is regulated by the FEMA and the Foreign Direct Investment ("**FDI**") Policy, formulated by the Department of Industrial Policy and Promotion of the Ministry of Commerce and Industry of the Government of India. FDI Policy provides for sector-specific regulations, in the form of investment caps, requirements for investment, and sectors in which FDI is prohibited (such as gambling, atomic energy and agricultural activities). Under the FDI Policy, an overseas investor can make an investment in India either under the 'automatic route' [i.e., without requiring any prior approval from the Foreign Investment Promotion Board ("**FIPB**"), Government of India] or under the 'approval route' (i.e., requiring prior approval of the FIPB, Government of India). Any inflow that is covered under the 'approval route' and is more than INR 5,000 Crore (INR 50bn) (increased from INR 30bn by FDI Policy 2016) requires a prior approval of the Cabinet Committee on Economic Affairs ("**CCEA**"), a special committee formed to oversee the economic policy framework of the Government of India.

Competition/Anti-trust laws

Anti-trust issues in India are regulated by the Competition Act, 2002 ("**Competition Act**") which replaced the Monopolies and Restrictive Trade Practices Act, 1969. The Competition Commission of India ("**CCI**") has notified the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 ("**Combination Regulations**"), which regulate 'combinations' such as mergers and acquisitions which are likely to cause an appreciable adverse effect on competition in the relevant market in the country.

Other relevant laws

Other relevant laws that govern M&A transactions are the Income-tax Act, 1961, laws relating to service tax, value-added tax/sales tax, and stamp duty on certain instruments.

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Significant deals and highlights

Energy, Mining and Utilities (“EMU”)

M&A activity in the EMU sector reached new heights in the year 2016. The deals in this sector marked an increase as much as three times that of 2015, with a total value of approximately US$ 17bn.

- *Rosneft – Essar (Energy)*

This inbound deal bolstered the M&A activity of 2016. Indian debt-struck conglomerate, Essar Group, sold a combined 98% stake in Essar Oil Company, the second-largest private oil firm in the country, to Rosneft Oil Company, Russia’s biggest listed oil producer, along with its partners Trafigura Group Pte and United Capital Partners (UCP) for US$ 12.9bn. Rosneft acquired a 49% stake in the refinery and the Vadinar port in Gujarat and all the petrol pumps across India. On the other hand, Netherland’s Trafigura Group Pte, one of the largest commodity trading and logistics companies in the world, and Russia’s investment fund UCP divided the other 49% stake, equally.

This arrangement between the parties was announced in October, 2016 at the BRICS Summit in Goa, India in the presence of Mr. Narendra Modi, Prime Minister of India, and Mr. Vladimir Putin, President of the Russian Federation. This deal saw the biggest inflow of FDI in the Indian refinery.

- *Indian Oil Corporation (“**IOC**”), Oil India Limited (“**OIL**”) and Bharat Petroleum Corporation Limited (“**BPCL**”) – Rosneft (Energy)*

Earlier in September 2016, the Indian consortium consisting of IOC, OIL and Bharat Petro Resources Limited, a 100% subsidiary of BPCL, successfully acquired a 29.9% stake in Russian oil fields LLC Taas-Yuryakh Neftegazodobycha, and a 23.9% stake in JSC Vankorneft from Rosneft Oil Company, for a combined value of approximately US$ 3.14bn.

As can be seen from this outbound deal, India is aiming at increasing its participation in the oil sector and, on the other hand, paving the way for increased participation by the Russian oil giants in its growing fuel market.

Financial services

The insurance market in 2016 saw large amounts of activity. This increase could be attributed to the increase in the FDI cap in the sector to 49% under the automatic route from the earlier 26%. This increase had a ‘trickle effect’ of increasing the share of already existing partners. Furthermore, the rise in the sectoral cap for FDI in insurance has made this sector more lucrative for new entrants.

- *HDFC Life – Max Financial (Life Insurance)*

This multi-layered transaction worth approximately US$ 3bn was one of the most notable deals of 2016. Announced in August 2016, the composite scheme of arrangement between HDFC Standard Life Insurance Company Ltd. (“**HDFC Life**”), Max Life Insurance Company Ltd. (“**Max Life**”), Max Financial Services Ltd. (“**Max Financial Services**”) and Max India Ltd. (“**Max India**”) contemplated a merger and a demerger between the parties to create the largest private sector insurer in the country.

As per the transaction, in the first stage, Max Life would merge with Max Financial Services. Thereafter, the life insurance business of Max Financial Services would demerge into HDFC Life and the residual business of Max Financial Services would merge with Max India. Eventually, HDFC Life (the merged entity) would be listed on the stock exchanges and would have an approximate market of 11% in the life insurance space.

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Even though the completion of the transaction is subject to many regulatory approvals including the Insurance Regulatory and Development Authority ("**IRDA**") and CCI, this is one of the first big mergers in the life insurance sector. It appears that this merger between two big ticket parties would pave the way for further, similar deals in the coming year.

- *HDFC ERGO – L&T Insurance (General Insurance)*

The buyout of L&T General Insurance Company Limited ("**L&T Insurance**") by HDFC ERGO General Insurance Company Limited ("**HDFC ERGO**") for US$ 5.51bn was the first such transaction in the general insurance business after the relaxation of FDI in the insurance sector. By September 2016, the deal had received the required approvals from IRDA and CCI. This deal has pushed HDFC ERGO to a higher ranking in the private sector insurance segment and is reflective of comparable forthcoming deals.

Domestic M&A

In 2015, there was a significant dip in domestic M&A transactions to US$ 7.3bn as compared with US$ 19bn in the year 2014. However, domestic M&A dominated the M&A space in 2016. Domestic M&A increased to 82% in the first half of 2016. The period from January to March 2016 saw unprecedented activity in domestic M&A. The deal value in this period increased by almost 125% as compared to the same period in 2015. The smaller and younger companies saw many transactions which could be credited to the increased competition by the large players in the market. The consolidation between companies may be for increasing their market space and their target customers and for marking a relevant geographical presence in the ever-evolving economy. A liberalised economy, with government policies favouring entrepreneurship, has boosted M&A transactions in India.

For instance, in one of the first M&As in the cab aggregator market, Ola Cabs acquired TaxiForSure for US$ 200m. This consolidation may help the Indian taxi aggregator to give competition to its rival, Uber. In another deal, Tata Power Company entered into an agreement to purchase the green energy portfolio of Welspun Energy Private Limited for US$ 1.4bn, which is one of the biggest M&A transactions in the renewable energy sector in Asia. Similarly, the digital payment platform Paytm (of One97 Communications Pvt. Ltd) acquired the platform Shifu, which analyses the usage pattern of the device, for US$ 8m in January, 2016. Other large-scale acquisitions include: MakeMyTrip acquiring GoIbibo for approximately US$ 2bn, creating one of India's biggest online travel services; Titan Industries acquiring a 62% stake in CaratLane, the biggest online jeweller in India, among others.

Other notable deals were in the manufacturing and building, telecommunications, and chemical sectors. Some prominent deals are discussed below.

- *Videocon – Airtel (Telecommunications)*

In March 2016, Bharti Airtel bought the rights to use the spectrum (airwaves) of Videocon Telecom in six circles (telecom service areas) out of the 22 circles in the country, for US$ 660m. The licence, which expires in 2032, provides Airtel the right to use the 1,800 MHz band allotted to Videocon by the Government of India. The Spectrum Trading Guidelines were announced by the Government in October, 2015. This deal was struck to boost the fourth generation (4G) data services in the wake of the launch of Reliance Jio (launched in September 2016) which has the largest 4G network in India.

- *Jaiprakash Associates – UltraTech Cement (Cement)*

UltraTech Cement Limited, a part of the Aditya Birla Group, acquired the business of sale and distribution of cement and clinker cement plants of Jaiprakash Associates Limited

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("**JAL**") worth US$ 2.4bn. The deal announced in the first quarter of 2016, is expected to benefit JAL in paying off its creditors and strengthening its balance sheet and, on the other hand, would make UltraTech's position even stronger in the Indian cement market.

- *Jabong – Myntra (E-commerce)*

Flipkart-owned Myntra, an e-commerce company for fashion and other similar products, acquired Jabong from Global Fashion Group for a sum of US$ 70m. This deal is noteworthy because it marks the consolidation process in India's growing e-commerce trade.

Myntra was acquired by the Flipkart Group, which is the largest online e-commerce platform in the country, in 2014 for about US$ 300m. This series of acquisitions by Flipkart is significant for firming up its position as India's biggest online fashion player and also for competing with the increasing number of entrants in the market including Amazon (United States) and Alibaba (China), among others.

Others

Other sectors such as telecoms, chemicals and pharmaceuticals were active in 2016 and contributed to some important transactions of the year. The deal value of the telecommunications sector increased to approximately US$ 13.6bn in 2016 from US$ 2.5bn in 2015. In one of the major consolidation moves, Reliance communications and Aircel Limited announced their merger in September 2016 to create the fourth-largest phone company in India. The merged entity would work under a new brand name which would be able to exploit the spectrum (4G network) of Reliance Jio to enter the competitive data services market.

Another sector which saw a number of deals in the first half of 2016 was the pharmaceutical sector. One of the notable deals was announced in the first quarter of 2016 by Sun Pharma of its acquisition of around 14 prescription brands of Novartis, Japan for US$ 293m. By this acquisition, Sun Pharma penetrated the Japanese pharma market to increase its global presence.

Key developments

The legal and regulatory scenery in India has been evolving since the new government (Bharatiya Janata Party-led National Democratic Alliance) came into power in 2014. 2015 saw historic reforms by the government aimed at promoting the growth of the Indian economy. From further relaxation in FDI in various sectors to increase foreign investment and demonetisation to curb corruption, 2016 has been an eventful year for M&A-related activities.

Relaxation of FDI

As compared to 2015, the Government of India in June 2016 announced further relaxation in FDI norms across various sectors. This is aimed at increasing growth and employment opportunities in the economy by tapping into more foreign investment. Easing of FDI single-brand retail, aviation, pharmaceuticals, insurance and railways, among others, have boosted foreign investment in the country: 49% FDI is now allowed in the defence sector and scheduled air transport services (greenfield) under the automatic route and, beyond that, under the Government route. Additionally, the Government has relaxed the local sourcing norms for entities undertaking single-brand retail trading of products having 'state-of-art' and 'cutting-edge' technology and where local sourcing is not possible.

Furthermore, relaxation of FDI restrictions in the pharmaceuticals sector has brought in large amounts of FDI in this area. For example, in one of first largest overseas acquisitions

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by a Chinese pharmaceutical company, Shanghai Fosun Pharmaceutical (Group) Co. Ltd., one of the major healthcare companies in China, acquired an 86% stake in Gland Pharma for US$ 1.26bn. This came in the wake of relaxation in the pharmaceuticals sector which allows 74% FDI under automatic route in existing pharma companies. Gland Pharma was one of the first companies in India to acquire the approval of the United States Food and Drug Administration ("**FDA**") for its products.

Since the relaxation of FDI in June 2016, India has become one of the most open economies for FDI in the world. According to information from the Government of India, FDI increased from INR 1.07trn in the first half of last year to INR 1.45trn in the first half of 2016–17. This marks an increase of 36%, despite a 5% reduction in global FDI inflows. The Government of India, in order to further liberalise the FDI Policy, is considering phasing out FIPB completely in the upcoming financial year. This move was announced as part of the Union Budget for FY 2017–18 presented on 1st February, 2017 by the Finance Minister of India.

Demonetisation

In one of the most ambitious steps taken by the Government of India, in November, 2016, the Legal Tender status of INR 500 and INR 1,000 denominations of banknotes of the Mahatma Gandhi Series issued by the Reserve Bank of India ("**RBI**") was withdrawn. People/corporates/firms, etc. in possession of the banned notes could obtain value thereof by credit into their respective bank accounts. The Government justified the move in the light of issues of counterfeiting Indian banknotes, to effectively nullify 'black money' hoarded in cash and curb funding of terrorism with fake notes. The move created a so-called cash crunch which mostly affected small companies and sectors such as real estate and jewellery, which are more cash-intensive.

Demonetisation is likely to strengthen the position of the big-ticket players in the economy who may opt for M&As to achieve that. Overall, the promotion of a cashless and digitised economy is expected to go a long way to curb corruption and bring in transparency in transactions, which would further promote foreign investments and M&A activities.

Tax-related changes

- *Goods and Services Tax ("**GST**") Bill*

The Constitution (122nd Amendment) Bill, 2014 was introduced in the Parliament to amend the Constitution to provide a framework for the introduction of a goods and services tax. The Bill was approved by the President of India and was passed by both the Houses of Parliament in August, 2016. GST would replace all the indirect taxes such as excise duty, sales tax, and service tax as one of the most comprehensive and reformative tax regimes in India. Previously to have been implemented from 1st April, 2017, GST may now be implemented in the last quarter of 2017.

GST is expected to simplify the indirect taxation structure and boost M&A transactions by encouraging foreign entities to invest in India. GST is on the road to implementation, with the Central Board of Excise and Customs putting the final touches to the Model GST law and finalisation of the formation of the GST Council. The Government of India is to make extensive outreach efforts to trade and industry regarding the implementation of GST from the beginning of the FY 2017–18.

- *Reduction in corporate income-tax*

With the promise to reduce corporate income-tax gradually from 30% to 25% in the Union Budget for FY 2015–16, the Finance Minister of India, in Union Budget for FY 2017–18, reduced corporate income-tax for smaller companies with annual turnover up to INR 500m

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to 25%. This move is expected to benefit the 96% of companies which fall under this category and in turn improve the business environment of India.

- *Changes in tax treaties*

One of the main agendas for the present Government is to curb the 'black money' stashed in other tax havens and divert their flow in the economy. In this regard, amendment of the 33 year-old Double Taxation Avoidance Agreement ("**DTAA**") between Mauritius and India was one of the important steps taken in May 2016. The Protocol signed between the countries amends the DTAA in such a manner that India will have the right to tax the capital gains resulting from the sale of shares of an Indian resident company as acquired by a Mauritian tax resident on or after 1st April, 2017. The existing investments being grandfathered, the Protocol also provides for a transition period of two years wherein the gains would be taxed at 50% of the domestic rate. The full effect of the treaty would be felt post 1st April, 2019. Prior to the amendment, such capital gains were not taxed in India, thereby making investors structure the investment in India through Mauritius to avoid the payment of tax. The amendment is expected to deter such structured routing of investment and curb the loss of revenue.

Keeping the amendments of the India-Mauritius DTAA in mind, DTAAs with Cyprus and Singapore were also amended on the same lines in September 2016 and December 2016, respectively. These changes in the tax treaties are expected to have a notable impact on inbound investments in India as the benefit of the resident-based tax regime has been overhauled in consideration of curbing black money transactions. The existing investments in India routed through either of the mentioned countries may have to be revised and/or restructured in the light of the amendments in the tax treaties.

Insolvency and bankruptcy

Another distinguishable change brought in to the regulatory scenario of India is the advent of the Insolvency and Bankruptcy Code, 2016 ("**Code**"). The Code was approved by the President of India and passed by both the Houses of the Parliament in May, 2016.

The Code provides for time-bound settlement of matters regarding insolvency and bankruptcy of corporate and natural persons. The resolution process contemplated under the Code would be conducted by professionals known as Insolvency Professionals. The Code amended a number of statutes including the 2013 Act and has consolidated the scattered law on the subject. The sections of the Code are being notified in parts and the matters therein would be adjudicated by the NCLT/NCLAT. Once all the sections of the Code are notified, it would become the one-stop junction for all matters concerning insolvency and bankruptcy for legal entities and natural persons.

The Code is expected to boost investor confidence by improving debt recovery timelines and maximisation of asset value. The transparency and simplification in this area of law was the need of the hour, in view of the augmented business activities in the country.

Industry sector focus

EMU Sector

Unlike 2015 when the technology sector dominated M&A activity, 2016 saw a sharp fall in the sector to just 56 deals in 2016 from 89 deals in 2015. As seen, 2016 broke all previous records in M&A activities. However, the first half of 2016 was slow compared to the second half of the year wherein the major deals were announced. Only US$ 3bn worth of deals in the EMU sector took place in the period of January to June 2016. This was almost a 14% fall in deal value in comparison to the same period of 2015.

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The second half of 2016 saw increased levels of M&A activity in the economy in general, including this sector. The push to make the EMU sector stand out in the year 2016 was fuelled by the Rosneft–Essar deal wherein Russia's Rosneft acquired the Essar oil unit for a whopping US$ 12.9bn. This deal took the total deal value of the sector to US$ 17bn for the year, which is almost 25% of the entire deal value of M&A in 2016. The deal value in EMU increased thrice as compared to 2015.

This increase may be due to the oil-rich nations trying to secure the overseas market for their production, in the light of the fall in the prices of crude oil and other commodities. India is one of the largest-growing fuel consumers in the world. Most of the transactions were a cumulative effect of the Government of India's efforts in creating a liberalised India with strong investor confidence. The deals in EMU accounted for more than a 26% share in the total M&A in the year.

The year ahead

2016 has been an interesting year for M&A-related activities. Amidst the iconic global changes including the United Kingdom exiting the European Union (Brexit) and the presidency elections in the United States of America, India has held its ground and not faltered. In fact, the International Monetary Fund ("**IMF**") has predicted India will be one of the fastest-growing economies in the world in 2017. The improved M&A market since October 2016 is expected to continue in 2017 as well. The pickup in M&A activities has been there since the new Government was elected in 2014. The last 24 months saw a game-changing overhaul in the legal and regulatory structures in the country. The initiatives of the Government of 'Make in India', 'Digital India', '*Swachh Bharat*' (Clean India) have played a very important role in transforming India and pushing the economy to reach new heights. The Government has also established a friendlier and a more transparent atmosphere for entrepreneurs and small and medium-sized enterprises.

Additionally, more and more sectors have opened for FDI, which has amplified the competitiveness in the economy. Per the reports published by the Government, FDI since October 2014 to May 2016 grew 46% to UD$ 61bn after the 'Make in India' initiative was launched to promote India as a preferred hub for foreign investments. In the light of the changing scenario, Apple Inc. has announced its manufacturing activities to commence in the first half of 2017 in the country. An enlarged international presence has forced the domestic players and the public sector units to gear up and restructure their businesses.

Even though the e-commerce and other sectors have seen an upward trend, sectors such as real estate are still dominated by the Government, which makes it difficult for other players to penetrate. However, the construction sector was the most active in the first half of 2016, occupying approximately a 20% share in total M&A by deal value. A number of reforms have been undertaken by the Government to ease doing business in this sector. The Union Budget for FY 2017–18 has allocated US$ 60bn for building and upgrading India's infrastructure.

Another historic decision taken by the present Government was the scrapping of the 60 year-old Planning Commission and replacing it with the National Institution for Transforming India Aayog ("**NITI Aayog**"). The NITI Aayog promotes cooperation between States to build a stronger India. The Prime Minister has tapped into the age-old principle of 'united we stand, divided we fall', and has been encouraging 'cooperative and competitive federalism' among States. Competitive federalism has been embraced by many States in the country, which makes them a better destination for foreign investment in comparison to

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other States which are not as involved. Most of the reforms undertaken by the States have been in creating single-window systems, easing construction permits, reforms in indirect taxation, environment and labour, etc.

The M&A space has been mostly driven by regulatory reforms in the area. The implementation of GST and the Insolvency and Bankruptcy Code, among others, are expected to further enhance investor confidence and promote sustainable growth. The formation of the NCLT/NCLAT is also expected to push M&A and other restructuring activities. The first half of 2017 may be a testing ground for the newly formed tribunals in relation to the transfer of pending cases; it is expected to be in full flow in no time.

Furthermore, the steps taken by the Government to curb corruption and restrict the flow of black money in the economy, long-term investment and other M&A activity, look positive. The demonetisation move may have hampered GDP growth, however; as stated by the Finance Minister in the Union Budget for FY 2017–18, the move is expected to have only transient effects on the economy. In another move, a ban has been placed on all cash transactions above INR 0.3m (approximately US$ 4,500) which is proposed to be made effective in the second half of 2017.

The last couple of years have seen ups and downs in the global economy in connection with the fall in commodity and crude oil prices. India has taken strategic steps to sustain itself in times of crisis. The increased deal-making in the EMU sector is an example of this. 2017 is expected to be an important year in terms of consolidations in the domestic space. Inbound activity is also expected to grow with the relaxed FDI norms. All in all, 2017 appears to be a constructive year for M&A.

* * *

Sources

- The statistics, figures and information contained in this chapter are based on the reports of Mergermarket India and VCCEdge India, which are the financial research platforms, EY report for January–March, 2016, etc., and other financial, company and government websites.

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Indonesia

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Overview

Indonesia is a civil law country and an emerging market whereby local companies are mostly owned by either families or, in the case of state-owned companies, by the government. The Indonesian limited liability company adopts a two-tier board structure, where each company has a management board (board of directors) and a supervisory board (board of commissioners) as their governance structure.

For mergers and acquisitions ("**M&A**") activities in Indonesia, appetite from foreign investors depends on several determining factors, among others, the potential for economic growth, ease of doing business, political stability and legal certainty.

We list below the laws and regulations relevant to M&A transaction in Indonesia that we use in the preparation of this chapter:

- Law No. 40 of 2007 on Limited Liability Company ("**Company Law**");
- Law No. 25 of 2007 on Investment ("**Investment Law**");
- Law No. 8 of 1995 on Capital Market ("**Capital Market Law**");
- Law No. 5 of 1999 on Prohibition of Monopolistic Practices and Unfair Business Competition;
- Law No. 13 of 2003 on Manpower ("**Manpower Law**");
- Government Regulation No. 27 of 1998 on Merger, Consolidation and Acquisition of Limited Liability Company;
- Government Regulation No. 57 of 2010 on Merger or Consolidation of Business Entity and Acquisition of Company Shares which May Cause Monopolistic Practices and Unfair Business Competition;
- Presidential Regulation No. 44 of 2016 on List of Lines of Business Closed and Conditionally Open to Investment ("**2016 Negative List**");
- Regulation of Head of Investment Coordinating Board (*Badan Koordinasi Penanaman Modal* or "**BKPM**") No. 14 of 2015 on Guideline and Procedure of Investment Principle License, as twice amended, lastly by Regulation of Head of BKPM No. 8 of 2016;
- Bapepam-LK Rule No. IX.H.1 on Public Company Takeover ("**Rule No. IX.H.1**"); and
- other sector-specific laws and regulations (along with certain others cited in the elaboration below).

The Company Law generally provides the following types of M&A transaction: merger; consolidation; acquisition; and spin-off.

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- *Merger* is when one company or more merges into another company, resulting in assets and liabilities of the merging company being transferred by operation of law to the surviving company, and consequently the merging company dissolves by operation of law (without liquidation).
- *Consolidation* is when two companies or more consolidate themselves, resulting in the existence of a newly consolidated company which, by operation of law, acquires the assets and liabilities of the consolidating companies, and consequently the consolidating companies dissolve by operation of law (without liquidation).
- *Acquisition* is when a legal entity or person acquires shares in a company resulting in a change of control of said company.
- *Spin-off* is when:
  (i) all of the assets and liabilities of a company are being transferred by operation of law to two companies or more, and consequently the transferring company dissolves by operation of law (without liquidation); or
  (ii) a part of the assets and liabilities of a company are being transferred by operation of law to one or more companies, in which case the transferring company still maintains its existence.

In practice, acquisition has proven to be the most popular type of M&A transaction considering the straightforward procedure and the method of entering the Indonesian market by acquiring already operational companies or expanding an investor's already existing business in Indonesia. Merger comes second, and is usually undertaken by a certain group to unify several companies within its group for efficiency and branding purposes. Spin-off is rarely undertaken, save for some cases where an existing company with multiple businesses is forced under the prevailing regulations to engage in one particular business sector, obliging the company to spin-off the other businesses. Consolidation is the least popular type, as business owners typically prefer undertaking a merger transaction and maintain one surviving company compared to having a new company as a result of consolidating two or more companies.

Key issues of M&A transactions

<u>Change of control</u>

Referring to how the term 'acquisition' is defined under the Company Law, there must be a change of control of the target company for a transaction to be qualified as an acquisition transaction. If the intended transaction will cause a change of controller of the target company, there are strict procedural steps to be complied with under the Company Law, which inevitably prolongs the time needed to consummate the transaction. The procedural steps involve, among others, announcements in an Indonesian daily newspaper (addressed to creditors of the target company) and in writing to employees of the target company regarding the proposed transaction, the need to sign the sale and purchase of shares agreement in notarial deed form, and another newspaper announcement regarding completion of the transaction. The foregoing steps are not mandatory for transactions which do not cause a change of control of the company.

Having said the above, the Company Law does not provide a definition or threshold of 'control'. In practice, the generally accepted interpretation of 'control' is the ability to influence, directly or indirectly, the management and/or policies of a company. In its implementation, control may be gained through various means, e.g. by ownership of more

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than 50% issued shares (either individually or acting in concert), control over the majority of voting rights, and/or the ability to control and nominate key management positions in a company. For example, a shareholder owning merely 10% shares in a company can be viewed as a controller if the articles of association of said company stipulate that every shareholders' resolution can only be passed with approval from said shareholder.

In the context of public companies, Rule No. IX.H.1 defines 'controller' as a party (i.e. an individual, a company, a partnership, an association or an organised group) that:

(i) owns more than 50% of the total paid up shares; or

(ii) has the ability to determine, directly or indirectly, in whatsoever manner, the management and/or policies of a public company.

The concept of control does not only mean owning more than 50% shares of the public company. The key element would be whether or not after the transaction, even though the existing controller owns less than 50% shares, it retains control over the public company due to the consideration of point (ii) above.

Caution should be exercised when each of several parties owns less than 50% shares but they are seen to form an organised group that cumulatively owns more than 50% shares. An organised group exists when members of the group have a similar plan, agreement or decision to work for a certain goal. Consequently, the organised group will be deemed as a controller.

In light of the foregoing, the determination of whether a transaction triggers a change of control needs to be made on a case-by-case basis.

Foreign investment

- *General requirements*

The Investment Law dictates that foreign investments in Indonesia must be conducted in the form of a foreign investment company (PT *Penanaman Modal Asing* or "**PMA Company**") established under Indonesian laws and domiciled within Indonesian territory. The general requirements applying to all PMA Companies are as follows:

- The total investment is more than IDR 10 billion or its equivalent in US$, not including the value of land and buildings, subject to certain statutory exceptions.
- Out of such total investment amount, at least IDR 2.5 billion or its equivalent in US$, must be injected as the issued and paid up capital of the PMA Company.
- The minimum capital participation by each shareholder in a PMA Company is IDR 10 million or its equivalent in US$.

It is important to note that a company is considered as a PMA Company, and hence will be subject to PMA Company requirements, if there is a foreign shareholder owning even one share in said company.

- *Negative List and Grandfather Clause*

In the context of M&A transactions, foreign investors must firstly observe whether the line of business of the target company is open to foreign investments. The Indonesian Government has issued the 2016 Negative List (periodically updated taking into account the business environment in Indonesia), which determines and lists the lines of business that are closed and conditionally open to foreign investments. When a certain line of business is not expressly specified in the 2016 Negative List, the general presumption is that such line of business is open to 100% foreign investment. Due to the limitative nature of the 2016 Negative List, normally additional research needs to be conducted at

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the BKPM to ascertain whether the intended line of business is fully open or conditionally open to foreign investment. Aside from foreign shareholding limitations, for certain lines of business, the 2016 Negative List also sets out other requirements pertaining to location of the business, specific licences to be obtained or the need to enter into partnership with local businesses. Depending on the line of business of the target company, sector-specific laws and regulations may also set out foreign shareholding limitation, divestment requirement, or shareholder eligibility criteria, among others, in banking and mining sectors.

When a foreign investor intends to acquire a local target company having two lines of business or more, analysis must be done on whether there is a foreign shareholding limitation on each of the relevant lines of business. If a company has two separate lines of business, each with its own foreign shareholding limitation, the more restrictive limitation applies. For example, if a company engages in both (i) employee outsourcing services (with maximum of 49% foreign shareholding) and (ii) job training services (with maximum of 67% foreign shareholding), then the foreign investor may only own up to 49% shares in the company.

On the other hand, the foreign shareholding limitations stipulated in the 2016 Negative List may not apply in the context of a M&A transaction pertaining to an already existing PMA Company. The 2016 Negative List contains the so-called 'grandfather clause' which allows PMA Companies to retain their foreign shareholding percentage in the event of merger or acquisition, as further elaborated below:

- In the event of a merger, the surviving company may retain the foreign shareholding composition as already stated in its investment licence.
- In the event of an acquisition, the target company may retain the foreign shareholding composition as already stated in its investment licence.

In the event of a consolidation, the newly consolidated company (as a result of consolidation of two or more companies) must adhere to the foreign shareholding limitation prevailing at the time of its establishment.

In some cases, the grandfather clause cannot be applied due to the existence of a sector-specific law or regulation which governs its own foreign shareholding limitation. For instance, in October 2009 the Government enacted Law No. 38 of 2009 on Post ("**Post Law**") which stipulates that a foreign post operator that intends to engage in courier services business in Indonesia must enter into a joint venture with a local post operator, where the majority shares in the joint venture company must be owned by the local post operator. The Negative List prevailing in 2007 (prior to the issuance of the Post Law) did not limit foreign shareholding in non-small scale courier services business, thus there have been PMA Companies majority-owned by foreign shareholders. To implement the Post Law, the Government further enacted Government Regulation No. 15 of 2013 on Implementation of Law No. 38 of 2009 on Post ("**GR No. 15/2013**"), which provides that post operators must obtain a Post Operator Licence, and pre-existing post operators are required to comply at the latest within two years after the enactment of GR No. 15/2013. Consequently, a PMA Company that is majority-owned by foreign shareholders is forced to adjust its shareholding composition so as to be majority-owned by local post operators before it can apply for the Post Operator Licence.

Although not ideal to maintain legal certainty, the Post Law and GR No. 15/2013 are superior in terms of regulatory hierarchy compared to the Presidential Regulation containing the 2016 Negative List and the grandfather clause provisions. Accordingly, in the event of conflict between those regulations, the Post Law and GR No. 15/2013 prevail as the higher-level regulations.

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- *Venture Capital Company ("VCC")*

In relation to the issue of foreign shareholding limitation as provided in the Negative List, the BKPM formally recognises the possibility of foreign investors investing through a VCC. Any shares participation by a VCC is not regarded as foreign investment even if the VCC itself is foreign-owned. By using a VCC, the foreign investor will be able to invest in businesses subjected to foreign shareholding limitation. However, investment through a VCC can only be done on a temporary basis of not more than 10 years, with possible extension of up to 10 years. Aside from its temporary nature, investing through a VCC is deemed to be relatively unattractive considering that foreign investors may only own up to 85% shares in a VCC, and the extensive set of Financial Services Authority (*Otoritas Jasa Keuangan* or "**OJK**") requirements surrounding the establishment and operation of a VCC.

- *Limited Participation Mutual Funds (Reksa Dana Penyertaan Terbatas or "RDPT")*

RDPT has been considered as an alternative structure to avoid the issue of foreign shareholding limitation. RDPT is a vehicle used to collect funds from professional investors which will be managed by a local investment manager in a securities portfolio. RDPT can only own controlling shares in private companies that engage in real sector activities, and will appear as a local shareholder when investing in those private companies.

Setting up RDPT is administratively not easy because there are several formalities to be complied with under OJK Rule No. 37/POJK.04/2014 on Limited Participation Mutual Funds in the Form of Collective Investment Contracts.

RDPT is formed through a collective investment contract (*kontrak investasi kolektif*). It is a contract between a local investment manager and a local custodian bank, which extends to bind holders of participation units. Even if all the participation units of RDPT are held by foreign investors, the RDPT will still be regarded as a local shareholder.

Given RDPT is just a contract and the Company Law provides that only individuals and legal entities can hold shares in Indonesian limited liability companies, a question then arises whether RDPT is eligible to become a registered shareholder from the Company Law point of view.

Notification requirement to the Business Competition Supervisory Commission (*Komisi Pengawas Persaingan Usaha* or "**KPPU**")

An acquisition, consolidation or merger transaction that occurs between non-affiliated companies must be notified within 30 business days from the effective date of the acquisition, consolidation or merger to the KPPU if the transaction meets the following threshold:

- the value of assets of the combined businesses in Indonesia exceeds:
  - (i) IDR 2.5 trillion;
  - (ii) IDR 20 trillion for banks, or
- the sales turnover of the combined businesses in Indonesia exceeds IDR 5 trillion.

KPPU is authorised to impose administrative sanction in the form of a fine of IDR 1 billion per day of delay, with a maximum of IDR 25 billion, for failure to notify KPPU of a transaction that meets any of the above thresholds.

Employees' rights

The Manpower Law provides that when an employer has undergone a change of status, merger, consolidation or change of ownership, the employee may choose not to continue

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his employment relationship with the employer. If the employee decides to terminate his employment, the employee will be entitled to receive severance package in the amount of one-time severance pay, one-time service appreciation pay and compensation in line with the calculation formula as stipulated in the Manpower Law. This provision seeks to protect the interest of employees in case of certain corporate actions which may affect the policies and decision-making of the employer. It is important to note that the right to seek a termination and receive a severance package will only be applicable for employees hired under an indefinite period employment agreement (permanent employees) and not for employees hired under definite period employment agreement (contract employees).

The Manpower Law does not provide any elucidation as to what constitutes a change of ownership, leading to wide-ranging interpretations. Although there is no explicit connection between 'change of ownership' under the Manpower Law and the term 'change of control' under the Company Law, in practice, the change of ownership in this context is generally interpreted as a direct change of control of the employing company. It is therefore understood that transfers of shares in a company that do not result in a change of control of said company, will not trigger employees' rights to seek termination and receive a severance package.

In its implementation, it is not uncommon to see a target company procuring a statement letter from each of its employees, principally stating that the employee is willing to continue employment with the company under the same terms and conditions.

Rights of minority shareholders

In M&A transactions that do not result in 100% ownership over a target company, it is also important to be observant of the rights of minority shareholders. As provided in the Company Law, the rights of a minority shareholder include, among others, the following:

- be registered in, and have access to, the shareholders' register of the company;
- file a claim against the company to the relevant district court for any damage caused by the acts of the company considered to be unfair and unreasonable resulting from decisions made by the general meeting of shareholders ("**GMS**"), the board of directors and/or the board of commissioners;
- require the company to purchase its shares at a fair price, if the shareholder does not agree with the acts of the company deemed to be damaging the relevant shareholder or the company, specifically in (i) amending the articles of association of the company, (ii) transfer or encumbrance of more than 50% of the net assets of the company, or (iii) merger, consolidation, acquisition or spin-off of the company;
- shareholder(s) representing at least 10% of the total number of issued shares with valid voting rights (unless the articles of association of the company provide for a smaller percentage of representation) is entitled to request a GMS to be convened by the board of directors or board of commissioners of the company, and to request a permit to the head of relevant district court to convene the meeting by itself if the board of directors or board of commissioners fails to convene the requested GMS within a certain period;
- shareholder(s) representing at least 10% of the total number of issued shares with valid voting rights is entitled to:
  (i) file a claim on behalf of the company against a negligent director or commissioner to the relevant district court for causing loss to the company;
  (ii) file a request to the relevant district court to conduct an investigation on the company, only after the company fails to provide certain requested information

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and if there is reason to believe that the company or its director or commissioner has committed an unlawful act causing loss to shareholders or third parties; or

(iii) propose dissolution of the company at the GMS.

Public company takeover

- *Typical route*

The popular structural means of obtaining control of a public company in Indonesia is by way of (i) shares acquisition from an existing controller of the public company, and (ii) shares subscription for pursuing a backdoor listing. This backdoor listing gives shareholders of a private company the opportunity to own majority shares of the public company by way of selling their shares in the private company to the public company in a rights issue procedure, allowing them a tight grip on control over both companies.

In that procedure, the public company will issue pre-emptive rights to purchase new shares in the public company to each shareholder in proportion to its ownership percentage. The prospective controller will have to enter into an agreement with the existing controller, pursuant to which the existing controller must: (i) procure the public company to commence and complete the rights issue procedure; (ii) transfer its pre-emptive rights to the prospective controller during the rights issue period; and (iii) not subscribe any remaining unsubscribed pre-emptive rights during the rights issue period.

For the purpose of becoming a new majority shareholder of the public company, the prospective controller will need to exercise those pre-emptive rights by subscribing to the newly issued shares. The prospective controller usually takes the role as standby buyer to also purchase the newly issued shares which are not subscribed by the other existing shareholders, eventually causing even further dilution to the public shareholding.

- *Disclosure and secrecy obligations*

Prior to closing, takeover negotiations are almost always done under a shroud of secrecy and the content of negotiations would be deemed as insider information. This insider information means any material information that an insider has, which is not yet available to the public. An insider includes, among others, a director, commissioner, employee or principal shareholder (i.e. a party indirectly or directly owning at least 20% voting rights) of a public company.

An insider is prohibited from providing insider information to a party that would reasonably be expected to use the insider information in securities trading. Violation of the insider trading rule is subject to imposition of criminal sanctions in the form of imprisonment of up to 10 years and fine of up to IDR 15 billion.

A controlling shareholder, director or employee of the target public company should take precautions in the event each of them provides any insider information to a prospective controller (i.e. acquirer) with respect to negotiations or due diligence.

OJK has the authority to investigate insider trading allegations; however, it exempts off-the exchange securities transactions between an insider having insider information and a non-insider from the insider trading rule if certain requirements are met: among others, the non-insider must provide a written statement to the insider certifying that the insider information to be received will be kept in secrecy, and will not be used for purposes other than transactions with the insider.

If the prospective controller decides not to make an announcement on the negotiations, all parties involved in such negotiations must keep confidential the information resulting from the negotiations. In practice, the parties must sign a confidentiality agreement to avoid possible allegations of insider trading.

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Under Rule No. IX.H.1, the prospective controller may voluntarily announce information on the negotiations in at least one Indonesian daily newspaper having national circulation, and provide the announcement to the target public company, OJK and Indonesia Stock Exchange ("**IDX**"). Because the date of the announcement will influence the mandatory tender offer ("**MTO**") pricing, careful consideration of disclosure content and timing is important to be discussed by all parties in the transaction in order to avoid any negative sentiment from the market.

Any further progress of the negotiation, postponement, or cancellation has to be announced within two business days after occurrence of each progress.

Obligations to announce a takeover, via at least one Indonesian daily newspaper with national circulation, and to submit a notification to OJK at the latest one business day following the effective date of the takeover, arise when there is a new controller. The disclosure must include the number of acquired shares and the new controller's total ownership, the new controller's detailed identity and, if applicable, a statement that the new controller is an organised group.

- *MTO procedure and pricing*

A change of control arising from a direct or indirect takeover of a public company, unless the takeover falls under certain exemptions set out in Rule No. IX.H.1, must be followed by MTO.

The MTO is an offer that must be made by a new controller to purchase the remaining shares of the target public company, and a way for minority shareholders to exit should they not agree with the acquisition. The MTO does not extend to shares owned by principal shareholders and other controlling shareholders of the target public company.

In brief, the MTO procedure is as follows:

- the new controller must first submit a draft of the announcement of the information disclosure on the MTO along with its supportive documents to OJK, and the target public company within two business days after the takeover announcement;
- the new controller must obtain an OJK statement letter stating that the new controller can announce the information disclosure;
- at the latest two business days after receiving the OJK statement letter, the MTO announcement must be made in one Indonesian daily newspaper with national circulation that must include, among others, the purchase price along with the calculation, provisions of payment and implementation period;
- the MTO must start one day after the MTO announcement for a fixed period of 30 days;
- the MTO settlement must be in the form of cash and made at the latest 12 days after the closing of the MTO period; and
- the new controller must submit a report on the result of the MTO to OJK within five business days after the settlement is completed.

The pricing for the MTO will depend on whether or not the shares of a public company are listed and traded at IDX, and the change of control is caused by direct or indirect takeover. As one of the examples, for direct takeover of a public company whose shares are listed and traded at IDX, the MTO price is the higher of (i) the average of the highest daily traded price during the 90-day period prior to the takeover announcement or the negotiation announcement (if the negotiation announcement is made prior to closing), or (ii) the takeover price.

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- *Exemptions*

A new controller is not required to conduct an MTO if the change of control is triggered by rights issue, merger or voluntary tender offer ("**VTO**"). The VTO is less popular as a means of obtaining control. OJK allows the offeror to settle the payment for completing the VTO by cash or securities.

- *Reporting obligation*

As a general rule, a party that holds 5% or more shares in a public company must report to OJK within 10 days from the transaction date, regarding:

- its share ownership in the public company; and
- any change of the share ownership in the public company.

In practice, the report is submitted by the direct shareholder of the public company because it is the name of the direct shareholder that will appear in the shareholders' registry of the public company.

Caution should be exercised when each of several parties owns less than 5% shares, but they are viewed cumulatively to meet the 5% threshold and jointly constitute an organised group. Consequently, they will be required to aggregate their shareholding for the purpose of submitting the report to OJK.

There are no prescribed disclosure forms for this matter, however, the report must at least contain certain information; among others, the purchase or the sale price per share.

Failure to comply with the reporting obligation is subject to a fine in the amount of IDR 100,000 for each day of delay, with a maximum amount of fine of IDR 100 million.

The reporting requirements are provided in the Capital Market Law and OJK Rule No. 60/POJK.04/2015 on Disclosure of Certain Shareholders.

Significant deals and highlights

According to the Annual Issue 2016 of Duff & Phelps's Transaction Trail ("**Duff & Phelps**"), the M&A deal volume during 2016 reached a total of 131 deals in Indonesia with a total announced deal value of approximately US$ 8.5 billion. It is interesting to note that domestic M&A took up the majority share (more than 60%) of total deal value. Duff & Phelps also explains that M&A deal values during 2016 showed significant recovery, where deal values reached approximately US$ 8.5 billion compared to US$ 1.6 billion in 2015.

One of the notable deals in 2016 was PT Medco Energi Internasional Tbk's acquisition of a controlling stake in PT Amman Mineral Internasional, which owns 82.2% shares of PT Newmont Nusa Tenggara, for US$ 2.6 billion.

Key developments

On 16 December 2015, OJK issued Rule No. 32/POJK.04/2015 on Rights Issues, and Rule No. 33/POJK.04/2015 on the Form and Content of a Prospectus for a Rights Issue. OJK now acknowledges non-cash capital injections in a rights-issue situation provided that an appraiser is appointed to assess the fair value and the fairness of such injections. If proceeds of the rights issue will be used by a public company to purchase shares in a target company and the seller of the target company intends to subscribe new shares of the public company in the rights issue, the seller can consider its shares in the target company as the consideration for the subscription.

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OJK now requires the public company to convene a GMS to approve the rights issue prior to the submission of a registration statement to OJK. After obtaining the approval, there will be a 12-month deadline for the public company to get an effective statement from OJK with respect to the rights issue. The rights issue prospectus must include detailed information on the standby buyer or the proposed new controlling shareholder. This includes the source of funds used for the shares subscription and the beneficial owner of the new controlling shareholder.

On 23 December 2016, OJK issued Rule No. 74/POJK.04/2016 on the Merger or Consolidation of Public Companies. For a merger or consolidation involving a public company and its direct wholly-owned subsidiaries whose financial statements are consolidated, this OJK rule provides that the public company is not required to disclose information in its merger or consolidation plan with respect to the procedures for converting shares, *pro forma* financial information, summary of the appraisal reports on the shares of each company, and summary of appraisal report on the merger or consolidation.

In addition, the 2016 Negative List does not apply to indirect or portfolio investment through domestic capital market; however, it does not provide clear provisions on how extensively foreign investors can enjoy this exemption by way of purchasing listed shares through IDX. In light of the above issue, a market practice approach should prevail.

Industry sector focus

According to Duff & Phelps, the top sectors with high-value deals in 2016 were: (i) materials which include among others, mining (55%); followed by (ii) energy (17%); (iii) banking, financial service and insurance (6 %); (iv) retail (5%); and (v) others (17%).

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Barli's main concentration is capital markets, covering the whole spectrum of equity and debt transactions including IPOs, offshore securities offerings, rights offerings, bonds issuance, public M&A and tender offers. He has advised numerous listed companies in connection with their related party transactions involving conflict of interest, material transactions and mandatory disclosure issues.

His practice also encompasses joint ventures and corporate governance. He advises the boards and management of public and securities companies, as well as investors, in all aspects of compliance with securities laws and regulations in Indonesia. This includes periodic and ongoing disclosure requirements, general meeting of shareholders, substantial shareholding disclosure, broker-dealer compliance and exchange listing and compliance requirements.

He has established close working relationships with many prominent local underwriters and international investment banks, and thrives on handling transactions with challenging timelines and complex structures.

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Eric is one of the Partners leading the Corporate & Securities practice of the firm. His extensive knowledge of a broad range of business sectors – coupled with his breadth of experience – give him an in-depth understanding of various legal issues normally dealt with when doing business in Indonesia. He understands that clients want clear advice – however complex the issues – and that prompt response and direct accessibility are most valued. When dealing with the legal issues at hand, he is every bit enthused in understanding exactly the aims of the client and draws on his critical thinking and pragmatic approach to deliver client-focused advice. Clients also benefit from Eric's responsiveness and unerring eye for detail.

Eric advises clients on a wide range of corporate work in different sectors, covering domestic and cross-border transactions and sector-specific advisory work. He regularly acts as counsel in M&A transactions, joint ventures, e-commerce operations, real estate purchase and disposal, as well as financing & securitisation deals.

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Ireland

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Overview

Ireland is reported once again to have remained the fastest-growing economy in the European Union in 2016 for a third successive year, having weathered the knock-on effects of an eventful and somewhat volatile year from both a global economic and geo-political perspective. Domestically, Ireland was itself without a government for a number of months following elections early in the year, which may account to some extent for the relatively weak start experienced to M&A activity in 2016. However, viewed overall, the M&A market in Ireland remained relatively strong in 2016, buoyed no doubt by the resilience of the economy in the face of global vicissitudes. The Central Bank of Ireland ("CBI") estimates that GDP grew by 4.5% in 2016 and the European Commission is forecasting GDP growth of 3.6% for 2017 and 3.5% for 2018 respectively. This growth has been led mostly by the strength of domestic demand, which after a period of robust growth, appears now to be gradually moderating; however, the CBI indicates that prospects for sustained, solid growth in Ireland remain positive.

There were 422 deals announced in 2016, which was a reduction of 11.3% compared to 2015 according to recent data from Experian. Transactions totalled about €49bn in value, 67% less than 2015. This decrease in activity should be viewed against the backdrop that 2015 was an exceptional year in which the total recorded deal value was heavily inflated by three large transactions which completed during the course of the year (CRH's €6.5bn acquisition of certain assets of Holcim Limited and Lafarge S.A.; Bohai Leasing's €6.5bn acquisition of Avolon Holdings Limited; and Paddy Power and Betfair Group Plc's €3.8bn merger). Also, as was to be expected, the uncertainty arising from the result of the British referendum on EU membership in June 2016 led to many transactions being suspended or abandoned entirely and contributed to a reduction in the overall deal volume for the year, with the impact felt most in Q3. The decrease in deal flow may also be attributed, in part, to the clampdown on corporate inversion transactions by the US Treasury Department, which had been responsible for Ireland becoming one of the most targeted countries by US companies for M&A transactions in 2015.

Although 2016 did not reach the highs attained the previous year, when taken in the context of the last decade as a whole, 2016 remains one of the strongest years for M&A transactions in recent times and indeed, Irish transactions accounted for 2.9% of all European deals and represented 5% of their total value over the course of the year. The decrease in activity in 2016 is also in line with general global trends.

In terms of the nature and composition of the deals which occurred in 2016, there was a notable absence of the type of high-value, "mega deal" acquisitions that have been a feature

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of the Irish M&A landscape in recent years; however, by contrast there was an increase of 16.7% in the number of small deals concluded, with a corresponding uplift of 23.4% in the value of such deals from 2015.

As regards the type of transactions which took place, as was the case in 2015, the most common form of acquisition encountered in Ireland was one in which a foreign company acquired an Irish target, with such transactions accounting for 37% of the total volume of deals according to research by Investec.

The sector of the economy that oversaw the largest number of transactions in 2016 was the Technology, Media and Telecommunication sector, with the continuing attractiveness of Irish offerings in this sector largely attributable to the ability of such companies to scale quickly.

Significant deals and highlights

While 2016 was not characterised by the "megadeals" which were witnessed in 2015 and, in fact, the year recorded less than half as many deals with a consideration of over €1bn than in the previous year, there were nonetheless a number of highlights in 2016. The largest deal was reported in November when Allergan commenced a €9.4bn share buyback after the abandonment of its merger with Pfizer last year, following the change of rules relating to inversions (discussed in further detail below). Johnson Controls Inc., a US maker of car batteries and heating and ventilation equipment, and Cork-based Tyco International Plc agreed to merge in a deal valued at $16.6bn, resulting in a corporate tax inversion for Johnson Controls. While last year's Pfizer-Allergan transaction did not overcome the scrutiny of the US Treasury under the new inversion rules, it appears that the Johnson transaction inversion has been deemed to be primarily for operational reasons and not solely a tax avoidance strategy.

Avolon, the Irish aviation leasing company purchased by Bohai Leasing Co., Limited, part of the Chinese HNA Group, in 2015 agreed to acquire the leasing business of CIT Group Inc. for $10bn. This transaction will see Avolon become the third-largest aircraft-leasing company in the world, behind Gecas and Aercap. In another significant transaction, Fleetmatics, a fleet management business which originated in Ireland but which has a US activity base, was taken private by Verizon, the US telecoms group. This deal represents a return to the traditionally strategic approach of global companies purchasing home-grown businesses in order to diversify their positions. At the end of December 2016, Sumitomo, the Japanese conglomerate, announced that it had offered €751m for the Dublin-based fruit distributors Fyffes in a deal which will result in the merger of the largest banana distributors in Asia and Europe respectively.

The following table, produced by Experian, sets out the top 10 deals which took place in Ireland last year:

Date	Consideration (€m)	Deal Type	Target	Bidder
11/11/2016	9,375	Share Buy-Back	Allergan Plc, Dublin	
06/10/2016	9,375	Acquisition	Aircraft Leasing Business of CIT Group, Inc. USA	Avolon Holdings Ltd. Dublin

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Date	Consideration (€m)	Deal Type	Target	Bidder
25/01/2016	3,225	Reverse Takeover	Johnson Controls Inc. USA	Tyco International Plc, Cork
18/08/2016	2,836	Acquisition	Valves and Controls Business of Pentair Plc, Dublin	Emerson Electric Co. USA
01/08/2016	2,765	Acquisition	LifeCell Corp, USA	Allergan Plc, Dublin
20/09/2016	2,141	Acquisition	Fleetmatics Group Plc, Dublin	Verizon Communications Inc, USA
31/05/2016	1,538	Acquisition	Tobira Therapeutics Inc. USA	Allergan Plc, Dublin
27/06/2016	1,211	Acquisition	Celator Pharmaceuticals Inc. USA	Jazz Pharmaceuticals, Dublin
12/09/2016	975	Acquisition	Heartware International Inc,	Medtronic Plc, Dublin
09/12/2016	944	Acquisition	Raptor Pharmaceutical Corp, USA	Horizon Pharma Plc, Dublin

(*United Kingdom and Republic of Ireland M&A Review:* Experian Business Research: Full Year 2016, Experian)

As regards the type of transactions which took place, as was the case in 2015, foreign acquisitions by Irish companies were the most important types of deal in Ireland last year. However, US buyers have also played a significant role in driving transactions, as evidenced in the table above. One such notable deal in the technology sector, was the acquisition of Movidius by Intel in a deal worth €355m in September 2016. Movidius makes computer vision hardware which is used in drone and camera technology, and US-based Intel hopes to integrate Movidius's technology into its RealSense platform, which is being built into augmented-reality headsets.

Private equity is also playing an increasingly important role as seen, for example, in the acquisition of AA Ireland by Carlyle Global Financial Services Partners and Carlyle Cardinal Ireland for $166m. Pharmaceuticals and Agri-Food companies also continue to be important players, as evidenced in the table above.

Key developments

US measures to limit inversions

On 4 April 2016, the US Department of the Treasury announced that it was introducing further measures to "rein in" corporate inversion transactions which see US-parented multinational corporate groups acquiring smaller foreign companies and then altering the tax domicile of the merged group to that of the foreign-acquired company in order to reduce or avoid paying tax in the US. These new rules build upon guidance that had previously been issued by the US Treasury Department in September 2014 and November 2015 in which it had tried to curtail these types of transactions by making it more difficult for companies to undertake an inversion, and by reducing the economic benefits of doing so.

Despite the US Treasury's guidance, inversion transactions had become quite a prevalent feature of the Irish corporate landscape in recent years due to the low rate of corporate tax payable in Ireland once a US company re-domiciles to Ireland. The Central Statistics Office

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in Ireland identified these kinds of transactions as one of the main drivers for the sharp rise in GDP experienced in 2015.

The new rules represent an attempt to reinforce the US Treasury Department's well-established anti-corporate inversion stance, and included the introduction of temporary regulations on inversions in April as well as additional regulations to address earnings stripping (which were eventually introduced in October).

Earnings stripping was described by the US Treasury Department as a tactic often employed after a corporate inversion, whereby the US tax liability of the corporation is minimised through the use of internal loans which see the new US subsidiary company borrowing from the new foreign parent or one of its foreign affiliates in a low-tax country and using the interest payments on the loans to offset earnings. The result is that the profits of US-based businesses are effectively moved overseas. The new rules (81 FR 72858) classify this type of intra-company transaction as if it were stock-based instead of debt, thereby eliminating the interest deduction for the US subsidiary.

The temporary regulations introduced regarding inversion operate so as to prevent the practice whereby foreign companies increase their size through the acquisition of multiple US companies over a short timeframe or through a corporate inversion in order to avoid the inversion thresholds under current US law. This in turn enables them to complete a subsequent and, often, larger acquisition of an US company to which the US tax code's existing curbs on inversions will not apply. The new rules restrict this practice by providing that the stock of a foreign acquirer which is attributable to assets acquired from a US company within the previous three years is to be disregarded when calculating the size of that company for the purpose of the US tax code.

The combination of these new rules has greatly reduced the economic benefit and rationale for structuring transactions in this manner and Ireland has seen a corresponding drop in the number of these types of transactions occurring in 2016, as well as the abandonment of some corporate inversions which were understood to be in the pipeline. Chief among these was the planned $160bn merger of Pfizer and Allergan, which would have created Ireland's biggest company by shifting Pfizer's global tax base to Ireland but which was reported to have been abandoned by virtue of the new rules.

The Treasury Department has acknowledged that these new rules are not likely to completely halt the flow of such transactions – such a move would only be possible if Congress voted to change the US tax code, which is only expected to occur as part of a complete overhaul of the tax code and is therefore unlikely in the near future – and indeed, despite the introduction of these new controls, 2016 still witnessed the merger of US company Johnson Controls Inc. and Cork-based Irish Tyco International plc, which saw the headquarters of the merged company move to Cork.

Market Abuse Regulations

The Market Abuse Regulation (EU 596/2014) ("MAR") and the Market Abuse Directive on criminal sanctions for market abuse (Directive 2014/57/EU) came into effect in Ireland and across the EU on 3 July 2016, and are aimed at strengthening the legal framework underpinning the function of detecting, sanctioning and deterring market abuse and ensuring greater transparency and market integrity. MAR extends the application of the existing market abuse and inside information regime beyond issuers with shares admitted to trading on regulated markets, such as the Main Market of the Irish Stock Exchange ("ISE"), to include issuers of securities traded on multilateral trading facilities such as the ISE's secondary market, the Enterprise Securities Market ("ESM"). As MAR has direct effect in

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all EU Member States, its introduction had an immediate implication for M&A transactions carried out by such issuers.

The following are the main changes that MAR has introduced which should be borne in mind by companies in the context of M&A transactions:

- Market soundings: MAR introduced new procedures in relation to "market soundings", which are described as communications of information prior to the announcement of a transaction in order to gauge the interest of potential investors in a transaction and the possible conditions attaching to it (such as its potential size or pricing). This could cover takeover situations where information is communicated between the bidder and the target's shareholders with a view to the bidder seeking irrevocable undertakings. Such market soundings may involve the disclosure of inside information to potential investors; however, provided that the requirements of MAR are complied with in advance of making such a disclosure (these requirements include making a written assessment as to whether the content of the communication constitutes inside information, and procuring the consent of the recipient of the market sounding), it will be nonetheless deemed to be legitimate. Issuers will also be required to maintain, for a period of five years, records demonstrating their compliance with MAR in relation to market soundings. This new regime effectively regulates the practice of market soundings for the first time, and issuers will need to ensure adherence to these new requirements in future.
- Insider lists: MAR introduced heightened requirements in respect of the maintenance of insider lists by issuers, which must now detail those persons acting on the issuer's behalf (including advisers) who have access to inside information (which could include information in relation to a proposed M&A transaction). Such lists must now be kept in a prescribed format and will require a greater level of information to be provided than previously. Issuers are also required to ensure that those persons with access to inside information acknowledge their duties in this regard and are cognisant of the applicable sanctions for breach of these duties.
- Delay of disclosure of inside information: MAR imposes a general obligation on issuers to inform the public as soon as possible of any inside information; however, issuers are entitled to delay the disclosure of this inside information where it would be likely to prejudice their legitimate interests, provided that the delay is not likely to mislead the public and the confidentiality of the information can be ensured by the issuer. M&A negotiations will continue to be covered by this legitimate interest exemption; however, MAR now requires that issuers inform the CBI where disclosure of inside information was delayed and to provide a written explanation of how the conditions for delay were satisfied. This will require companies to make a clear determination as to whether proposed M&A activity has reached the threshold to become inside information and will entail ongoing monitoring of any such delay, as well as detailed record-keeping to be undertaken by issuers to ensure that delay of such information is permitted and justified. From a target's perspective, it should be noted that it is likely to be deemed to be in possession of inside information as soon as an approach is received.
- Stake-building: In addition to the safe harbour provided by MAR in relation to market soundings, MAR provides a safe harbour in respect of certain "legitimate behaviours" which may be relevant to actions undertaken in connection with a takeover. For example, where a person has obtained inside information in the conduct of a public takeover or merger with a company and uses that information only for the purpose of

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completing that takeover or merger, then there is a presumption that such behaviour is not insider trading. This presumption, however, explicitly excludes stake building – the practice of acquiring shares in a target ahead of making a bid – and such activity will only fall outside the new market abuse rules if the only knowledge the bidder has is its own knowledge of its imminent, but as yet unannounced, offer.

Beneficial ownership of corporate entities

Regulations giving effect to Article 30 of the fourth Anti-Money Laundering Directive 2015/849 came into force in Ireland on 15 November 2016. Article 30 requires each Member State to ensure that corporate and other legal entities incorporated within the Member State have "adequate, accurate and current" information on their beneficial ownership which is held in a central register and is accessible to competent authorities. These requirements apply generally to all corporate entities (excluding corporates listed on an EU regulated market who are subject to disclosure requirements consistent with other aspects of EU law) and therefore will need to be borne in mind in the context of M&A transactions.

A corporate must now enter the following information into its beneficial ownership register: (i) the name, (ii) date of birth, (iii) nationality, and (iv) residential address of each of its beneficial owners; (v) a statement on the nature and extent of the interest of that beneficial owner; (vi) the date on which each natural person was entered into the register as a beneficial owner; and the (vii) date on which each natural person ceased to be a beneficial owner. Where there is doubt as to the identity of the natural person beneficial owner, then the corporate must enter the details of the senior managing official, such as a director or CEO, into the register.

Beneficial ownership is defined as either direct (through holding 25% plus one share of the shares/voting rights of the corporate body) or indirect (by controlling multiple legal bodies which hold over 25% of the shares in the relevant body). In certain circumstances, the beneficial owner is required to notify the corporate body in question of his/her position as a beneficial owner and of any change in this status. The body corporate must maintain an up-to-date register of beneficial ownership and give notice to any natural person where there is "reasonable cause to believe" that he/she is a beneficial owner.

Industry sector focus

The Technology, Media and Telecommunication sector recorded the highest volume of deals as well as the highest level of deal value in 2016. Deals in this sector accounted for 36.3% of the total deal value for the year, and in total 45 deals were recorded. In a continuation of trends seen in recent years, a large proportion of deals in this sector (approximately 50%) saw foreign companies targeting Irish businesses as part of expansion strategies. Most notable among these deals was Verizon's acquisition of Fleetmatics, Intel's acquisition of the processor chip company Movidius, the acquisition of Dublin-based billing software company Brite:Bill by Amdocs, as well as the sale of UTV Ireland to telecoms company Virgin Media.

By contrast, the Agri-Food/Food Services sector saw the majority of deals, more than 80% of the total, involving the acquisition of foreign businesses by Irish companies. One such deal was Greencore's acquisition of US-based Peacock Foods for €695m which, together with Sumitomo's purchase of Fyffes in December, contributed to this sector posting 22% of the total deal value.

Considering the banner year experienced by the pharmaceutical sector in 2015 in which the sector generated many of the largest domestic and international M&A transactions, 2016

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was comparatively quiet. This can generally be attributed to the US Treasury clampdown on corporate inversions, however, the sector continues to remain an important source for Irish M&A activity, and contributed 13% of all inbound deals in the first half of 2016. The most significant outbound deal in this sector was the acquisition of Celator Pharmaceuticals for €1.1bn by Jazz Pharmaceuticals in May.

High property valuations and the prospect of good rates of return on investment resulted in an increase in deal flow in the real estate sector, where venture capital funds appear to be starting to realise their investments and exit the market. Within this sector the retail property market enjoyed particular success with €1.6bn reported to have been invested in the sector in 2016, exceeding the 2015 total by 60%. By contrast, with the prevalence of portfolio sales over the last number of years, the majority of such retail investment sales in 2016 were single asset sales, with the acquisition of Blanchardstown Town Centre by Blackstone for €950m representing the largest single asset sale in the history of the State. 2016 also saw Oaktree Capital Management, a US-based private equity firm, purchase two Hazel Portfolio retail parks for a combined total of €50m.

Following an active 2015, the Irish hotel sector recorded 55 hotel sales in 2016 with approximately €700m changing hands. These figures would be higher still if investment sales or loans associated with hotel properties, which were purchased as part of loan portfolio sales, were taken into consideration. Significant transactions in this sector included the sale of the Gresham Hotel, the Burlington Hotel and the Dublin Lifestyle Collection, which comprises the Morgan, the Spencer and the Beacon Hotels.

The year ahead

The outlook for M&A activity in Ireland in 2017, as gauged by market participant sentiment, has been characterised as "cautiously optimistic", with 81% of M&A executives and advisers in a survey conducted by KPMG expressing their belief that 2017 will prove to be an equally, if not more prolific, year than 2016. The caution underlying this optimism undoubtedly stems from the uncertainty that still surrounds the likely implications of both Brexit and the change to the political administration in the US.

While it now seems probable that the government in the United Kingdom ("UK") will be in a position to trigger article 50 of the Lisbon Treaty by the end of March and thereby begin the two-year period of withdrawal negotiations, there is still much that is unclear as regards the exact form that this exit from the EU will take, and the nature of the UK's future trade relationship with the EU and, in particular, Ireland.

Ireland is uniquely exposed to the potential effects of Brexit by virtue of the shared land border and close historic and economic ties with the UK. By way of example, total goods and services exports to the UK are equivalent to around 17% of Irish GDP and the UK represents one of Ireland's largest trading partners.

As regards the impact of Brexit on M&A activity, initially, there is likely to be a decrease in the number of Irish investors seeking UK targets for acquisition until new trade agreements are agreed and investor confidence in the UK is restored, with dealmakers projecting that Irish assets will overtake UK assets, in a shift from previous years.

However, Brexit is also likely to present opportunities for Ireland that may counteract some of the possible negative effects. These are likely to include the migration of activities and businesses from the UK to Ireland as businesses seek to retain access to the European market, with the Industrial Development Agency ("IDA") reporting that a significant number of UK businesses are currently considering relocating to Ireland. In this regard,

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Ireland as an English-speaking, Eurozone, common-law country, with a well-educated workforce and stable local political landscape is likely to prove attractive as a location for increased inward investment for such companies in the coming years. In addition, Brexit may result in increased M&A activity due to the diversification of businesses as companies attempt to de-risk, and asset re-pricing as a result of fluctuations in the value of the pound.

The optimism expressed for the year ahead may also be somewhat tempered by virtue of the uncertainty regarding the approach of the new Trump administration towards foreign investment by US-based companies, including the warning made by a senior economic adviser to the administration that the US corporate tax rate could be cut from 35% to 15%. Such a move would be likely to reduce the incentive for companies to locate activities outside the US, including in Ireland, but it remains to be seen whether such plans could or would be implemented.

Debt funding seems set to remain the preferred means of financing deals in 2017 and crucially, access to such funding in Ireland is increasing as a result of the expanding range of borrowing options open to dealmakers, as represented by the growing number of alternative, non-traditional debt providers and the continued presence of private equity funds in the Irish market.

The sectors which are expected to see the most activity in 2017 are the technology, agri-food and healthcare/pharma sectors, which are areas which have traditionally provided robust levels of investment in Ireland. The anticipated upward trend of M&A activity in the agri-food sector is in spite of this industry's heightened exposure in the short term to the potential consequences of Brexit, given that almost 50% of Irish food exports are sold into the UK. Indeed, the Unconditional Phase 1 approval of the ABP Group merger with Slaney Foods by the European Commission during the year suggests there is scope for further consolidation of Irish agri-food businesses.

This year is also likely to see the re-admission to trading of Allied Irish Banks p.l.c. ("AIB") shares on the London Stock Exchange and Irish Stock Exchange, which had been forecast to take place during 2016 but which was delayed due to unfavourable market conditions. This will represent one of the largest Dublin and London IPOs this year and the process will also see the sale by the Irish Government of at least 25% of its stake in the bank. There is also speculation of a possible flotation of Irish telecoms company, Eir, however this may be pushed to 2018 as the company undergoes a process of deleveraging in order to get its debt under control prior to any flotation.

The EY Global Capital Confidence Barometer has found a near-record 57% of companies surveyed actively pursuing acquisitions in the next 12 months, pointing to an increase in M&A activity globally in 2017. The resilience demonstrated by the Irish economy in the last year, coupled with the 3.6% forecast increase in GDP for 2017 (which is about double that expected for the Eurozone as a whole) and the "business as usual" attitude of market participants, should mean that Ireland is likely to experience growth in M&A activity in 2017.

* * *

Sources

The information in this chapter is based on reports in the financial press, publications of the Central Bank of Ireland and European Commission, specialist reports, company and financial websites (Experian, Investec, etc.) and other publicly available information.

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Ivory Coast

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Overview

Ivory Coast is one of the 17 members of the Organization for the Harmonization of Business Law in Africa (OHADA). The principal aim of this organisation is to standardise business law in member countries, who formerly each had different rules dealing with legal and economic business issues.

The other goals are:

- to offer common rules to inspire more confidence in the African legal environment and economic development and integration;
- to improve the skills of judges, lawyers and all actors of the legal system; and
- to encourage international investors to operate within the African continent.

The Treaty between member states has several appendices called Uniform Acts which apply directly in the member states and prevail over conflicting national provisions.

The advantageous geographical location of the Ivory Coast attracts many investors, and it explains the choice of this country for OHADA's Common Court of Justice and Arbitration.

Pursuant to the adoption of the OHADA Treaty, we noticed an increase of economic activity at the beginning of the 2000s. The development of commercial activities in Ivory Coast is growing, and Ivory Coast remains a key economic power in the sub-region.

The decline of some commercial activities in the past decade has resulted in company mergers to limit losses and strengthen the position of companies in the national and international market.

Merger and acquisition deals operated over the past decade have been operated under the Uniform Act on Commercial Companies and Economic Interest Groups which was recently revised on January 30th 2014, and came into force on May 5th 2014; also these deals have been concluded with other Uniform Acts regarding general commercial law and local tax law.

Significant deals and highlights

Financial market

Mergers in the Ivory Coast have mostly been recorded in the financial market.

In June 2001 the merger of the International Bank for Trade and Industry of Côte d'Ivoire (BICICI) and PARIBAS bank was conducted. This merger uncorked all of PARIBAS bank's assets for the benefit of BICICI on the transfer. The reason for the merger was that both banks were part of the same group, BNP PARIBAS and, for the sake of efficiency and harmonisation of the new group at the international level, the group decided to carry out the

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merger of all affiliated entities across the world. Thus, the merger would reduce operating costs while maintaining market share thanks to the synergies that would result. The share capital of BICICI increased by 1,666,670,000 CFA francs (€2,540,822) in compensation for the contribution made by the dissolving PARIBAS bank. The share capital of the bank was set at 16,666,670,000 CFA francs.

In 1978, the Banque Atlantique Group created the Atlantic Bank of Côte d'Ivoire (BACI) and, ten (10) years later, Compagnie Bancaire Atlantic Ivory Coast (COBACI) by the resumption of the activities of Barclays Bank in Ivory Coast. The group has worked since then with two brands in Ivory Coast. Since January 1st 2009, we have seen the merger between BACI and COBACI, seeking to become a key player in the private banking sector, operating with a regional synergy in West and Central Africa.

This merger, which consisted in BACI absorbing COBACI, has resulted in the disappearance of COBACI for the benefit of BACI, which triggered several advantages on the acquisition of COBACI agencies. Such an operation prevented BACI from financing a costly deployment for the expansion of its branch network. BACI also saw an increase in capital resulting from the merger contribution in the amount of 336,580,000 CFA francs (€513,113), bringing the share capital up to 12,336,580,000 CFA francs (€18,806,995).

Other deals within the Ivorian financial market:

(i) the merger by absorption of the Company SOBFI by the company SAFCA−ALIOS FINANCE to which the company SOBFI brought of all of its assets estimated at 2,577,442,455 CFA francs (€3,929,328); and

(ii) the acquisition by Access Bank Plc of Nigeria of Omnifinance Bank Ivory Coast with a stake of 98% for an amount exceeding 10bn CFA francs (€15,244,902).

Agro-industrial sector

In this area, we have seen GMG Investment Ltd, a major Singaporean group, acquire a maximum of 60% of the share capital of the company Ivoirienne de Traitement de Caoutchouc (ITCA). The sole shareholder, Fonds Interprofessionnel de Solidarité Hevea (FISH), has become a minority shareholder. Following this acquisition, ITCA changed its method of administration. Thus ITCA has become a public limited company with a Board of Directors and CEO, instead of a sole shareholder public limited company with a General Administrator. The share capital was increased from 200m to 500m CFA francs by issuing 30,000 new shares. This merger allowed ITCA, despite its many losses, to avoid bankruptcy, renew its processing equipment and occupy a place of choice among domestic companies in direct contact with farmers because it needed significant working capital to continue the activities.

Medical insurance sector

A recent merger and acquisition operation has been conducted in Côte d'Ivoire by a leading insurance company, SAHAM, whose medical branch had decided to acquire hospitals and clinics and medical laboratories to expand its network.

The main challenge during this operation was to bear in mind that since the medical sector is a regulated activity, in buying the assets or operating a change of control by acquiring the majority of shares, the actors had to maintain in the new company, as shareholders, the owner/holder of the ministerial authorisation to conduct the medical activity.

The entire operation over all Côte d'Ivoire amounted to 10,000m CFA francs (€15,244,902). IKT Law firm assisted for part of the operation, amounting to 4,000m CFA francs (€6,097,960).

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Key developments

Mergers and acquisitions transactions certainly have common problems:

- A merger would be the result of two companies deciding to form only one entity.
- An acquisition would be the result of the transfer of all the assets of one company to the dominant or absorbing company.

In light of these two results there are two tax regimes that apply:

(i) the common regulation system; and
(ii) the special merger regime.

In the **common regulation system**, the dissolution of the absorbed company implies a multitude of taxation related to any liquidation. The contribution to the acquiring company of the absorbed company's estate then drives the registration fees. The exchange of the absorbed company's securities against those of the acquiring company then results in taxing shareholders, due to capital gains that may be released by this action. Suffice to say that such a tax can be suicidal in some cases and prohibit any merger, which would no longer make economic sense. Alongside the common regulation system, Ivory Coast has a special tax regime that seeks to assist the necessary adaptation of businesses, and to facilitate the merger or consolidation of businesses.

The **special merger regime** only applies to corporations and to two situations, namely:

(a) the acquiring company or the new company has its headquarters in Ivory Coast and they are either Private limited companies or Public limited companies; and
(b) the companies involved in the operation have specifically expressed, in the act of contribution, the wish to benefit from this regime (Article 757 of the General Tax Code).

Taxation of the special merger regime is done on a sliding scale for the taxable value of capital contributed:

- From zero to 5bn CFA francs of capital contributed – 0.3%.
- Above 5bn CFA francs of capital contributed – 0.1%.

In cases where the acquiring company takes over all or part of the acquired companies, a fixed fee of 18,000 CFA francs must be paid. As for capital gains (Article 32) conducted as part of the merger, they are exempt from the tax on business profits and income tax.

In the special merger regime, the tax administration allows that depreciation as recorded in the accounts of the acquired company may continue in the acquiring company.

One of the major interests of the practitioner is in tax optimisation:

- How to reduce the tax risk for both companies involved, and especially for the company that remains?
- How to evaluate and assess bad debts from a fiscal and accounting point of view for the new company?

Has the merger or acquisition been properly decided by each company's governance bodies?

Furthermore, due diligence is a necessary step before moving forward in an M&A operation. Indeed, it is important, for instance, to pay particular attention to the case of the staff, as there is a risk of overuse of employees or doubling of positions. At this level, it is possible to conduct a dismissal for economic reasons, insofar as the acquiring company will not be physically able to keep all employees. It should be noted, however, that the employee dismissed for economic reasons has a right of re-employment in the two years following his dismissal. It remains a constraint for the new entity because during this period it may be exposed to litigation in social matters if that rule is not complied with.

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Regarding acquisitions or equity investments, it is important that a thorough audit is performed before the acquisition transaction, to avoid excessive taxation.

The decision to merge is primarily an economic and financial analysis that incorporates varying degrees of tax parameters. The tax treatment of mergers is governed by the provisions of the General Tax Code. The merger decision is preceded by a pre-acquisition phase which is a legal, tax and accounting due diligence, so that investors have a better understanding of potential target companies.

Therefore a decision to operate a merger or an acquisition will determine the tax implications. The tax authorities are now closely analysing the operations.

Since the new tax law of January 2016, all transfers of share are subject to a 1% tax on the price of the transfer.

In case of transfer of a business real estate (acquisition of assets), a 10% fee is paid on the selling price.

Regarding merger activities in Ivory Coast, they obey both the provisions of the OHADA Uniform Act and the national provisions, including the tax law under penalty of nullity.

As for conflicts of law, companies submit their merger agreement to the court to which they intend to submit in case of substance or form of dispute. Usually they opt for arbitration for disputes on the formalities of the merger. However, if not, the competent court shall be determined according to national legislation.

Industry sector focus

In the area of mergers and acquisitions, the financial sector has registered the most fusion and acquisition operations. Indeed, globalisation is increasingly significant for companies, the liberalisation of capital inducing the gradual disappearance of geographical barriers and the emergence of homogenous markets. Merger activity is allowing businesses to strengthen their market position with respect to increasing competitive pressure and a tendency to overproduction and falling prices.

The increase in equity values in the stock market is one of the positive impacts of merger activity. This enthusiasm is justified by the prospect of a substantial increase in the market value of the companies participating in the said mergers. Banks also merge with a view to combine their skills and savings to increase their productivity and profitability.

The year ahead

Ivory Coast has shown strong economic potential within the past five years. Indeed, financial institutions have been extending their network by building several agencies throughout the country, and infrastructures are developing too.

The efforts of Ivory Coast to be an emerging economy are considerable. Based on the year 2014 figures, the country was solely responsible for 45% of the monetary capacity of countries of the West African Economic and Monetary Union (UEMOA) as well as 60% of agricultural exports.

Several sectors such as food processing have developed to achieve the economic emergence referred to by the authorities.

Ivory Coast attracts investors because trade with other countries has doubled in frequency in recent years. The traditional agricultural crops such as oil palm, cashew and rice have very strong growth prospects in the long term.

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The oil, hydrocarbons and mining sectors have promising new discoveries which have attracted large new Moroccan, South African, Chinese and European competitors. The transportation sector and IT sector are also quite active and, according to "Doing Business 2014", Ivory Coast appears among the economies that have made the most progress in 2012/2013 in the 10 areas studied by the report.

The growth of the Ivorian economy accelerates well and direct foreign investment is contributing significantly to this growth.

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Japan

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Overview

Since December 2012, under the leadership of Prime Minister Shinzo Abe, Japan has been in the process of implementing economic policies popularly known as "Abenomics", comprising three components (called the three arrows): massive monetary easing; expansionary fiscal policy; and long-term growth strategy. On January 29, 2016, the Abe administration announced a negative interest rate. Although the full results of these policies are still unclear, the initial impact was a surge in the Japanese stock market together with a significant depreciation of the Japanese yen against other major currencies: comparing the figures as of year-end 2016 and 2012, the Nikkei 225 was up 83.9% (to JPY 19,114 from JPY 10,395), and the yen was approximately 30% cheaper against the US dollar. The yen depreciation has certainly helped the competitiveness of Japanese companies abroad. Comparing the figures as of the year-end of 2016 and 2015, the Nikkei was up 0.4%, and the yen was approximately 3% higher against the US dollar.

More than five years after the massive earthquake in Northern Japan, and resulting tsunami and nuclear power plant accident, the region close to the epicentre is still struggling to rebuild its economy. However, business activities in other parts of the country have returned to normal, and Japanese M&A activity in the following years has been quite active. In particular, outbound M&A activity has been strong across a variety of industries, including telecommunication, healthcare, financial services, industrials, energy and consumer products. Many Japanese companies that have no international presence or experience now list overseas strategies or expansion as among their top priorities. Although the inbound M&A market is not quite as active (with some exceptions in the hi-tech sector), we have seen a number of domestic deals, particularly consolidations within the same industry.

The March 2011 earthquake and nuclear disaster presented serious challenges to Japan's energy strategy. As of the end of 2016, only five of the 50 nuclear plants in the country are operating, even though nuclear power had previously accounted for more than 30% of Japan's energy supply. In the M&A context, it is no surprise that this energy predicament has continued to lead to investment, mainly by major trading houses into natural resources all over the world. We will see this year how the fall in the oil price will affect this trend.

Active cross-border M&A

As stated above, outbound M&A activities have continued to grow, and the depreciation of the Japanese yen has not substantially impacted this trend. The volume of outbound M&A in 2016 was more than JPY 1 trillion for the second year in a row, although it was slightly slower than the previous year, which was the first time in history it had reached such an amount. There has been particular M&A activity by Japanese companies in North America

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and South-East Asia. It should be noted that, in terms of deal value, Europe was the largest destination for Japanese companies this year.

Among Asian countries, Myanmar has been the focus of significant attention from Japanese companies. After the US started to relax sanctions, more and more Japanese companies have indicated their interest in Myanmar. The Japanese government is also supporting the Myanmar government by, for example, helping to establish a stock exchange in Myanmar. M&A activities by Japanese companies in Myanmar began to develop in 2013, a trend that we expect to continue over the next few years.

"China plus" strategy

As a result of a flare-up in a dispute between Japan and China over small islands in the East China Sea, there were quite a few anti-Japan protests across China. Business activity by Japanese companies in China decreased and many of them began diversifying their investments into other countries. As a consequence, many Japanese companies in all industrial sectors have already or are now planning to invest not just in China but also in other parts of the world, particularly in Southeast Asia.

Significant deals

Large European M&A deals

The largest Japanese M&A deal in 2016 was in the United Kingdom. On July 18, 2016, **SoftBank Group Corporation** ("SoftBank") announced that they had reached agreement to acquire the entire issued and to-be-issued share capital of **ARM Holdings plc**., a global technology company with strong capabilities in semiconductor intellectual property and the Internet of Things, at UK£ 24bn (approximately US$ 31bn) by means of a court-sanctioned scheme of arrangement. As a result, ARM Holdings became a wholly owned subsidiary of SoftBank on September 5, 2016.

On February 10, 2016, **Asahi Group Holdings, Ltd.** ("Asahi") announced the acquisition of **the Italian, Dutch and British business of SAB Miller plc** ("SABMiller") including the "Peroni", "Grolsch" and "Meantime" brands at €2.55bn, in connection with the acquisition of SABMiller by Anheuser-Busch Inbev SA/NV ("AB InBev"). The transaction was completed on October 11, 2016. **Asahi** then announced on December 13, 2016 the acquisition of **AB Inbev's businesses in the Czech Republic, Slovak Republic, Poland, Hungary and Romania** and other assets that were owned by SABMiller, including the "Pilsner Urquell" brand, at €7.3bn on a cash-free, debt-free enterprise value basis.

Large M&A deals in North America

On July 21, 2016, **Komatsu Ltd.**, a leading Japanese manufacturer of construction and mining equipment, forest machines and industrial machinery, announced the acquisition of **Joy Global Inc.** ("Joy Global"), a leading manufacturer of surface and underground mining equipment headquartered in Milwaukee, Wisconsin, for approximately US$ 2.9bn through a US reverse triangular merger. The merger agreement was approved at the shareholders' meeting of Joy Global on October 19, 2016. On December 20, 2016, **Sumitomo Mitsui Banking Corporation** ("SMBC"), one of the largest Japanese banks, announced the acquisition of all membership interests of **American Railcar Leasing LL.C.** ("American Railcar Leasing"), a leading railcar leasing company in United States, from Icahn Enterprises L.P. at approximately US$ 3.4bn. SMBC and American Railcar Leasing will have a combined fleet of approximately 50,000 railcars that will serve a broad range of industries including energy, steel, agriculture, petrochemical and consumer goods. On

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September 13, 2016, **Renesas Electronics Corporation**, a premier supplier of advanced semiconductor solutions headquartered in Tokyo, announced the acquisition of **Intersil Corporation**, a leading provider of innovative power management and precision analog solutions, at approximately US$ 3.2bn.

Significant M&A deals among Asian players

The largest Japanese M&A deal in the previous year (2015) was the acquisition of a minority stake in one of the largest Chinese holding companies, jointly by a Japanese trading house and a Thai conglomerate. On January 20, 2015, **ITOCHU Corporation** ("ITOCHU") announced that they entered into a strategic business alliance with **CITIC Limited** and **Charoen Pokphand Group Company Limited** ("CPG), with a total deal value of approximately HK$ 80.3bn.

This year, on June 21, 2016, **SoftBank** announced that it had reached agreement with **Tencent Holdings Limited** ("Tencent"), a leading provider of Internet value-added services headquartered in Shenzhen, China, and listed on the Hong Kong Stock Exchange, pursuant to which Tencent will acquire up to 84% of **Supercell Oy** ("Supercell"), a mobile game developer based in Helsinki, Finland, at an equity value of approximately US$ 10.2bn. Following the transaction, Supercell will be 84% owned by a consortium established by Tencent, and the remaining shares will be owned by Supercell's employees.

Domestic consolidation

On March 17, 2016, **Canon Inc.** ("Canon") announced the aquisitoin of **Toshiba Medical Systems Corporation** ("TMSC"), a leading global company in the medical equipment industry, especially in the field of medical X-ray computed tomography systems, from Toshiba Corporation at approximately JPY 666.5bn. TMSC became Canon's subsidiary on December 19, 2016. On December 15, 2016, **FUJIFILM Corporation** announced the acquisition of **Wako Pure Chemical Industries** at JPY 154.7bn through a tender offer. On April 26, 2016, **Coca-Cola West Co. Ltd** and **Coca-Cola East Japan, Co. Ltd**., the two major bottlers of Coca Cola products, announced the integration of their business.

Insurance sector quite active

In 2015, Japanese insurance companies were all especially active in making outbound M&A investments and in consolidating with each other in the domestic market. **Tokio Marine Holding Inc.** acquired 100% of the outstanding shares of **HCC Insurance Holdings, Inc.;** at approximately US$ 7.5bn. **Mitsui Sumitomo Insurance Company Limited** acquired 100% of the shares of **Amlin Plc**; **Meiji Yasuda Life Insurance Company** acquired 100% of the outstanding shares of **StanCorp Financial Group, Inc.**; **Sumitomo Life Insurance Company** acquired 100% of the shares of **Symetra Financial Corporation**; **Nippon Life Insurance Company** integrated with **Mitsui Life Insurance Company**; and **Nippon Life Insurance Company** acquired 80% of the outstanding shares of **MLC Limited**, a subsidiary of National Australia Bank.

This trend was followed by other players in 2016: on October 5, 2016, **Sompo Holdings, Inc.** a leading Japanese insurance group, announced the acquisition of 100% of the outstanding ordinary shares of **Endurance Specialty Holdings Ltd**., an insurance holding company headquartered in Bermuda and listed on New York Stock Exchange with operations in Bermuda, the United States and the United Kingdom, at approximately US$ 6.3bn, through a reverse triangular merger process.

Increase of inbound M&A

In 2016, the total deal value of Japanese inbound M&A more than doubled from previous

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years. On November 22, 2016, CK Holding Co., Ltd., a 100% subsidiary of **KKR CK Investment L.P.,** which is indirectly owned and operated as an investment fund by Kohlberg Kravis Roberts & Co. L.P., announced the acquisition of all of the issued and outstanding shares of **Calsonic Kansei Corporation**, a Japanese company that primarily engages in the manufacture and sale of automotive parts worldwide, at a price of approximately JPY 498bn through a tender offer. **Sharp Corporation** ("Sharp") announced on February 25, 2016, that it would issue new shares to **Hon Hai Precision Industry** ("Hon Hai"), a leading technology company based in Taipei, Taiwan, and the anchor company of Hon Hai/ Foxcomm Technology Group, **Foxconn (Far East) Limited,** a 100% subsidiary of Hon Hai, **Foxconn Technology** and **SIO International Holding Limited**, through a third party allotment at an amount of JPY 489bn. As a result of the issuance, Hon Hai became the parent company of Sharp on August 12, 2016.

Key developments

Amendment to the Companies Act

The Companies Act was completely overhauled in 2006, and is therefore a relatively new law compared to the other fundamental laws of Japan. Nonetheless, the rapidly changing business, financial and economic environment faced by Japanese companies has already highlighted the shortcomings of the rewritten Companies Act. As a result, an amendment of the Companies Act (the "Amendment") was passed by the Japanese Diet in June 2014 and came into effect in May 2015. Now that one year has passed since the enactment of the Amendment, new M&A practices under the Amendment have been introduced and established.

While the Amendment focused on certain corporate governance issues, including an option to introduce a new corporate governance system that includes an audit and supervisory committee (defined as "*kansa-tou iinkai secchi kaisha*" in the Amendment) and the introduction of double derivative actions in certain circumstances, there were some major reforms that have directly impacted M&A practice including among others: (a) regulation on the issuance of shares that results in creating controlling shareholders; and (b) minority squeeze-out procedures. Other reforms also have an impact on M&A practices in Japan (e.g., shareholder remedies which include the ability to seek an injunction of mergers and other reorganisations).

(a) Third Party Allotment ("TPA") transactions

In Japan, a commonly used method of acquiring control of a publicly listed company is through the subscription by the acquirer of a large number of newly issued shares of the target company through Third Party Allotment ("TPA") transactions. However, this strategy faced strong criticisms because, under the Companies Act, a TPA only required board approval (unless it was deemed a discounted issuance) and could easily result in the dilution of minority shareholdings.

The Amendment obliges any company which plans to issue new shares to send written notice to all shareholders, or to make a public notice of its intention to issue the shares (unless it submits a security registration statement separately required under the Financial Instruments and Exchange Act), if the acquirer of the shares will own a majority of the voting rights as a result of the share issuance. If shareholders owning 10% or more of the total voting rights of the issuer dissent within two weeks from the date of such notice, the issuer must obtain approval of the proposed share issue by at least a majority vote at a shareholders' meeting. However, if such issuance of

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shares is urgently necessary to continue its business due to a serious deterioration in the company's financial situation, this requirement for a shareholder vote will not be applicable.

(b) Squeeze-out procedure

If minority shareholders remain after the completion of a tender offer, it is common for Japanese purchasers to employ a squeeze-out procedure to acquire 100% of the shares of the target company, with the goal of avoiding certain regulatory burdens, such as ongoing disclosure obligations. Before the Amendment, mainly for tax reasons, the conversion of a target company to a private company was usually achieved through a complicated structure, primarily by using a special class of shares to collect the shares that were not tendered through the tender offer. However, this squeeze-out procedure was complicated and time-consuming because the target company was required to obtain shareholder approval and a court order. Completing the entire squeeze-out procedure usually took between four to six months, after the completion of the tender offer. Recently, however, because of the new trend of using the squeeze-out procedures that became available due to the Amendment, the complicated squeeze-out procedure above is no longer commonly used.

The Amendment introduced a straightforward minority squeeze-out procedure which became more frequently employed after the Amendment took effect. If a controlling shareholder directly or indirectly owns 90% or more of the total voting rights of the company after the completion of the tender offer, that shareholder would be able to require the remaining shareholders to sell their shares without need for shareholder approval or a court order, subject to the approval of the board of the target company. Dissenting shareholders have the right to seek an injunction to prevent such a purchase if it is illegal or extremely unjust. Dissenting shareholders also have an appraisal right.

If the acquiring shareholder fails to obtain at least 90% in the tender offer, a squeeze-out procedure through stock consolidation after the Amendment has become more common. Subject to approval at the shareholders' meeting, the target company will conduct the stock consolidation using a consolidation ratio by which the shares held by all shareholders other than the controlling shareholder will become less than one share (fractional shares), and the acquiring shareholder will eventually purchase such fractional shares. As a result, only the controlling shareholder will remain as the sole shareholder and all other minority shareholders will receive cash. Although the Companies Act prior to the Amendment provided for stock consolidation, this method was not used because of the lack of an adequate minority protection mechanism, an aspect which M&A practitioners believed raised the risk that the entire squeeze-out process could be challenged as being unfair. The Amendment, however, changed that by granting appraisal rights to dissenting shareholders who disapprove of the stock consolidation, a development which M&A practitioners believe is an appropriate level of minority protection. Therefore, after the enactment of Amendment, stock consolidation rapidly became the common form of squeeze-out procedure.

Developments in corporate governance

Recently, corporate governance has become a hot issue in Japan and we have seen important developments in this area. As described above, the Amendment of the Companies Act contains certain corporate governance developments including the introduction of an audit and supervisory committee. In addition, in February 2014, the Japanese Financial

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Services Agency ("FSA") introduced a Japanese version of the "Stewardship Code", which is entitled "Principles for Responsible Institutional Investors". The FSA announced that, as of December 2016, 214 institutional investors have adopted the stewardship code as a result of such introduction by the FSA. This development is affecting the relationship of Japanese companies with their institutional shareholders, which is also affecting M&A practices in Japan.

Furthermore, in May 2015, the Tokyo Stock Exchange ("TSE") adopted the Corporate Governance Code (the "Code"), entitled "Japan's Corporate Governance Code − Seeking Sustainable Corporate Growth and Increased Corporate Value over the Mid- to Long-term", which was included in its listing rules. The adoption of the code had a significant impact on the corporate governance system and M&A practices in Japan. The Code was a product of the joint efforts of the FSA and the TSE, which in August 2014 organised the "Council of Experts Concerning the Corporate Governance Code". The Code is intended to establish fundamental principles for effective corporate governance for listed companies in Japan. It includes not only important principles on corporate governance, such as a requirement for at least two independent directors, but also principles relating to M&A, such as principles relating to anti-takeover measures, capital policies that could result in a change of control or in significant dilution (e.g., management buyouts or share offerings), and cross-shareholdings. Since the Code is based on the notion that companies need proper corporate governance to achieve sustainable and mid- to long-term growth, it has become more important for companies to explain to their shareholders how a proposed M&A transaction would result in the sustainable and mid- to long-term growth of the company.

The Code also recommends that remuneration to directors include incentives that reflect mid-to long-term performance or potential risks. As one of the reactions of this recommendation, the introduction of new types of remuneration has become a very hot issue in Japanese corporate governance. For example, so-called "restricted stock", which is commonly used as a long-term incentive in western countries, has been rapidly introduced. Restricted stock is granted to management with certain conditions including transfer restrictions, and the relevant laws and practices have been recently amended for issuing restricted stock in Japan. In 2016, the Ministry of Economy, Trade and Industry of Japan ("METI") issued a practical guide for issuing restricted stock under current Japanese law. Additionally, the tax laws were amended in 2016. Under the amended tax laws, management is not taxed upon grant of the stock, but rather when the restriction on transfer is lifted. The ordinance of the Financial Instruments and Exchange Act has been also amended to grant certain exceptions to required disclosures regarding the restricted stock. These amendments will facilitate the introduction of new management remuneration structures in Japan.

Although Japanese companies are active in cross-border M&A deals, they have not typically granted long-term incentives in the M&A transactions. However, with the rapid movement toward introduction of long-term incentives, we may see more cases in the near future of Japanese companies giving long-term incentives to the management of overseas target companies in cross-border M&A.

Court decisions regarding the fairness of price in M&A

In recent years, an increasing number of minority shareholders who are to be squeezed out have begun questioning the fairness of the squeeze-out price, especially in MBO transactions or acquisition by a majority shareholder where there is an issue of a conflict of interest between the minority shareholders and the management or majority shareholder of the company. The Companies Act allows shareholders who oppose the squeeze-out to

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request the courts to determine the "fair price" of their shares. However, it does not define the parameters in determining the fairness of the share price, and the courts are free to make that determination at their own discretion. This uncertainty in price determination poses a major risk when conducting a squeeze-out process, and has contributed to the rise in challenges of the squeeze-out price by minority shareholders.

Court challenges started in now famous cases such as the Rex Holding, the Sunster and the Cybird cases. Each of the courts in these cases considered various factors in deciding the fair price but stressed the importance of the market price among other pricing measures. Since the determination of the fair price was made on a case-by-case basis, it was difficult to establish exactly what factors will be taken into account in addressing the issue.

In this context, the Supreme Court made an important decision in 2016 in the Jupiter Telecommunications Co., Ltd. case (J:COM case), reversing the lower court decisions that followed the previous framework in deciding the fair price in squeeze-out procedures after the tender offer. Under the previous framework, as described above, the court tried to determine the fair price itself taking into account various factors and using certain calculation measures. On the other hand, in the J:COM case, the Supreme Court held that, even in a case where there is a conflict of interest between the majority shareholder (*i.e.* acquirer) and the minority shareholders, if the tender offer is conducted in accordance with "generally accepted fair procedures", the court should in principle approve the tender offer price as a fair squeeze-out price. This Supreme Court decision is regarded as a paradigm change from the previous framework. Although there was a similar Supreme Court decision in the Tecmo, Ltd case in 2012 involving a corporate reorganisation transaction, the J:COM case is the first time the Supreme Court has made it clear in the context of a post-tender offer squeeze-out that the court will basically review the fairness of the procedures rather than the fairness of the price itself. In the J:COM case, the Supreme Court cited examples of the "generally accepted fair procedures" that were followed, including the fact that: (i) J:COM established an independent committee and obtained its opinion; and (ii) it was clearly announced in the tender offer procedure that the squeeze-out price would be the same as the tender offer price.

While the J:COM ruling should provide much more predictability in this type of transaction, there are still certain open issues, including: (i) any other factors that would be regarded as a "generally accepted fair process"; (ii) the scope of application of this Supreme Court decision; and (iii) how the court would determine the squeeze-out price in cases where it finds that "generally accepted fair procedures" were not followed. Nonetheless, the J:COM case will likely have a significant impact on Japanese M&A practices, making it more important to consider carefully the factors that would be regarded as "generally accepted fair procedures" in each transaction. Not only an independent committee as described in the J:COM case, but other approaches, including setting the so-called "majority of minority condition", may be more commonly taken in this type of transaction. It will be important to follow how Japanese M&A practices are actually affected in the coming years.

M&A practices relating to anti-corruption regulations

As described above, we are still seeing a strong trend of out-bound investments by Japanese companies into emerging markets including ASEAN countries. Expansion into these new markets has heightened concerns about potential corruption and other compliance risks, which have begun to have an impact on outbound M&A transactions. For example, Japanese companies have increased their focus on compliance issues in the conduct of M&A due diligence. The Japanese government has also begun looking more closely at corrupt practices involving Japanese companies and foreign officials. In 2014, the Tokyo District

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Public Prosecutor's Office indicted a Japanese railway consulting firm and its executives on charges of making illegal payments to officials in Vietnam, Indonesia and Uzbekistan. In July 2015, METI published an amendment to the "Guideline to Prevent Bribery of Foreign Public Officials", and also in July 2016, the Japan Federation of Bar Association published the "Guidance on Prevention of Foreign Bribery". In this very active situation relating to anti-corruption practices in Japan, we expect to see further developments in M&A practice from the perspective of compliance with anti-corruption policies.

Representations and warranties insurance

Representations and warranties insurance is a relatively new topic in the Japanese M&A scene. This insurance is infrequently used in Japanese M&As, except for certain cross-border M&As. But recently Japanese insurance companies have started to actively provide representations and warranties insurance in Japan. Also, in recent Japanese M&A practice, we have started to see transactions where the representations and warranties provided by the seller are limited compared to previous practice, and buyers are seeking alternative protection. As a result, this insurance is gradually becoming more common and will become more widespread even in domestic M&As. Since this insurance is relatively new in Japan, practitioners face practical or legal issues in introducing it under the Japanese M&A legal framework and practice. But we believe that representations and warranties insurance will become an important tool to hasten negotiations between sellers and buyers.

The year ahead

Overall M&A trends

Given the current Japanese economic conditions and intensified global competition, coupled with the abundant cash reserves of Japanese companies, we believe that outbound M&A activities will continue to grow strongly, with particularly strong growth in outbound deals into Asian countries including Myanmar, despite the recent slowdown of emerging economies. Outside Asia, North America and Europe are likely to continue to be favourite destinations but increasingly, Latin American countries and African countries are also being added to the mix.

Amendment of the Companies Act; the Corporate Governance Code

As discussed above, the Amendment of the Companies Act and the implementation of the Corporate Governance Code have started to lead to significant changes in Japanese corporate culture as well as M&A practices. The J:COM Supreme Court case will also affect the squeeze-out process going forward. However, we must bear in mind that this new M&A landscape in Japan is still young and evolving, and it is important to follow how it develops going forward as practices become more well-established.

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Macedonia

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Overview

The legal framework governing mergers and acquisitions (M&A) in the Republic of Macedonia comprises laws defining corporate and contractual steps of the process, as well as the reporting obligations of participating companies.

The Law on Trade Companies, published in 2004 (Company Law), and the Takeover Law, published in 2013 (Takeover Law), are recognised as primary sources of law relating to M&A.

The Company Law stipulates the general conditions, processes and procedures and other forms of company reorganisation, applicable to all types of companies.

Under the Company Law, M&A are carried out either as a share purchase deal, on the basis of a notarised share purchase agreement, or as a regulated reorganisation on the basis of the merger agreement entered in a form of notarial deed, following strict corporate steps and disclosure requirements. The change of ownership as a consequence of an M&A transaction is subject to registration in the trade registry maintained by the Central Registry of the Republic of Macedonia.

A revised Takeover Law was passed in May 2013, regulating the takeover procedure applicable to companies that issue securities listed on the Macedonian Stock Exchange and securities issued by joint stock companies with special reporting requirements pursuant to the Law on Securities. The provisions of the Takeover Law apply for a period of one year after a company ceases to meet these criteria. The control takeover threshold that triggers a mandatory takeover bid is acquisition of more than 25% of the voting shares in a company. The additional takeover thresholds are acquisition of an additional 5% of the voting shares of the target company within a period of two years of the successful takeover, and the highest takeover threshold is 75% of the voting shares.

The provisions of the Takeover Law do not apply to purchase of shares owned by the Republic of Macedonia, including shares owned by beneficiaries of funds from the State Budget, agencies, funds and public companies and other institutions and legal entities performing activities of public interest established by state-owned assets.

In addition, the Securities Law, passed in 2005, regulates the manner and conditions for issuance and trading in shares, and sets the general legal framework of the capital market and the licensed market participants, disclosure obligations of joint-stock companies with special reporting obligations, and other issues with regard to shares.

The Macedonian Security and Exchange Commission (SEC) and the Commission for Protection of Competition (CPC) are the principal regulators related to M&A transactions.

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The SEC is established as an autonomous and independent regulatory body with public authorisations prescribed by the Securities Law, the Law on Investment Funds and the Takeover Law. It extends the regulatory framework with secondary legislation relative to M&A, and in particular the acquisitions of listed and reporting companies, to which Takeover Law applies.

The CPC is a state body with the status of a legal entity, independent in its work and decision-making process within the competencies provided by the Law on Protection of Competition. It controls the application of the provisions stipulated in the Law on Protection of Competition, and monitors and analyses the conditions on the market to the extent necessary for the development of free and efficient competition. The CPC, *inter alia*, gives clearance in cases of mergers and acquisitions that meet the regulatory thresholds.

The publicly available information published on CPC's website show the following statistics:[1]

- 26 merger notifications were reviewed and approved by the Commission for Protection of Competition in the period from January until the end of November 2016, of which:
    - four transactions involved Macedonian companies directly, and the relevant M&A were performed in the Republic of Macedonia; and
    - 22 M&A were performed outside of the Republic of Macedonia and between foreign companies.

The CPC clearances involved various sectors, including but not limited to the business premises rental sector, banking sector, travel services sector, etc. Most of the transactions performed in the Republic of Macedonia were acquisitions of shares by way of execution of a notarised share purchase agreements, in accordance with the Law on Trade Companies.

The trend, pursuant to the statistical data of the CPC, shows an increase of transactions relative to the whole of 2015, when the CPC reviewed and approved:

- eight M&As performed in the Republic of Macedonia; and
- 29 M&As performed outside the Republic of Macedonia.

Significant deals and highlights

The mergers that occurred in the business premises rental sector and the banking sector in 2016 are the most significant deals to have taken place in 2016 in the Republic of Macedonia.

Acquisition of Balfin MK DOOEL Skopje by Hystead Limited

Hystead Limited (Hystead), a UK company controlled by Hyprop Investments Limited (Hyprop), has acquired Balfin MK DOOEL Skopje, the owner of the Skopje City Mall, the largest mall in the capital city of Macedonia – Skopje. Hystead purchased 100% shareholding in Balfin MK DOOEL Skopje from Balfin Finance BV, Amsterdam for a purchase consideration of €92 million. Pieter Prinsloo, Hyprop's CEO, said: "Our objective is to own a high quality shopping centre portfolio in South-Eastern Europe. Macedonia is a small, open economy which has taken great strides to strengthen their economy over the last decade. The World Bank estimates Macedonia's real GDP growth of 3.3% for 2017. Skopje City Mall's high occupancy, promising footfall, balanced tenant mix and expansion opportunities ensure that it is an attractive investment. The mall's current management team will remain, to ensure the retention of critical skills. Our expectation is that the investment will enhance Hyprop's income distributions."

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Acquisition of Alpha Bank AD Skopje by Silk Road Capital AG[2]

Silk Road Capital AG has acquired direct control over Alpha Bank AD Skopje by purchasing 100% of its shares.

Other notable M&A transactions in the period from January until the end of November 2016 include:

- acquisition of Amadeus Slovenia and NMC DOO Skopje by Amadeus IT GROUP S.A.;[3] the relevant market in this transaction is the market for services related to the searching, payment, reservations, booking, issuance of tickets and other procedural services in real time provided by travel providers and tourist agencies regarding air tickets;
- acquisition of AD AGROKUMANOVO Kumanovo[4] by METAL-NET DOO export-import Kumanovo and KVALITET-PROM export-import Kumanovo, affecting the market for wholesale of metal goods, pipes, devices and equipment for plumbing and central heating;
- acquisition of certain assets, i.e. production capacities, of Visteon MACEDONIA ELECTRONICS LTD by Delphi Hungary Autóalkatrész Gyártó Korlátolt Felelősségű Társaság;[5] the relevant market in this transaction is the market for production of electrical and electronic equipment for motor vehicles (components of printed silicon circuits);
- acquisition of ADIENT SEATING DOOEL Stip (formerly JOHNSON CONTROLS STIP DOOEL Stip) and ADIENT AUTOMOTIVE DOOEL Strumica (formerly JOHNSON CONTROLS AUTOMOTIVE STRUMICA DOOEL Strumica) by Adient Global Holdings Ltd, an intra-group acquisition in the automotive sector; and
- accession of Blizoo Media and Broadband DOOEL Skopje into ONE.VIP DOO Skopje (a Telecom Austria subsidiary) driven by, and implemented for, the improvement of the range and quality and availability of telecommunications services and provision of advanced communications facilities and services within the Republic of Macedonia.

Key developments

Notably, M&A transactions are governed by the size of the market. Republic of Macedonia, being a small market, has limited M&A opportunities, leading to limited M&A transactions. In addition, the interest in acquisitions in the financial, real estate and telecom sector is declining, leaving a number of opportunities without completion.

The interest of international financial institutions has shifted from equity investments into increasing their loan portfolio on the market. Also, international finance institutions have several divestments in the financial sector.

The role of institutional investors in M&A transactions is not expected to increase. Pension funds tend to diversify their portfolio between investments in state securities and securities tradeable on local and foreign markets issued by listed companies, and private equity funds are not sufficiently developed.

Though there was an increase in legislation activity, none of the amendments made in the governing laws will affect the M&A market.

The Law on Technological Industrial Development Zones and the benefits for investors it provides have achieved increased investment activity, resulting in the presence of international companies in the technological industrial development zones. Indirectly, this has affected the M&A market by several transactions with companies operating in these zones.

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Industry sector focus

There is an expansion of activity in the following sectors:

- the business premises rental sector; and
- the banking sector.

Business premises rental sector

The expansion of activities in the business premises rental sector is due mainly to the increased interest of foreign companies in starting businesses in the Republic of Macedonia. In the past couple of years, the number of foreign companies opening IT companies and information (call) centres in the Republic of Macedonia has significantly increased. These businesses, as well as companies in the telecommunications sector, are mostly interested in renting business premises. There is a 13.3% increase in leased business premises in comparison to 2014.

2016 inbound investments[6]

The rate of foreign direct investments through the first three quarters of 2016 has increased compared to the same rate in 2015. The majority of foreign investment in the first three quarters 2016 was in the sector for manufacturing of motor vehicles and other transport equipment, as well as in the financial intermediation services sector.

Most inbound foreign direct investments in Macedonia originated from Germany, Turkey and Slovenia.

The year ahead

The parliamentary elections held in December 2016 and the political situation will most likely adversely affect the volume of M&A transactions. Despite the elections, it is expected that the economy in 2017 will continue its steady growth between 3–4% (depending on the institution making the economic analysis and prognosis).

Low taxation rates remain attractive for investors and may lead to particular interest for acquisitions in the hospitality and tourism sectors, as well as in the information and communication technology sector. M&A opportunities remain in the banking and insurance sector, energy generation, food industry and retail markets.

Government incentives, new export-oriented facilities, labour market and solid credit support are expected to maintain the assumption of economic growth, thus enabling stability.

Stock market trading may be boosted by the creation of SEE Link DOO by the Macedonian Stock Exchange, the Bulgarian Stock Exchange and the Zagreb Stock Exchange, a company established for the purposes of facilitating order-routing and direct processing of trade deals between the markets in Macedonia, Bulgaria and Croatia. The project is an important first step in regional integration efforts, and should be seen as a transitional development to build upon, rather than a complete or final optimal solution. The goal is to develop the order-routing vehicle that has the potential to build sufficient critical mass by increasing trading volumes and improving liquidity in the regional stock exchanges. It has triggered interest by other stock exchanges in the region, and the Slovenian Stock Exchange and Belgrade Stock Exchange have joined this platform.

Nevertheless, Macedonia is not immune to external economic environmental influence, and the weakening of global growth in 2016 may have a negative effect on the Macedonian economy.

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Overall, it is expected that the Macedonian M&A market will follow the trends in the south-east Europe region.

* * *

Endnotes

These statistics are not comprehensive and are based only on the information available from the CPC. They do not include all M&A transactions, but only those that triggered the notification requirements. There is no official record of all M&A transactions.

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His 20-year experience in various projects, mostly focused on privatisations, M&A, and financial arrangements of IFIs and international banks, as well as his corporate experience, give him an excellent track record and know-how for transactions involving financing structures.

His experience in several industries, combined with his banking experience and various independent corporate positions in companies (including serving as member and Chairman of the Board of Directors of the Macedonian Stock Exchange; Board member in a still processing plant; a zinc and lead smelter; a brokerage house; and an insurance company) and banks (including his current participation as an independent member of Supervisory Board in a local bank), represent a solid basis for taking important roles as legal advisor to financial institutions as well as companies in various industries.

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Malta

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Overview of the Maltese market

After exceptional growth in 2014 and 2015, Malta's economic performance has settled down. However, the European Commission has forecast Malta's economic growth to remain well above the European Union ("**EU**") average, and the economy's steady upward trajectory is being projected to continue at a broadly unchanged pace in 2017 and 2018.

Figures recently released by the National Statistics Office (the "**NSO**") confirm that, for another successive year, Malta is enjoying an economic boom that shows no sign of dissipating.

Foreign direct investment ("**FDI**") flows into the Maltese market during the first six months of 2016 stood at a colossal €156.7bn, according to the NSO, with FDI flows rising by €1.9bn during the same six months (representing an increase of €455.6m over the corresponding flows in 2015).[1] The NSO has also published figures that indicate a steady and consistent increase in Malta's FDI, with the latest report capping four successive years of growth since June 2013 when Malta's FDI was €136.3bn.

Unemployment rates have also been remarkable. Standing at 4.9% in October 2016, Malta's unemployment rate is the fourth-lowest in the European Union.

Key to Malta's excellent economic performance is its financial services sector, with 95.6% of Malta's FDI being attributable to financial and insurance activities; with the success of this local sector causing numerous international structures to rush to use Malta as an effective base for their international operations. After all, Malta benefits from an ideal geographic location in the centre of the Mediterranean, and provides phenomenal ease of access to Europe, the North African region, the Baltics and Western Asia.

Of course, the benefits of settling in Malta go beyond the mere geographic.

Malta acceded to the European Union (the "**EU**") in 2004, with subsequent EU Membership providing access into the integral European Common Market. Malta is also party to the Schengen agreement, which allows anyone within the Schengen area to move freely within the countries forming part of the agreement. Institutions and operators in the financial services sector also enjoy passporting rights into other EU member states.

The consensus may have been that 2016 was a difficult year for Europe. Naturally, the political environment matters for business. Events in 2016 indicate that the future could be somewhat bleak. The uncertainty brought about by the US presidential election and the historic Brexit vote in June 2016 may somewhat dampen the enthusiasm of recent years regarding international M&A activity. After all, the United Kingdom has long been considered one of Malta's closest allies and trading partners in the EU, and Brexit could

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have far-reaching consequences for Malta. Some hits are expected in the tourism sector, as the cost of holidaying in Malta may rise and currency fluctuations may concurrently increase the cost of exports to the United Kingdom. However, Malta is being considered as one of the EU jurisdictions that is best positioned to act as an attractive domicile post-Brexit. It has been reported that a number of UK companies have shown interest in moving part of their business to Malta to benefit from passporting rights into the EU. After all, Malta is a member of the Commonwealth, English is one of Malta's two official languages and, in matters of financial services and company law, the English language version of our legislation prevails in a court of law in case of conflict.

Malta's political and economic stability has been acknowledged by international rating agencies as one of the hallmarks of the Maltese jurisdiction. Malta has weathered the international financial crisis and, as recently as February 2017, Fitch has confirmed Malta's 'A' grade and upgraded its outlook from "stable" to "positive". Fitch also projected that in the coming two years, the country's GDP will increase by 3.3%, inflation rates will remain low, investment will keep increasing, and Malta's national debt will be the lowest it has been in 20 years. Fellow ratings agency Standard and Poor's confirmed this outlook and have recently upgraded their forecasts for Malta, from an already positive 'BBB+' to an 'A-'.

The motor behind the booming Maltese economy has been a combination of foreign players investing in the country's growing economic sectors (such as iGaming, health care and digital media) as well as local players being actively eager to collaborate for the mutual interest of themselves and the Maltese market in general. This would not have been possible, however, without a legislative framework that is constantly being renewed, steadily moulding an environment that facilitates investment in the jurisdiction, particularly in the form of international mergers and acquisitions. Undoubtedly, the EU Merger Directive[2] has been essential in allowing mergers and acquisitions under tax-neutral regulations, and the use of Malta's favourable fiscal platform. In Malta, on the transfer of certain assets, income tax on capital gains is subject to the typical corporate tax rate at 35% – however, thanks to Malta's full imputation tax system (a legacy of its British colonial past), this amount may be reduced to as little as 5%.

The legal framework governing mergers and acquisitions

The Companies Act

Mergers and acquisitions of companies registered under the laws of Malta are prominently regulated by the Companies Act (Cap. 386 of the laws of Malta) (the "**CA**") enacted in 1995.

The CA is principally based on English company law and transposes the full suite of European company law directives. It regulates the registration, management and administration of commercial partnerships, their dissolution and winding up (including in the case of insolvency), the granting of pledges over shares in companies, and the offering of securities in companies to the public (including the relevant prospectus requirements for such offers).[3]

Part VIII of the CA (dealing with 'Amalgamation of Commercial Partnerships') contemplates a number of detailed provisions allowing for the mergers of companies.

Amalgamation of two or more companies may be effected by: (i) a merger by acquisition whereby the acquiring company acquires all the assets and liabilities of one or more other companies in exchange for the issue to the shareholders of the companies being acquired

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of shares in the acquiring company (and a cash payment, if any, not exceeding 10% of the nominal value of the shares so issued);[4] or (ii) the formation of a new company whereby two or more companies transfer into a newly set-up company all their assets and liabilities in exchange for the issue to the shareholders of the merging companies of shares in the new company (and a cash payment, if any, not exceeding 10% of the nominal value of the shares so issued).[5]

In the case of corporate entities which are not registered under the laws of Malta, reference should be made to the Cross-Border Mergers of Limited Liability Companies Regulations (Legal Notice 415 of 2007), which transposes the European Community Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies. In terms of such regulations, in the case of cross-border mergers, the law to be followed is that of the Member State in which the company has its registered office, central administration or principal place of business, provided that at least two of the companies are regulated by the laws of different Member States, and one of which is registered under the laws of Malta.

Other legislative instruments of note, issued in terms of the CA, are the Companies Act (SICAV Incorporated Cell Companies) Regulations[6] and the Companies Act (Incorporated Cell Companies) Regulations,[7] which provide for the possibility of establishing investment companies with variable share capital ("**SICAV**"), as well as grouping limited liability companies into an incorporated cell company. In this way, a cluster of incorporated cells can be grouped under an incorporated cell company structure where their combined assets and liabilities can be attributed to a particular individual cell of the cell company, in order to limit the availability of assets and liabilities only to creditors and shareholders of that single cell. This is a very attractive feature of the Maltese legislative framework, particularly in the insurance sector. In fact, it has been reported that Lloyd's of London actively considered Malta as its new European headquarters outside of Britain following the Brexit vote for a while, particularly because of the unique cell structure found in Maltese law.

Civil Code

Another important piece of legislation in the field of mergers and acquisitions is the Civil Code (Cap. 16, laws of Malta).

First enacted in 1861 and claiming the *Code Napoleon* as its major source, the Civil Code contains the rules governing the law of obligations. Inspired by the Roman (or Civil) law system, the Civil Code regulates the rules for the validity of contracts, suretyship, mandate, joint and several liability, security trusts and nominate contracts (such as sale, lease and contract of works).

The Commercial Code

The Commercial Code (Cap. 13, laws of Malta) is another indispensable point of reference for practitioners in the mergers and acquisitions field. It regulates agency contracts and management arrangements as well as modes of payments used in the commercial world such as bills of exchange and promissory notes. It regulates traders and acts of trade and commercial contracts in general.

Importantly, the Commercial Code states that the commercial law is the *lex specialis* that shall apply in commercial matters. However, where a lacuna exists in the Commercial Code, the usages of trade shall apply and, in the absence of such usages, the Civil Code shall apply.

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The Financial Markets Act and the Listing Rules

Another relevant legislative instrument is the Financial Markets Act (Cap. 345 of the Laws of Malta)[8] (the "**FMA**") which regulates the authorisation of regulated markets, central securities depositories and the orderly trading in transferable securities.

Financial instruments may only be listed on a regulated market in Malta if they are first authorised by the Listing Authority. The Listing Authority (which, in Malta, forms part of the single financial services regulator known as the Malta Financial Services Authority) is established and regulated by the FMA. Listing shall take place in accordance with the Listing Rules which are issued by the Listing Authority in terms of the said FMA.

The Listing Rules are applicable to companies whose financial instruments have been admitted to listing on a regulated market.

Importantly, Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids is transposed by Chapter 11 (and Chapter 5 with respect to article 10 of the said Directive). The Listing Rules provide that where a person acquires a controlling interest in a company as a result of the acquisition of shares, either directly or by persons acting in concert, that person must make a bid as a means of protecting the minority shareholders of that company. However, the obligation to launch a mandatory bid does not apply where control has been acquired following a voluntary bid made to all the holders of securities for all of their holdings.

The Listing Rules impose particular obligations on takeover bids for the securities in companies registered in Malta and which are authorised, licensed or otherwise supervised by the Malta Financial Services Authority (the "**MFSA**") (such as credit institutions, entities carrying out insurance business, insurance intermediaries and trustees). In this case, a person must obtain the written consent of the MFSA prior to the take-over. The Listing Rules also impose an obligation on the offeree company and its board of directors to notify the MFSA upon becoming aware that any person intends taking any one of the actions mentioned above.

In addition to the Companies Act (The Prospectus) Regulations, the Listing Rules regulate the content and the approval of the prospectus for issue. The Listing Rules set out the conditions that need to be met by prospective issuers and sponsors, the minimum corporate governance requirements, the reporting requirements and shareholder rights. The Listing Rules also transpose the Prospectus Directive[9] and Transparency Directive[10] (the "**TD**").

Control of Concentrations Regulations

The Control of Concentrations Regulations[11] (hereinafter referred to as the "**CCR**") binds persons or undertakings to notify the Malta Competition and Consumer Affairs Authority (hereinafter referred to as the "**MCCAA**") of the merging of two or more undertakings that were previously independent from each other, or the acquisition by one or more undertakings, or by one or more persons already controlling at least one undertaking, whether by purchase of securities or assets, by contract or by any other means, of direct or indirect control of the whole or parts of one or more other undertakings.

The requirement for notification is then further subject to a turnover threshold in Malta in the preceding financial year exceeding €2,329,373.40, and each of the undertakings concerned having a turnover in Malta equivalent to at least 10% of the combined aggregate turnover of the undertakings concerned.

For the purposes of notification, it is therefore irrelevant whether one or more undertakings is not present in Malta, as the MCCAA only requires that the undertaking makes sales in Malta in order to fall within the parameters of notification.

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Notification to the MCCAA is done by the acquiring party unless the concentration is that of a merger or acquisition of joint control, in which case it shall be notified by the parties jointly by virtue of a form detailing the parties to the concentration, the nature of the concentration, ownership and control, personal and financial links, and previous acquisitions and supporting documentation.

Notification must be made within fifteen (15) working days from the conclusion of the agreement, announcement of public bid or the acquisition of a controlling interest. Without such notification, the concentration cannot be put into effect.

The CCR also delves into the possibility of a simplified procedure in certain instances.

The MCCAA's decisions with regard to concentrations are publicly available and can conveniently be found on the MCCAA online portal,[12] with eight (8) notifications having been listed in 2016.

Employment and Industrial Relations Act

The Employment and Industrial Relations Act (hereinafter referred to as the "**EIRA**") (Cap. 452, laws of Malta) is of particular relevance to mergers and acquisitions due to the rules set out in case of acquisitions of going concerns.

In the event of a transfer of business, persons in the employment of a transferring business, or as at the date of the transfer of the business, are to be deemed to be in the employment of the transferee, and will maintain any and all rights and obligations which they held under the previous employer.

This obligation on the prospective employer is an important factor which must be considered during the due diligence process which takes place prior to the acquisition of a company having employees registered with the Employment and Training Corporation in Malta.

In addition, old and new employers are duty bound to keep informed the representative of the employees who are to be affected by the transfer.

The specific rules governing such transfers of business are contained in the Transfer of Business (Protection of Employment) Regulations.[13]

Recent developments

The past year saw three substantial updates to the Companies Act, all intended to transpose EU Directives into locally enforceable law.

Firstly, in April 2016, the CA was amended by Act XIX of 2016 (an omnibus act amending various financial services laws) to be brought into line with the TD for the purpose of harmonising transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market.

The CA was further amended by virtue of Act XXXVI of 2016 to be brought into line with Directive 2014/56/EU[14] to introduce new and specific auditing requirements regarding the statutory audit of public-interest entities.

Thirdly, Act LIV in December 2016[15] transposed Directive 2014/95/EU[16] on the disclosure of non-financial and diversity information by certain large undertakings and groups into Maltese law.

The Listing Rules were amended on 11 August 2016 with a view to bringing the Rules in line with the Market Abuse Regulation,[17] pursuant to which the period during which 'restricted persons' are prohibited from dealing in an issuer's securities was reduced from two months to 30 days prior to the publication of annual/half yearly results. The MFSA

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has also launched a consultation document on proposed amendments to the listing rules in order to reflect the Statutory Audit Directive,[18] resulting in changes to the composition and functions of audit committees.

Similarly, the Financial Markets Act was updated in 2016 through Act XIX of 2016 for the purpose of designating the MFSA as the competent Maltese authority for the purposes of implementing the relevant provisions of the CRAR, CSDR, EMIR, MiFID, MiFIR and the SSR.

Further to a 2015 judgment of the Constitutional Court which declared that the Industrial Tribunal (the "**Tribunal**"), the tribunal with exclusive jurisdiction to consider and decide all cases of alleged unfair dismissal and other breaches of employment law, was unconstitutional because it did not guarantee independence and impartiality, all pending and new cases filed before the Tribunal were suspended pending the necessary legislative amendments. Act XXXIIII of 2016 amended the EIRA so that provisions relating to the composition of the Tribunal, the appointment of members and chairpersons of the Tribunal, and certain powers of the Tribunal, ensure a fair hearing in cases heard before the Tribunal.

Another interesting legislative development is the introduction of the Office of the Arbiter for Financial Services by virtue of Act XVI of 2016. The Office is an autonomous and independent body with power to mediate, investigate and adjudicate complaints filed by customers against all financial services providers.

Mergers and acquisitions in 2016

2016 was characterised by some notable mergers and acquisitions, building upon the wave of M&A activity of previous years, also noted in the fifth edition of this publication.

In the financial services sector, Calamatta Cuschieri Group plc acquired the entire share capital of Crystal Finance Investments Limited in April 2016. Both the acquiring party and the target were renowned for their activity in the field of portfolio and wealth management for professional and retail clients (with the target being the local representative for UBS AG), and the takeover possibly signals the start of a trend of consolidation in the market. All employees of Crystal Finance Investments Limited were retained on the same terms and conditions following the acquisition, with the target continuing to operate normally under its own brand and through its branch network throughout Malta.

Another important M&A transaction in the financial services sector was the sale of a 78.46% stake in Banif Bank plc to the Al Faisal group, a private Qatari investment group which is one of Qatar's largest private diversified industry groups, in October 2016. The stake sold was held by Octant SA, the Portuguese resolution fund vehicle that was created at the time of intervention in Banif S.A. in December 2015 and which had inherited those assets which were not purchased by Santander. The acquisition was subject to the receipt of proper approval from the European Central Bank and the MFSA. The remaining shares in the company continue to be held by four Maltese private shareholders. This acquisition is certainly likely to be one of substantial importance for the Maltese economy, with the acquiring company immediately signalling its intent to provide the bank with additional capital resources to strengthen the bank's capitalisation and support its focused diversification and expansion plans – including enhancing the Bank's existing range of services for retail and corporate customers and the development of new private banking and investment banking services.

Argus Group, a leading insurance services provider, present in Malta through Argus Insurance Agencies Limited, acquired Maltese-registered company, Island Insurance Brokers Limited, in June 2016. Both the acquiring company and the company being acquired in this situation

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operate predominantly in the insurance industry, specifically in the areas of health, life, property, and casualty insurance, with Island Insurance Brokers Limited being an insurance broker in all classes of insurance business in terms of the Insurance Intermediaries Act (Cap. 487, Laws of Malta).

Continuing the trend of 2015, M&A movement was also registered in the professional services and accounting sector. In January 2016, RSM Malta and the local accountancy firm, Spiteri Bailey & Co, combined their resources to become one firm employing a large talent pool of over 100 highly skilled and qualified employees in the fields of accounting, law, IT, tax and risk management.

In the information technology sector, the acquisition by GO Data Centre Services Limited of 51% of the share capital of Kinetix IT Solutions Limited in January 2016 was a notable transaction, with the acquiring company being a holding company engaged in the business of data centre services, cloud services, software, the management of IT services and computing hardware sales; and the target being active in the provision of IT solutions, sale of computing hardware and software to businesses as well as service management and support service at the customers' premises. This acquisition conveys the significant market strength of GO Data Centre Services Limited which, along with its pre-existing shareholding in BMIT Limited, now holds controlling shares in two major companies in the information technology sector.

A particularly exciting M&A transaction on the local scene was the triumvirate joint venture of Pater Holding Company Limited, United Group Limited, and Tum Invest Limited, all of whom decided to pool their resources into a merger that saw the creation of the new Maltese-registered company, Motors Inc. All three of the merging parties operate principally in the automotive sector, and acting as local representatives of valued brands. Pater Holding Company Limited was the sole Maltese distributor of Hyundai vehicles as well as automobiles manufactured by the FIAT group. On the other hand, United Group Limited and Tum Invest Limited each held fifty per cent (50%) stakes in the company Cars International Limited, which itself represented brands like Kia, Opel and Saab. Following the merger, each of the parties was given joint control of the new company in exchange for the transfer of their assets and liabilities, with the result being that each now holds an equal 33.3% of the issued ordinary shares of Motors Inc. This merger comes at a time when the market for the importation of new vehicles in Malta was under considerable pressure due to the exponential increase of importation of second-hand vehicles from the United Kingdom due to the beneficial exchange rates.

A notable M&A transaction with an international flavour, and perhaps the most significant in terms of transaction value, was the acquisition by Shanghai Electric Power Co. Limited (of China) of 33% of the issued share capital in the otherwise state-owned Enemalta, with the deal being announced in December 2016 for a compensation of two hundred and fifty million euros (€250,000,000). The Government of Malta heralded the deal as the largest foreign investment in the country's history.

Malta's M&A outlook

The momentum seen in recent years in M&A activity certainly carried on into 2016, with a high degree of substantial mergers and acquisitions, with such transactions very often acting as effective conduits of substantial FDI into Malta.

The constant legislative updates have been fundamental in ensuring that the appropriate environment exists for such growth in the M&A activity. Malta prides itself on a simple, flexible and user-friendly regulatory approach but one which is fluid enough to keep up to

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date with the realities of modern day practice and well in line with any requirements created by the European Union, as well as being firm in its adherence to proper ethical and legal standards in taking all necessary care and due diligence.

The sense of inherent positivity in the Maltese economy at the moment is reflected in the growth of the Malta Stock Exchange which has, during 2016, continued to focus on the domestic market, but intensified its efforts to attract international business, and consequently M& A activity, from Europe but also particularly China, Turkey and the Middle East to take advantage of Malta's cost-effective listing solutions. In fact, in an interesting strategic move, in 2016 the Malta Stock Exchange introduced the MSE Sharia Compliant Index, which helps to place the stock exchange in a position to explore opportunities within Islamic Finance.

On the horizon, attempts at tax harmonisation within the EU could, to some extent, threaten Malta's sustained growth in attracting international mergers and acquisitions. However, it is important to note that, as yet, taxation matters remain the sovereign right of each individual EU Member State and, after all, tax is not the only or most important reason for Malta's strong performance in recent years. Malta boasts a robust regulatory and legal framework, business-friendly approach from regulators, a high-end operational infrastructure, excellent human resource skills, cost competitiveness, geographical proximity to other European financial centres and a safe economic and political climate which give decision-makers the necessary peace of mind.

* * *

Acknowledgment

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* * *

Endnotes

1. NSO News Release | 14 February 2017 | 1100 hrs | 028/2017.
2. Council Directive 2009/133/EC of 19 October 2009 on the common system of taxation applicable to mergers, divisions, partial divisions, transfers of assets and exchanges of shares concerning companies of different Member States, and to the transfer of the registered office of an SE or SCE between Member States.
3. *Vide* the Companies Act (The Prospectus) Regulations, Legal Notice 389 of 2005, as amended.
4. Article 343(2), CA.
5. Article 343(3), CA.
6. Legal Notice 550 of 2010.
7. Legal Notice 119 of 2012.
8. Financial Markets Act (Cap. 345 of the Laws of Malta), 1992.
9. Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC.

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10. Directive 2013/50/EU of the European Parliament and of the Council of 22 October 2016 amending Directive 2004/109/EC of the European Parliament and of the Council on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market; Directive 2003/71/EC of the European Parliament and of the Council on the prospectus to be published when securities are offered to the public or admitted to trading and Commission Directive 2007/14/EC laying down detailed rules for the implementation of certain provisions of Directive 2004/109/EC.
11. Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC Text with EEA relevance.
12. http://mccaa.org.mt/en/mergerdecisions.
13. Legal Notice 433 of 2002, as amended.
14. Directive 2014/56/EU of the European Parliament and of the Council of 16 April 2014 amending Directive 2006/43/EC on statutory audits of annual accounts and consolidated accounts.
15. Act LIV of 2016.
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17. Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council, and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC.
18. Directive 2006/43/EC of the European Parliament and of the Council of 17 May 2006 on statutory audits of annual accounts and consolidated accounts, amending Council Directives 78/660/EEC and 83/349/EEC and repealing Council Directive 84/253/EEC.

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Mexico

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Overview

The main laws regulating mergers and acquisitions and in general, all type of business combinations in Mexico, are: the Commerce Code, which generally regulates all commercial acts and transactions; the Federal Civil Code, regulating relationships between individuals and private or public companies; the Corporations Law, regulating company structuring and mergers; the Bankruptcy Law, regulating corporate restructuring; and the Law of Negotiable Instruments and Credit Transactions, which provides the legal framework for the possession and transfer of shares and other negotiable instruments. All of these laws have a nationwide scope of application in their Federal character.

There are also other complementary laws that may apply depending on the nature of the transaction, the entities involved, and their corporate purpose and nationality, such as the Securities Market Law, the Federal Antitrust Law, the Federal Labor Law, the Foreign Investment Law and their respective regulations and rules.

Transaction agreements in Mexico may be governed by a foreign law, as is common in global acquisition transactions, while it is also common for them to be governed by Mexican federal or the state laws of the location of the acquired assets. The Commerce Code and the Federal Civil Code are the main laws governing these type of transactions; however, local laws from the states of Nuevo Leon (with Monterrey as capital city), Jalisco (with Guadalajara as capital city) and Mexico City are considered to be the most sophisticated local jurisdictions, and are regularly used to govern transactions – although other new geographical areas, such as El Bajio and Baja California, are emerging as new industrial and commercial poles where mergers and acquisitions activity is also taking form.

Financial institutions, private lenders, funds, bank syndicates and the stock market greatly support fund access for these transactions. Transactions among private companies are commonly governed only by the interests of the parties; while by contrast, transactions involving public companies (companies with shares registered at the Mexican Stock Exchange) are subject to some restrictions overseen by the National Banking and Securities Commission.

There are certain specific industries that are subject to additional restrictions and regulations. Among the most restricted industries are transport, oil & gas exploration (although recently deregulated, as we discuss further in this document), trade, telecommunications and banking. Although less restricted, some other activities and sectors are subject to special regulations when there are foreigners involved, such as insurance, explosives, newspapers, air transport services, border administration services and others.

Additionally, there are special programmes designed to encourage investors and new development in specific industries. The manufacturing and development sectors are among

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those incentivised, in addition to industries benefiting from various international treaties approved by the Mexican government. Most importantly, the recent energy reforms set in motion a major agreement shift, which is now allowing foreign and Mexican private companies to work in activities that in the past could only be undertaken by the Mexican government-controlled Petroleos Mexicanos (Pemex).

The steady economic growth of the country in recent years has caused an increase in mergers and acquisitions activity. New growth areas across the country offering infrastructure and skilled human capital, and the looming presence of a private equity funds market, are attracting foreign capital into different investment areas such as the energy, mining and technology fields.

Significant deals and highlights

In 2016, the Mexican M&A (mergers & acquisitions) market registered a 9% decrease in value, despite a 2% increase in the number of transactions compared to 2015. In number of transactions, the leading sectors were Real Estate (25), Financial (20) and Retail & Distribution (18). Q4 was the most important quarter in M&A activity with 91 transactions, such as OTPP and CPPIB's acquisition of 49% of Autopista Arco Norte at a US$ 935.96m value range.

We highlight the following as the most significant M&A transactions that occurred in Mexico during the year 2016 by size and scope:

(a) The private equity fund KKR acquired from Pemex for US$ 1.2bn, through a sale-and-leaseback structure, some of its infrastructure assets, with a concurrent lease back to Pemex for a 15-year period; the acquisition included pipelines, a system of subsea cables, two non-drilling platforms and a facility for gas compression.

(b) Acquisition of the totality of the shares of the Mexican clothing retail chain Suburbia by the Mexican department store Liverpool for an amount of approximately US$ 1bn. Suburbia was a Mexican subsidiary of U.S.-based retailer Wal-Mart Stores Inc. This acquisition involved intellectual property rights for the Suburbia trademark and other related trademarks such as Weekend and Non Stop, as well as 119 stores and lease agreements with Wal-Mart and other related third parties.

(c) Acquisition of the Ventika I and Ventika II wind farm facilities located in the Mexican state of Nuevo Leon, the largest operating wind farm in Mexico, by IEnova, the Mexican subsidiary of Sempra Energy, for an approximate amount of US$ 900m.

(d) Acquisition of 49% of the Mexico City toll highway "Autopista Arco Norte" by OTPP and CPPIB for an approximate amount of US$ 936m.

(e) Acquisition of U.S.-based Pittsburgh Glass Works (PGW) by the Mexican glass manufacturer Vitro for an approximate amount of US$ 310m. Additionally, Vitro announced that it will acquire seven manufacturing plants and two satellite plants in the U.S., and an investigation centre and four glass processing plants in Canada.

(f) Acquisition of the totality of the shares of Spanish industrial bakery Panrico by the Mexican bread maker Bimbo for an amount of approximately €190m (around US$ 209m).

(g) Acquisition of 90% of the shares of the European automotive company ACE by the Mexico-based conglomerate Grupo Industrial Saltillo or GIS for an amount of approximately US$ 80m.

(h) Acquisition by Mexican retailer Soriana of 96.31% of the shares of its competitor, Mexican retailer Controladora Comercial Mexicana, for approximately US$ 1.6bn, and

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which grew Soriana's facilities to 143 stores, in addition to other assets and includes the use of trademarks and technology platforms.

(i) Acquisition of Vonpar, one of the largest private bottlers in Brazil, by the Mexican multinational beverage company, Coca-Cola FEMSA, or KOF in a deal valued at approximately US$ 1.1bn.

(j) Acquisition of Cerámica San Lorenzo, which markets and manufactures ceramic floors and coatings, by Mexican Grupo Lamosa for approximately US$ 230m.

Key developments

During 2016 the Corporation Law, one of the key laws that govern mergers and acquisitions in Mexico, was amended to include the Simplified Stock Corporation (*Sociedad por Acciones Simplificada*, or "SAS") as a new type of corporation, being the first single-member corporation in Mexico allowing one or more individuals, Mexican or foreign, to incorporate a company in an easier and more efficient manner. Although the scope of operation is certainly limited for the SAS, this amendment to the Corporation Law represents a big step towards the simplification and practicality of doing business in Mexico. To summarise the main features of the SAS, we can mention the following:

(a) It can be incorporated by one or more shareholders, who should be only individuals, with a simple process of incorporation, since it can be done electronically.

(b) The total annual revenues of a SAS cannot exceed MXN $5,000,000 (approximately US$ 250,000).

(c) It has no limitations on foreign investment.

(d) Its shareholders can incorporate the company electronically without the need of a notary public, expressing their consent through the standard form of bylaws available in the electronic incorporation system at the Ministry of Economy's website.

Other significant law applicable to mergers and acquisitions in Mexico which was recently created is the new **Insurance and Bonding Law.** It came into force since April 2015; however, certain relevant aspects were not effective until the year 2016. This Insurance and Bonding Law reinforces Mexico's position in the bonding sector, which has a steady growing market, even prior to the implementation of this new law. To summarise the main features of the Insurance and Bonding Law, we can mention the following:

(a) Implementation of the insurance bond (*seguro de caución*), which blends the legal structure of both the insurance and certain bonding products in an innovative way.

(b) Modifications to the way of determining the capital requirement of insurance companies, which has traditionally been based on average parameters.

(c) Creation of a proper framework of self-regulatory bodies for the development of the industry, renewing the framework for the liquidation and dissolution of insurance and bonding companies.

(d) It creates also the framework necessary to permit insurance companies to carry out mechanisms that will enable them to transfer insurance portfolios to vehicles offering securities to the investing public.

(e) It provides for information disclosure requirements with respect to information and risk management.

(f) It envisages strengthening the insurance companies' corporate governance.

Along with the reforms in the Oil & Gas and Electricity sectors which derived in the

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new Federal Hydrocarbons Law and the Electricity Industry Law and all their applicable regulations during the year 2014, some amendments to the **Foreign Investment Law** also became effective on August 12, 2014, related to the exploration and production of hydrocarbons, the planning and control of the national power grid and the transmission and distribution of electric power, which will remain strategic activities to the Mexican state, but the private sector would be open to participate in them in certain cases and subject to certain conditions. Also, some amendments were made to enable:

(a) The free participation of foreign investment in: (i) gasoline and liquefied petroleum, gas marketing and the supply of fuel; (ii) the use of vessels operating in inland and coastal waters, and on the high seas that offer support services for the exploration and exploitation of hydrocarbons; and (iii) the construction of pipelines for the transportation of oil and its derivatives, and in oil and gas drilling wells.

(b) Petrochemical manufacturing is no longer a strategic activity of the Mexican state.

(c) Starting January 1, 2017, the Energy Regulatory Commission (CRE) is analysing and granting permits for the sale of gasoline and diesel to the public, and Pemex may not limit the supply of these products only to those who have franchise agreements with Pemex.

Competition was encouraged since the Reform in Telecommunication was approved back in 2013 with the publication of the new **Federal Law of Telecommunications and Broadcasting**. Such reform eliminates, among others, the 49% limit on direct foreign investment in the telecommunications sector, and it forced market-controlling America Movil to open its infrastructure. Since then, many new players have arrived in this sector and acquisitions have been recorded; such as AT&T acquiring Isuacell and Nextel, and Grupo Televisa acquiring Television Internacional (TVI) in year 2016. The main purposes of this new law are as follows:

(a) To regulate the use of radio spectrum, public telecommunications networks, orbital resources, satellite communication, public telecommunication services provision and the process of free competition in these sectors.

(b) To strengthen the rights related to freedom of speech and access to information.

(c) To adopt measures in order to encourage competition in open and pay television, radio, mobile and fixed telephony, data and telecommunications services in general.

(d) To create conditions to increase substantially the telecommunication infrastructure and the obligation to make its use more efficient, which has a direct impact on the lowering of prices and increase of service quality.

Industry sector focus

(a) **Energy industry**. Since the energy reform in year 2014, the Mexican energy market and the power sector have opened up to foreign and private opportunities and this is expected to reverse declining Mexican oil productivity. The most important events of year 2016 in the energy sector were: the bid process for significant farm-out agreements with Pemex (the first in its kind in Mexico); the success of the different bidding rounds for different and significant E&P packages; the access granted to third parties for the sale of fuels, triggering with such access the free import of gasoline and diesel during 2017; and the determination of prices according to market conditions starting in 2018. During 2016, the energy sector contributed with an important participation in M&As; a figure of around US$ 6bn in value of transactions represents an increase of 343%

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compared to 2015. Given the high value of the transactions, this sector was one of the main players of the year.

(b) **Power industry**. Together with the energy industry, the power sector is aiming to be one of the most active business sectors in Mexico in the following years. Since the reforms began back in 2014, the main beneficiaries have been the manufacturers and major industrial conglomerates, major consumers and investment entities participating in electricity generation. The open market in electricity is reacting, bringing international competitors to develop power plants including clean energy fields, bringing technology in such area into the country. Companies such as IEnova, the Mexican subsidiary of Sempra Energy, which acquired the Ventika I and Ventika II wind farm facilities, have been part of the M&A development in this sector.

(c) **Aerospace industry**. The aerospace industry in Mexico involves all those companies providing manufacturing, maintenance, repair, engineering, design and related services for commercial and military aircraft. Mexico consolidated its position in the sector as a global leader, having a competitive operating environment and strong trade links. It is reported that aerospace investment inflows represent 47% of total foreign direct investment in Mexico. For example, the Canadian company Bombardier in 2016 began outsourcing part of the work on its Q400 aircraft in Mexico, and the French company SAFRAN is planning to invest US$ 75m in a factory in Mexico for the production of its Leap engine in 2017.

(d) **Automotive and components industry**. Mexico is also an attractive location for the manufacturing of automobiles and components, offering competitive labour costs and a strategic location for business, having several of the most significant worldwide brands investing in large plants or expanding its current ones. This industry sector contributes approximately 35% to Mexico's GDP. During 2016, Mexico sold a record of 1.6 million units, Nissan Motor Co. being the leading player with a 25% market share, followed by General Motors with a 19% market share, Volkswagen with a 15% market share, Toyota with a 6.5% market share and Kia and Hyundai with a 6% market share, according to the Mexican Automobile Distributors Association. In recent months, this industry has been the most sensitive to any potential trade barriers, which could ultimately result in being imposed by the U.S. for cars imported to such country from Mexico. While it is too early and impossible to determine the effects, if any, of any such potential barrier or increased tariffs, the uncertainty generated has resulted in a number of companies in this sector delaying projects or further investments. This is a key sector of the Mexican economy, which should be closely monitored for future investment and growth opportunities in the country.

(e) **Construction industry**. Since 2014 the construction industry has left behind its declining phase and begun accumulating months of consecutive growth, mainly driven by private investment, such as derived from M&As. This continuing growth is a consequence of the structural reforms executed by the Mexican government, including the energy sector reform, which allows foreign and local private companies to participate in the oil and gas related products market, and hence, the construction of pipelines, power plants and airports have increased since then. Also the housing construction sector increased in 2016 due to lower interest rates on mortgage loans.

(f) **Telecommunications industry**. At the end of year 2016, the telecommunication sector registered annual growth of 2.1%. During year 2016, the telecommunications sector reported new operators, M&A transactions between competitors, launching and

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incorporation of value-added services, and a significant decrease in the services' prices compared to year 2015. Although the TV market is now widely open for almost anyone who wants to go into the business in Mexico, the constant growth of the over-the-top (OTT) content industry (video and other media transmitted via the internet without an operator of multiple cable or direct-broadcast satellite television systems), makes it the main competitor. OTT content will also generate a new race in the media market and consequently an increase in M&A activity in this sector which has been a constant subject of debate regarding antitrust regulations, given the predominance of the main competitors in the different areas of this industry.

The year ahead

For 2017, the Mexican M&A market seems in some ways to be uncertain, due to uncertainty derived from any potential modifications to the trade policies in the U.S. Considering that Mexico's exports to the USA account for approximately 80% of its total exports, such dependency could have a significant impact on the Mexican economy. However, the improvement of the macroeconomics of Mexico, the recent reforms in strategic sectors like energy, telecommunications and the automotive industry, and any political or implementation stalling of any such Mexican-adverse potential policies by the U.S., could bring M&A activity and competitiveness back on track in 2017.

Although Mexico's manufacturing sector may suffer during the uncertain period while any potential new trade policies are being negotiated by Mexico and the U.S., making it difficult to maintain the investment and growth levels registered in the past four years, other sectors such as telecommunications, technology and other outsourcing services may continue their growth. Another attractive M&A activity could come from Mexico's banking sector, considering the effect that the recent rate increase announced by the FED could have.

Even though the economic forecast for Mexico for this year may be additionally challenged by any potential changes in commercial and trade policies in the U.S., with an expected gross domestic product that will expand by only 1.7%, the Mexican currency's loss in value may generate a perfect climate for M&A activity, as the country may be seen as a good opportunity to invest. We anticipate that the application of the structural reforms, which finally will take a more substantial form in the year 2017, the current situation of the country, and the internal activity that seems to continue its normal growth, will be reflected in mergers and acquisitions in a diversity of sectors such as real estate, energy, financial and retail.

There is no doubt that 2017 will be a challenging year for Mexico and its M&A activity, but any potential changes in commercial and trade policies in the U.S. have also brought increased awareness from local and foreign investors of the new opportunities that a major change in the relationship between Mexico and the U.S. could create.

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Netherlands

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Overview

Apart from relevant case law, the key legal framework for public M&A in the Netherlands consists of the Financial Supervision Act (*Wet op het financieel toezicht*) and the Civil Code (*Burgerlijk Wetboek*), which lay down the main principles, and the Public Bid Decree (*Besluit Openbare Biedingen*), which contains detailed regulations that govern the public bid process (including the bid timetable, required announcements and contents of the offer memorandum).

The Authority for the Financial Markets (*Autoriteit Financiële Markten*, AFM) is generally competent to supervise a public bid for (voting) securities that are listed on a regulated market in the Netherlands (in particular, Euronext Amsterdam). The AFM does not supervise self-tender bids for such securities, as these are exempt from the public bid rules. If the AFM is competent, no public bid may be launched without the publication of an AFM-approved offer memorandum. The AFM will not act as an arbiter during a public bid (unlike, for example, the UK Panel on Takeovers and Mergers). Instead, the AFM supervises compliance with the (mainly) procedural aspects of the bid process, and may take enforcement actions in case of infringement, including fines. The AFM is not competent to rule on whether a mandatory bid is triggered. This is the exclusive competence of the (specialised) Enterprise Chamber at the Amsterdam Court of Appeals.

Other relevant legislation includes the Works Councils Act (*Wet op de ondernemingsraden*), which may require employee consultation, as well as the Competition Act (*Mededingingswet*) and the EU Merger Regulation, which may require merger clearance from the Authority for Consumers and Markets (*Autoriteit Consument & Markt*, ACM) or from the European Commission, respectively.

M&A activity in the Netherlands slowed slightly in 2016, compared to 2015. The market slowed down markedly when the UK voted to leave the EU. However, we saw activity pick up again quickly following the summer, with somewhat of a rally at the end of the year, which continued into 2017. With a healthy economic outlook, we do not (yet) see any signs of deal flow slowing. Also, some good size deals are getting done or, in some cases, being attempted.

Still, where we saw six public bids for Dutch targets in 2015 (with Prosensa, TNT Express, Grontmij, Royal Ten Cate, Ballast Nedam and Batenburg Techniek as targets), we saw four public bids in 2016 (USG People, NXP Semiconductors, AVG Technologies and Royal Reesink). However, 2017 appears off on a healthy start with public bids for Cnova and Delta Lloyd, while also Kraft Heinz's short-lived interest in Unilever recently created a stir in the Dutch market (see, 'Significant deals and highlights', below).

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The continued healthy deal flow appears to reflect an ongoing, general market confidence, whereby the financial crisis seems to bit-by-bit be viewed as a thing of the past (even though we believe that some of the adverse dynamics might still be present), resulting in increased activity by Dutch as well as non-domestic strategic buyers. At the same time, the continued availability of private equity funds and improved debt availability have arguably resulted in a (continued) level of upward pressure in valuations.

Both inbound and domestic M&A were healthy, whereby the largest deals taking place in the Netherlands tend to be inbound, or have at least significant cross-border angles. The Netherlands is and appears to remain an attractive, and receptive, market for non-domestic acquirers. Having said that, we note that on 16 February 2017, the Minister of Economic Affairs published, and invited comments on, a draft for a Dutch Act on Avoidance of Undesired Control Telecommunications, which – if adopted – might make an acquisition of a Dutch telecoms company by a non-Dutch prospective buyer more onerous (see 'Key developments', below).

Also, the establishment of anti-takeover devices has made somewhat of a resurgence over the past few years. In that respect, the typical Dutch model in M&A has moved back towards consensual, negotiated deal-making. However, that is not to say we could not see an unsolicited public bid in the year to come.

In the meantime, as US and other tax dynamics have changed, the previously existing flow of inversion deals has dried up. Also, on 23 May 2016, CF Industries Holdings, Inc. (NYSE: CF) and OCI N.V. (Euronext Amsterdam: OCI) announced the termination of the proposed combination of CF and the European, North American and Global Distribution businesses of OCI. The parties explained that the US Treasury announcement of 4 April 2016 materially reduced the structural synergies of the combination. Since that time, both companies explored alternative transactions and structures that would be attractive to their respective shareholders. However, the companies noted that they were unable to identify an alternative acceptable to both parties and, therefore, agreed to terminate the combination.

Although we personally see a very healthy Dutch M&A pipeline, we also see a level of economic and political uncertainty, including uncertainty surrounding the potential outcomes in key elections coming up in Europe (among others, in the Netherlands, on 15 March 2017). Generally, Dutch M&A practitioners send mixed messages about their pipelines as this book goes to press in early 2017.

Significant deals and highlights

NXP sells its Standard Products business

Arguably, NXP has been one of the most prolific 'Dutch deal machines' in 2015 and 2016.

In March 2015, NXP Semiconductors N.V. (NASDAQ: NXPI) and Freescale Semiconductor (NYSE: FSL) jointly announced their agreement to enter into a merger agreement under which NXP would merge with Freescale in a US$ 11.8bn transaction valuing the combined enterprise at just over US$ 40bn. In exchange for their shares, Freescale shareholders received US$ 6.25 in cash and 0.3521 of an NXP ordinary share for each Freescale common share. The transaction was unanimously approved by the boards of directors of both companies. Closing of the transaction occurred in December 2015, simultaneously with NXP's US$ 1.8bn divestiture of its RF Power business to JAC Capital. The divestiture was a condition for NXP's merger with Freescale. Clearance for the RF Power transaction was obtained from the US Committee on Foreign Investment in the United States (CFIUS) at the end of November 2015.

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Subsequently, in August 2016, JAC Capital, a subsidiary of Chinese state-owned investment company JIC, and Wise Road Capital, acquired the Standard Products business of NXP in a US$ 2.75bn deal, subject to amongst others European Commission, Federal Trade Commission (US), CFIUS and the Chinese Ministry of Trade clearance.

Qualcomm acquires NXP

On 27 October 2016, Qualcomm Incorporated (NASDAQ: QCOM) and NXP Semiconductors N.V. (NASDAQ NXPI) announced a definitive agreement, unanimously approved by the boards of directors of both companies, under which Qualcomm will acquire NXP. Under the agreement, a subsidiary of Qualcomm makes a tender offer to acquire all of the issued and outstanding common shares of NXP for US$ 110.00 per share in cash, translating into an equity value of US$ 38.5bn and a total enterprise value of approximately US$ 47bn. The transaction is expected to close at the end of 2017, pending approval by shareholders and regulatory bodies.

Apollo acquires Lumileds

In March 2015, a consortium led by GO Scale Capital announced its intention to acquire an 80.1% interest in Lumileds, the LED components and automotive lighting business headquartered in California, United States, of Royal Philips (NYSE: PHG, Euronext Amsterdam: PHIA). Philips would retain the remaining 19.9% interest. The value of the transaction would amount to US$ 3.3bn.

In October 2015, Philips announced that the intended transaction had led to unforeseen concerns by CFIUS. As a consequence, the closing of the transaction – which was initially foreseen in the third quarter of 2015 – became uncertain. In January 2016, GO Scale Capital and Philips jointly announced that they terminated their March 2015 agreement for the intended acquisition. Both parties were unable to resolve CFIUS' concerns and, thus, regulatory clearance was not granted.

Subsequently, in early 2016, according to (unidentified) sources, private equity groups CVC and KKR were rumoured to target Lumileds. The consortium lost the auction of Lumileds in 2015, but was rumoured to be reassessing the options for the unit.

However, on 12 December 2016, Philips announced that it had signed an agreement to sell an 80.1% interest in Lumileds to certain funds managed by affiliates of Apollo Global Management, LLC (NYSE: APO). Philips will retain the remaining 19.9% interest in Lumileds.

The transaction values Lumileds at an enterprise value of approximately US$ 2bn, including debt and debt-like items. Philips expects to receive cash proceeds, before tax and transaction-related costs, of approximately US$ 1.5bn and participating preferred equity. The transaction is expected to be completed in the first half of 2017.

NN Group acquires Delta Lloyd

On 5 October 2016, NN Group, the leading Dutch insurer (Euronext Amsterdam: NN), announced a conditional, unsolicited proposal to acquire its competitor Delta Lloyd (Euronext Amsterdam: DL AE, Euronext Brussels: DL BB) through a public bid.

Delta Lloyd initially rejected the unsolicited offer, but on 2 February 2017, NN Group and Delta Lloyd jointly announced a recommended public cash offer by NN Group for all issued and outstanding ordinary shares of Delta Lloyd. The offer is an all-cash public bid for the issued and outstanding ordinary shares (traded on Euronext Amsterdam) in the capital of Delta Lloyd at an offer price of €5.40 (cum dividend) per ordinary share, representing a total consideration of €2.5bn.

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Kraft Heinz approaches Unilever

On Friday, 17 February 2017, the Kraft Heinz Company (NASDAQ: KHC) acknowledged recent speculation regarding a possible combination of Kraft Heinz and Unilever PLC/ Unilever N.V. Unilever has a dual headed structure, whereby its business is held by LSE and NYSE listed Unilever PLC (LSE: ULVR, NYSE: UL) and Euronext Amsterdam and NYSE-listed Unilever N.V. (Euronext Amsterdam: UNA, NYSE: UN). A contractual equalisation agreement and several other agreements are in place between the two companies, so that they economically operate as a single group, and so that the shares have the same economic value.

Kraft Heinz confirmed that it had made a comprehensive proposal to Unilever about combining the Kraft Heinz and Unilever groups to create a leading consumer goods company with a mission of long-term growth and sustainable living. Kraft Heinz noted that while Unilever had declined the proposal, Kraft Heinz looked "forward to working to reach agreement on the terms of a transaction".

On the same day, Unilever announced that it had noted the announcement made by Kraft Heinz to the effect that it had made a potential offer for all of the shares of Unilever PLC and Unilever N.V. Unilever went on to say that Kraft Heinz's proposal represented a premium of 18% to Unilever's share price as at the close of business on 16 February 2017, and that that fundamentally undervalued Unilever. Unilever further noted that it had rejected the proposal as it saw no merit, either financial or strategic, for Unilever's shareholders. Unilever further noted that it did "not see the basis for any further discussions". The Unilever release went on to specify Kraft Heinz's proposal: Unilever common shareholders would receive US$ 50.00 per share in a mix of US$ 30.23 per share in cash payable in US dollars and 0.222 new enlarged entity shares per existing Unilever share, valuing Unilever at a total equity value of approximately US$ 143bn. The release also noted that, as at the close of business on 16 February 2017, a mix of US$ 30.23 in cash payable in US dollars and 0.222 Kraft Heinz shares per existing Unilever share would value each Unilever common share at US$ 49.61, representing the premium of 18% to Unilever's share price. Unilever confirmed, in line with the requirements under the UK Takeover Code, that its announcement was not being made with the agreement of Kraft Heinz. Unilever's (unsolicited) specification of Kraft Heinz's proposal triggered the commencement of statutory bid timetables, effectively putting (further) pressure on the bidder.

Following the above announcements, Kraft Heinz, under the rules of the UK Takeover Code (which are slightly more tight than, but ultimately have the same effect as, the Dutch takeover rules, which also applied to this situation) had to, by not later than 17 March 2017, either announce a firm intention to make an offer for Unilever or announce that it does not intend to make an offer for Unilever (i.e., triggered by the respective "put up or shut up" rules).

The US$ 143bn takeover, if completed, would have constituted the largest cross-border merger since Vodafone's US$ 183bn acquisition of Mannesmann in 2000. However, on Sunday, 19 February 2017, Unilever and Kraft Heinz, in a joint statement announced that Kraft Heinz had amicably agreed to withdraw its proposal for a combination of the two companies. They added that "Unilever and Kraft Heinz hold each other in high regard. Kraft Heinz has the utmost respect for the culture, strategy and leadership of Unilever." These kind words will "keep" Kraft Heinz away from a possible Unilever bid for six months, but not necessarily indefinitely.

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De Telegraaf in play

On 14 December 2016, Mediahuis N.V., the Belgian newspaper publishing house, and VP Exploitatie N.V., the family vehicle of the Van Puijenbroek family, announced their intention to jointly commence a public bid for Telegraaf Media Groep N.V. (Euronext Amsterdam: TMG), the publisher of, in particular, the leading Dutch morning paper *De Telegraaf*. The joint bidders' stated intention was to integrate TMG's business into the Mediahuis (newspaper) business. The announced bid price was €5.25, subject to ongoing due diligence. On 11 January 2017, the parties announced that they had, in the meantime, received tender commitments covering 55% of TMG's outstanding share capital, including the 41.3% stake in TMG's share capital held by VP itself.

On 23 January 2017, Talpa, the TV production firm run by high-profile Dutch media entrepreneur John de Mol (The Voice, etc.), announced that it intended to make a competing bid to acquire TMG with the aim of forming an independent Dutch multimedia company, with strong positions in print, radio, television and online content. Talpa noted that it had sent the boards of TMG a proposal for an intended public bid for all outstanding shares of TMG for an offer price of €5.90 per TMG share (cum dividend) in cash.

Subsequently, on 19 February 2017, Mediahuis and VP announced that they would be increasing their indicative bid price from €5.25 to €5.90. They announced that Mediahuis had acquired a 6.7% stake (previously committed to be tendered) at that €5.90 price. Including the (now still valid) irrevocables provided to the consortium, the two would again hold commitments for close to 60% of TMG's outstanding share capital. At the time of going to press of this book, shareholders were still speculating on a further increase in the ultimate bid price. However, a joint deal involving each of Mediahuis, VP and Talpa appears to be a distinct possibility as well.

Key developments

Protection of the Dutch telecoms industry from a national interest point of view

On 16 February 2017, the Dutch Secretary of Economic Affairs (currently, Henk Kamp) published draft legislation under which the Dutch government could in the future potentially block a foreign acquisition of a Dutch telecoms company.

The aim of the draft legislation is to create the power for the Secretary of Economic Affairs to block a change of control in the Dutch telecoms sector if such is deemed to be in the interest of the Dutch public order or national security. The Dutch government notes that, as a result of globally shifting economic power, the chances are increasing that a change of control in the telecoms business would partly be driven by geopolitical motives. It believes that that could give rise to national security or public order concerns. For instance, according to the Dutch government, control could potentially be used to further a political agenda, putting pressure on the Dutch government. Also, it says, control over telecommunications infrastructure and services could potentially be abused to gather information from confidential communications. Where such confidential communications belong to the Dutch government, such may affect national security.

The draft legislation defines relevant control, and relevant influence in the telecoms sector. It also lays down the criteria based on which the Secretary of Economic Affairs would need to assess whether the public order or national security is at risk. The legislation would furthermore enable the Secretary of Economic Affairs to terminate existing relevant control at a telecoms player, based on the same grounds. However, such interference in an existing situation would only be allowed if the relevant facts on the basis of which the

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interference would be sought would have occurred after the acquisition of control, or would have become known to the Secretary of Economic Affairs after such acquisition of control by the party concerned.

Any interested party can submit its comments on the draft legislation to the Secretary of Economic Affairs until 30 March 2017. Also after that, there is no certainty that this legislation will ever be enacted. The CEO of Dutch telecoms incumbent KPN has voiced his scepticism *vis-à-vis* the desirability of any such legislation.

Moreover, it is noteworthy that the Secretary of Economic Affairs has now explicitly singled out the telecoms business for protection from a national interest point of view. When, last year, Bpost, the partly state-owned Belgian national mail delivery company (Euronext Brussels: BPOST), submitted a bid, followed by a further improved bid, to PostNL, the privatised and now publicly traded Dutch national mail delivery company (Euronext Amsterdam: PNL), such approach(es) were roundly rejected by the board of PostNL. Bpost ended up retracting its offers, but not until after several prominent Dutch politicians had made statements to the effect that such an acquisition might be undesirable from a Dutch national perspective.

Having said that, the Secretary of Economic Affairs did at the time note that he did not see a basis to interfere with a view to Dutch national interests. He did the same, on 9 September 2016, in a letter to parliament after having been asked whether the Dutch government could potentially interfere in a possible sale of Tata Steel Netherlands. In that letter, the Secretary of Economic Affairs explicitly noted that the relevant strategic decision-making was up to Tata itself.

As it was widely known that the Secretary of Economic Affairs was working on legislation under which the Dutch government would become empowered to block a potential change of control of companies that run a business of national interest, there was a level of speculation in the market on which industries might be covered. That speculation is now gone (at least insofar as the position of the Dutch government is concerned). If legislation is adopted based on the current proposal, it will cover the telecoms business only.

<u>Renewed interest in anti-takeover defences</u>

During 2015, the hostile takeover attempts on Mylan further confirmed the strength and potential utility of defence mechanisms against hostile takeovers available to listed companies under Dutch law. Mylan managed to successfully fend off a hostile takeover attempt by Teva Pharmaceutical Industries through the use of a so-called ‘continuity foundation’: a strong anti-takeover measure where an independent (Dutch) foundation is granted a call option for newly issued preference shares to match the amount of the then outstanding voting rights in the listed company in case of hostile activity. The preference shares can be acquired by the foundation at nominal value (even paying up as little as 25% thereof; an amount that can typically easily be borrowed by the foundation or charged to the reserves of the listed company). The preferred dividend on the shares concerned will typically be low, just sufficient to cover the foundation’s financing costs, and fixed if the payment of the preference shares is charged to the reserves. Such preference shares must ultimately be cancelled, no later than two years following the issue, and are intended to create a (temporary) level playing field to enable the listed company to assess the bidder’s intentions and act appropriately. Thus, this type of defence mechanism can temporarily move voting power to an independent entity (the foundation) without affecting public shareholders’ economics. The mechanism has (re)gained popularity in recent years, following a tendency by Dutch public companies to abandon anti-takeover devices in the early years of this century.

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As part of its (privatisation) IPO, ABN AMRO put a foundation structure in place in which it issued its shares to a (Dutch) foundation, which in turn issued a depositary receipt for each share, which depositary receipts are the publicly traded securities. As a general matter, in this particular structure, the depositary receipt holders will always and immediately receive all economic benefits on the shares for which they hold depositary receipts as well as the voting rights thereon. This foundation will not normally vote any shares in its own discretion. However, in certain hostile situations, the foundation may limit or withhold the voting rights from depositary receipt holders and vote as it deems in the best interest of ABN AMRO. This structure, as opposed to the preference share option structure described above, was suited to ECB preapproval. We expect that (European) financial institutions may look at this structural defence more frequently in the future.

Notably, following the recent discussions between Kraft Heinz and Unilever, we understand that many international investors were somewhat surprised to learn that Unilever does not in fact have a foundation structure in place that functions as an anti-takeover device. Like ABN AMRO, Unilever has a foundation structure in place in the Netherlands under which the shares in its capital are held by the foundation in trust for the holders of publicly traded depositary receipts. However, as opposed to the ABN AMRO foundation, the Unilever foundation (a) can vote on shares with respect to which it does not receive voting instructions in relation to any of Unilever's general meetings, but (b) must grant voting rights to depositary receipt holders at all times (even in the event of hostile situations). Moreover, Unilever depositary receipt holders can demand the exchange of their depositary receipts against the underlying shares concerned in the capital of Unilever at any time (against a reasonable administrative fee).

Industry sector focus

No particular sector dominates the M&A market in the Netherlands. In the midmarket, there was a particular interest in the technology sector, the media sector, and the food sector during 2016. As noted above, not many public deals happened in 2016. Of those that did get announced, two (Qualcomm/NXP and Avast/AVG) were in the tech sector, with a heavy cross-border focus. The same goes for Apollo's privately negotiated acquisition of Royal Philips' Lumileds business. In an entirely different field, the Dutch financial regulators are known to be supportive of consolidation in the (life) insurance business. A clear example of a deal that appears to be driven (in part) by the underlying dynamics thereof is the recently announced public bid by NN Group for Delta Lloyd. Apart from that deal, we see smaller deals happening in the insurance business (including run-off portfolio acquisitions), and we expect to see more (substantial deal size) activity in 2017. Clearly, the sector is heavily regulated, but the regulators are generally receptive to (sensible) deal-making in the sector. Food and consumer goods remain another focus for potential market consolidation. After Kraft Heinz's recent approach to Unilever, many would now not be surprised if Unilever would make a move (whether by doing a substantial acquisition itself, renewing discussions with Kraft Heinz, or otherwise). Finally, we see the logistics sector as an active (growth) area where we would expect more deal-making to come.

The year ahead

In general, 2016 was a successful year for M&A in the Netherlands and there is no reason to believe that M&A activity will necessarily decline in 2017. The economic upturn in the Netherlands, the abundance of capital, and the cheap means of debt financing continue to

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be the main drivers for M&A deals. As follows from the above, 2017 appears to have had a strong start from a public M&A point of view, and we expect more to come as the year progresses.

M&A activity is also expected to stay strong in the midmarket. Experts indicate that at least half of the transactions in the midmarket are private equity-driven. Also, more than half of the M&A deals in the midmarket involve foreign investors (both private equity and strategic buyers), and the general expectation is that foreign investors will continue to be highly interested in the Dutch market. This can be generally explained by the solid (ICT) infrastructure and the general high educational levels in the Netherlands.

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Nigeria

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Overview and relevant laws

Foreign investors usually enter into the Nigerian market through some form of mergers and acquisitions ("M&A") transaction or another. Through an M&A deal, a foreign investor can gain access to existing local structures that already possess regulatory licences and, in certain cases, the goodwill associated with an existing strong local brand.

The principal legislation that regulates M&As are the Investments and Securities Act 2007 (the "ISA") and the Rules and Regulations issued by the Securities and Exchange Commission (the "SEC") pursuant to the ISA (the "SEC Rules"). The provisions of the listing rules of the Nigerian Stock Exchange (the "Listing Rules") also apply where any of the companies involved in the transaction is listed on the Nigerian Stock Exchange (the "NSE"). The Companies and Allied Matters Act, Chapter C20, Laws of the Federation of Nigeria ("LFN") 2004 ("CAMA" – the principal legislation that regulates Nigerian companies) would also apply. In addition to these laws, sector-specific laws and regulation may be applicable to an M&A deal depending on the industry in which the target company operates.

Sector specific approvals

Banks

All Nigerian banks and other financial institutions are regulated by the Central Bank of Nigeria ("CBN") and are subject to the provisions of the Banks and other Financial Institutions Act, Chapter B3, LFN 2004. Where the transaction involves the acquisition of more than 5% (five per cent), the prior approval of the CBN must be obtained.

Insurance

Any acquisition of 25% or more of the shares of an insurance company is subject to the prior approval of the National Insurance Commission.

Telecommunications

The prior approval of the Nigerian Communications Commission must be obtained in relation to any mergers in the telecommunications sector including the transfer or assignment of a licence, and transactions involving the acquisition of 10% or more of the shares of a licensed operator.

Capital market operators

By virtue of section 307 of the ISA, a capital market operator may not, without the prior approval in writing of the Securities and Exchange Commission (SEC), change its shareholding or directors.

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Pension fund administrators and pension fund custodians

The approval of the National Pension Commission ("Pencom") is required in respect of every acquisition of a significant shareholding in a pension fund administrator ("PFA") or pension fund custodian ("PFC") that would result in a change in its shareholding structure. The Pencom's approval is also required for every merger, restructuring or amalgamation of a PFA or PFC.

Restricted sectors

Under the Nigerian Investment Promotion Commission Act 2004 ("NIPC Act"), foreign ownership is permitted in all industries. However, restrictions apply to the following sectors:

- **Oil and gas**. To be competitive in the award of contracts, at least 51% of the shares of companies operating in the Nigerian oil and gas industry must be owned by Nigerians.
- **Shipping**. The Coastal and Inland Shipping (Cabotage) Act (Chapter C51) LFN 2004 restricts the use of foreign-owned or manned vessels for coastal trade in Nigeria.
- **Broadcasting**. A company applying for a broadcasting licence must demonstrate that it is not representing any foreign interests and that it is substantially owned and operated by Nigerians.
- **Advertising**. Only a national agency (that is, an agency in which Nigerians own not less than 74.9% of the equity) can advertise to the Nigerian market.
- **Private security**. A foreign investor cannot acquire an equity interest in, or sit on the board of, a Nigerian private security guard company.
- **Engineering**. A company engaged in engineering services must be registered with the Council for the Regulation of Engineering in Nigeria ("COREN"). One requirement for registration is that the company must have Nigerian directors registered with the COREN holding at least 55% of the company's shares.
- **Aviation**. To qualify for the grant of an aviation licence or permits, the Nigerian Civil Aviation Authority must be satisfied that an applicant is a Nigerian company or citizen.
- **Pharmacy**. The Pharmacist Council of Nigeria Act 2004 provides for the registration of non-Nigerian citizens only:
  - if the applicant's home country grants reciprocal registration to Nigerians; and
  - where the applicant has been resident in Nigeria for at least 12 months prior to the application.

Prohibited transactions

Nigerians and foreign investors alike, are prohibited from engaging in any business on the "negative list", i.e.

(a) the production of arms and ammunition;

(b) the production of, and dealing in narcotic drugs, and psychotropic substances; or

(c) the production of military and paramilitary uniforms.

Although the Federal Executive Council has the discretion to expand this list, it has not exercised its discretion in this respect.

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Thresholds and categories of mergers and acquisitions

Mergers, acquisitions or business combinations between or among companies are subject to the prior review and approval of the Securities and Exchange Commission ("SEC").

Merger thresholds

Merger thresholds are calculated based on the combined annual turnover or assets of the merging companies in Nigeria, as follows:

- **Small mergers**. These have a combined annual turnover or assets of less than NGN1 billion.
- **Intermediate mergers**. These have a combined annual turnover or assets of between NGN1 billion and NGN5 billion.
- **Large mergers**. These have a combined annual turnover or assets of NGN5 billion or more.

Intermediate and large mergers are subject to prior review and approval by the SEC. For small mergers, the SEC only needs to be notified that the merger has been concluded and the merging entities do not need to make a pre-merger filing to the SEC.

Acquisitions

The SEC Rules distinguish between mergers and acquisitions.

An acquisition of a majority interest in a private or an unlisted public company is subject to the prior review and approval of the SEC, except where either:

- The assets or turnover of the target is below NGN500 million.
- The acquisition is as a result of a holding company acquiring shares solely for the purpose of investment.

Mergers or acquisitions between two foreign companies are not regulated by the SEC.

Typical forms of acquisitions

Friendly acquisitions are achieved by means of a negotiated buy-out, a scheme of arrangement (scheme), a merger or a takeover bid (which may be voluntary or mandatory). Nigerian law does not provide a framework for hostile acquisitions/takeovers.

The structure for an acquisition will usually depend on the shareholding of the target company, and the disposition of the shareholders of the target. Where the shares are closely held, the acquisition could be easily and quickly achieved through a negotiated buy-out between the acquirer and the controlling shareholders. Where the shares are more widely held, the acquisition could be by means of a scheme or a takeover bid. Under the terms of a scheme, shareholders representing not less than 75% of those present and voting must approve a resolution for the acquisition of their shares by the acquirer at a specified price. If approved, all the shareholders are bound, whether they voted for or against the scheme. By contrast, under the takeover bid, each shareholder chooses whether or not to tender its shares to the acquirer. While institutional investors tend to take an active view of their investments and will consider and respond to a takeover bid, this is not perceived as being true of retail investors. Where an acquirer is able to acquire more than 30% of the issued share capital of a public company by a negotiated sale or a scheme, this will trigger an obligation to make a mandatory takeover bid to the remaining shareholders of the company.

Section 131 of the ISA sets out the circumstances in which the obligation to carry out a mandatory takeover bid would arise. It provides that where any person:

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(a) acquires shares, whether by a series of transactions over a period of time or not, which (when taken together with shares held or acquired by persons acting in concert with him), carry 30% or more of the voting rights of a company; or
(b) together with persons acting in concert with him, holds not less than 30% but not more than 50% of the voting rights of a company and such person or persons acting in concert with him acquires additional shares which increases his percentage of the voting rights,

then such person must make a take-over bid to the holders of any class of equity share capital in which such person or any person acting in concert with him holds shares. The prior approval of the SEC must be obtained before launching a takeover bid.

The SEC Rules now recognise certain exceptions to the takeover bid triggers in section 131 of the ISA. These exemptions are set out in Rule 445(1)(d) of the SEC Rules and are:

(a) where an ailing company undertakes a private placement which results in the strategic investor acquiring more than 30% of the voting rights of the company;
(b) an acquisition or holding of, or entitlement to, exercise or control the exercise of more than 30% voting shares of a company which is fully disclosed in, and granted in accordance with a proposal in a SEC-registered prospectus for the initial public offer of voting shares issued by the company, to a promoter in respect of the prospectus;
(c) an acquisition of shares or rights over shares which would not increase the percentage of the voting rights held by that person, e.g. if a shareholder takes up his entitlement under a fully underwritten rights issue; and
(d) convertible securities.

Overview of the M&A market in 2015/2016

Globally, M&A activity slowed down, amid economic and political uncertainty in many key economies in the world. M&A transactions reportedly fell by 17% in total deal value in 2016.[1] Nigeria, in particular, witnessed a slowdown in M&A activity as a result of the economic challenges arising from the decline in global prices of crude oil and its impact on the Nigerian economy (which is almost entirely dependent on crude oil). Despite this, in 2015, Nigeria was named the most attractive market to other African buyers for investments.[2]

In the latter part of 2016, the National Bureau of Statistics of Nigeria released official gross domestic product figures for the second quarter of 2016, which officially confirmed that the Nigerian economy was in recession.[3] The Nigerian M&A market has, however, remained resilient. There has been significant interest in the financial services and industrial sectors (which together attracted 50% of all private equity deals and 66% of all capital deployed in Nigeria in 2015) and consumer goods.[4] There has also been increasing interest in the health sector; between 2011 and the first quarter of 2016, 6% of sub-Saharan Africa health care deals were reportedly in Nigeria.

Also worth mentioning is Nigeria's rating on the "Transaction Attractiveness Indicator", which rates the attractiveness of a country's economy for M&A activity on a scale from 0 to 10. A country's score is based on past transactional activity in each country and a weighted average of 10 key economic, financial and regulatory factors that drive M&A activity. In a report issued by Baker and McKenzie,[5] Nigeria was ranked number 34 out of 37 countries with a score index of 1.5. While this rating seems low, it was reflected on a global scale, where M&A transactions reportedly fell from 0.1 in 2015, to 0.0 in 2016. In addition, the

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total number of deals fell from 41 in 2015, to 28 in 2016. In the same report, however, it was reported that it is expected that in 2017, Nigeria will be an attractive destination for foreign investment, which is expected to rise by 50% in 2019.[6]

Significant deals and industry sector focus

The uncertainty in the Nigerian economy resulted in approximately a 22% decline in the number of M&A deals and a 65% decline in the value of such deals in 2015.[7] Despite the relatively low M&A activity in Nigeria, 2016 still saw a number of transactions in various sectors of the Nigerian economy, some of which included Fast Moving Consumer Goods ("FMCG"), oil and gas, power, insurance, manufacturing and to a lesser extent, banking. While in most instances, the M&A deals were initiated by foreign direct investment, in other instances they occurred as a result of regulatory directives and local investment. Set out in Table A below are some of the big ticket deals that occurred across the M&A space in Nigerian in 2015/2016.

S/N	Transaction Description	Industry	Year
1.	Business combination/merger between the Coca-Cola Company, SABMiller and Gutsche Family Investments.	FMCG	2015/2016
2.	Kellogg acquisition of 50% in food distributor, Multipro Nigeria (a member of the Tolaram group).	FMCG	2015/2016
3.	Acquisition of BUA Flour Mills Limited and BUA Pasta Limited (owned by the BUA Group, one of Nigeria's largest food and infrastructure conglomerates) by Olam International Limited Olam International Limited.	FMCG	2015/2016
4.	The Coca-Cola Company's acquisition of Chi Limited, Nigeria's leading dairy and juice company.	FMCG	2016
5.	MTN's acquisition of Visafone, the only surviving Code Division Multiple Access (CDMA) network in Nigeria's telecommunications industry.	Telecoms	2016
6.	Guinness Nigeria acquisition of the distribution rights to McDowell's No. 1, a mainstream spirits brand of United Spirits Limited, an Indian mainstream spirits business which is also a subsidiary of Diageo Plc.	FMCG	2015/2016
7.	Helios and Netherlands-based Vitol Group teamed up in June to acquire a majority stake in Oando's Nigeria-based downstream energy business.	Oil and Gas	2015
8.	Swiss Re's acquisition of a 25% interest in Leadway Assurance.	Insurance	2016
9.	IFC and Swiss Re consortium's acquisition of the Hygeia Group, a healthcare group in Nigeria.	Healthcare	2016

Key developments

The SEC introduced new rules in April 2015 that prescribe significant penalties for breaches of its rules on mergers, acquisitions, external restructuring and other forms of business combination.

In November 2015,[8] the SEC announced the release of its Nigerian Capital Market Master Plan (the "Capital Markets Master Plan"), a 10 year plan aimed at stimulating growth in the Nigerian capital market.[9] It is expected that over the next nine years, the plan will assist Nigeria to improve in key areas such as investor protection and education, the attractiveness

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of the Nigerian capital market, product innovation, capital raising, and the legal and regulatory framework of the market. The SEC envisages that the implementation of the Capital Markets Master Plan will push Nigeria to becoming "…Africa's most modern, efficient and internationally competitive capital market".[10]

In a bid to achieve a stable foreign exchange regime and ease the foreign exchange scarcity, the Central Bank of Nigeria (the "CBN"), in June 2016, introduced a flexible foreign exchange market. What this means for foreign investors is that they are now able to inflow their foreign currency and convert it to Naira at a market-determined exchange rate as opposed to the previous CBN-determined rate.

The Competition and Consumer Protection Bill is pending before the Nigerian National Assembly. If passed, the Bill will establish a competition regulator to regulate competition in Nigeria. The objectives of the proposed Bill are to promote and maintain competitive markets in the Nigerian economy, promote economic efficiency, and protect and promote the interest and welfare of consumers by providing consumers with competitive prices and product choices. The Bill further seeks to prohibit restrictive business practices which prevent, restrict, or distort competition or constitute an abuse of a dominant position of market power in Nigeria; and contribute to the sustainable development of the Nigerian economy. The Bill is applicable to all undertakings and all commercial activities within, or having effect within, Nigeria.

The year ahead

Notwithstanding the economic challenges facing Nigeria, Nigeria's resilient middle-class, and sectoral developments such as the privatisation of the power sector, development, and increased funding of the manufacturing and agriculture sector, and the proposed sale of the Federal Government's unused assets, present opportunities for increased M&A activity in Nigeria in 2017.

While the recent economic challenges facing Nigeria have caused a slowdown in M&A transactions, there has been a continued interest from within the local market and foreign investors. Indeed, the last few months of 2016 saw an increased level of foreign interest which we expect to materialise into investments in 2017. We anticipate increased activity in the healthcare sector, FMCG, financial services and telecoms sectors. With the ongoing implementation of the SEC's Capital Market Master Plan, we are optimistic that there will be growth in the Nigerian capital market and increased foreign direct investment, leading to increased activity in the M&A space.

* * *

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Norway

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Overview

Most of 2015 turned out to be a rather dull year for M&A in Norway. Continuing declining oil and gas prices started to build a climate of pessimism due to negative macroeconomic outlooks for the largest industry in Norway, and in particular, during Q1 2015 there were very few large M&A deals around in the market. Still, the stock exchange continued to trade at an all-time high, and Norwegian consumer spending seemed to remain unchanged. During the first four months of 2015, the Oslo Stock Exchange's Main Index OSEBX was actually up 18.8%, reaching all-time high of 661.31 on 15 April 2015. As a result, many hoped for continuing growth in the stock market. However, from April 2015 and throughout most of that year, the oil prices continued to slide and the Oil & Gas sector witnessed further slowdown. As a result, the Main Index OSEBX fell back, even though it eventually ended 2.5% up compared with 2014. Still, in terms of the number of M&A transactions (both public and private), the 2015 market ended down 18% compared with 2014.

Entering 2016, continuing declining oil and gas prices contributed to enhance the negative macroeconomic outlooks for the largest industry in Norway, and in particular, during Q1 2016 there were very few large M&A deals around in the Norwegian market. This resulted in continuing pessimism making its impact on the stock exchange, which dropped 16.4% from 1 January until 11 February 2016. For Q1 2016, there were 11% fewer transactions announced compared with Q1 2016, and per end of April 2016, this figure had dropped to 18% fewer transactions. Nevertheless, during Q2 2016, the market witnessed an upturn in major economies, reduced volatility and increasing commodity prices. This again resulted in improved investor confidence and foreign investors starting to return to the Norwegian market. As a result, there were a total of 123 M&A transactions announced during first half of 2016. This was actually a 14% increase from the same period in 2015. What is also interesting is that total reported deal value increased from €3,664m for 1H 2015 to €4,709m for 1H 2016, while the average deal sizes fell from €130m for H1 2015 to €107m for H1 2016.

Looking at data from Mergermarket on a rolling 12-month basis for the period that ended 30 June 2016, the number of deals was actually moving sideways with the same period last year (30 June 2015). For Q2 2016, the average deal size was an estimated €165.7m, up from €125.2m compared to Q1 2016. Norwegian companies were targeted in M&A worth a total of €3.0bn for Q3 2016, which was a drop from €3.6bn in Q2 2016. The average reported deal size fell to €120.6m in Q3 2016. Per end of Q3 2016, Norway was behind all other Nordic countries in reported deal values, with the exception of Denmark, and Norway was also behind in total deal volumes except for Finland. In addition, the average deal size for Norwegian M&A transactions is currently lagging behind the other Nordic countries.

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During 2016, a turbulent stock market has made the Norwegian IPO-market muted, with only four new listings so far on Oslo Stock Exchange and Oslo Axess. The number of M&A deals, however, seems to indicate a relatively stable growth so far in 2016. As per year-to-day (end October 2016), it looks as if the M&A market, in a number of deals, will grow by around 10% compared with the same year-to-day date for 2015.

For Q3 2016, cross-border deals' share of the total deal volume year-to-date amounted to approximately 56%, which is higher than the historical benchmark around ±50%.

Significant deals and highlights

During 2015, Norway accounted for two out of the Top 10 Inbound Nordic M&A transactions announced (a substantial decrease from five out of the Top 10 in 2014), with an aggregate disclosed deal value of €2.883bn out of an aggregate €31.018bn deal value for all Top 10 Inbound Nordic M&A deals. As for CY2012, 2013, 2014 and most of 2015, the public-to-private transactions market comprised corporate trade buyers.

In 2015, a total of 12 takeover offers or attempted offers for public listed companies were announced or issued, compared with 15 takeovers and attempted public takeovers in 2014. Apart from Apax' €859m mandatory offer for Evry (a follow-up from 2014), the most notable public takeover deal announced was Knightsbridge Shipping's merger with the Oslo Stock Exchange listed Golden Ocean Group, with a deal value of €703m. Another standout public takeover announced in 2015, not structured as a traditional voluntary offer, was the acquisition of Northern Offshore, Ltd, a Bermuda-based company listed on the Oslo Stock Exchange, by Shandong Offshore Company Limited, a Bermuda-based company owned by Hong Kong-based Shandong Offshore International Company Limited. The acquisition was structured by way of an amalgamation under Bermuda law and thereby only required the acceptance of 1/2 of the shareholders in Northern Offshore to succeed (by way of the general meeting of the company approving the amalgamation in a vote requiring simple majority). The transaction valued Northern Offshore at €140m (NOK1.25bn), representing a 150.1% premium over Northern Offshore's closing share price as of the day prior to the announcement, and a 83.6% premium over the closing share price one month prior to the announcement date.

The Industrial & Manufacturing sector continued to show strong momentum for M&A deals throughout 2015. For many this came as a surprise, since transaction activity within this sector often is affected, at least indirectly, by activity within the Oil & Gas sector, but in 2015, the Norwegian economy was in fact impacted by two counteracting factors. One such factor was, of course, the collapse in oil prices affecting the Norwegian financial market, while the other factor was the Norwegian kroner exchange rate development helping Norway's competitive position. The strength of the M&A activity within the Industrial & Manufacturing sector was a result of the latter. Even if this sector took a large stake out of the total Norwegian M&A volume in 2015, most of these transactions were small-sized and not very noteworthy. One transaction worth mentioning from 2015, was GE Oil & Gas' acquisition of Advantec As, a Stord-based industrial machinery and equipment merchant wholesaler, from Norvestor V SBS LP, ultimately owned by Norvestor Equity AS. The transaction included Advantec's Installation Workover Control System capabilities and IWOCS Rental Fleet. Entering 2016, the Industrial & Manufacturing sector continued to lead the way for Norwegian M&A activity and per end of October 2016, this sector continues to be the most active in Norway. One transaction within this sector from 2016 worth highlighting is Agility Fuel Systems, Inc.'s acquisition of Hexagon Composites ASA's CNG

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Automotive Products Division for €122m, at 10.3x EBITDA, which was announced in June 2016. However, the most noteworthy transaction within this segment was Goldman Sachs Merchant Banking Division's acquisition of Navico Holding AS; Digital Marine Solutions Holding AS that was announced in July 2016.

Technology, Media & Telecommunication (TMT) also had a strong year in terms of deal volume for 2015. For 2015, the most noteworthy transaction within this industry was Tele2 Sverige AB's sale of Network Norway AS, a Norway-based provider of broadband, to ICE Communication Norge AS. Also worth mentioning was Norvestor Equity's €143m acquisition of Phonero AS, a Kristiansand-based wireless telecommunication carrier. The high activity within the TMT sector has continued into 2016, and so far into this year, we have seen some fairly large transactions within this sector. The most noteworthy of these was Opera Sofware ASA SPV of China's €1.121bn tender offer for Opera Software ASA, an Oslo-based listed developer of web browser software. This offer was, however, later withdrawn as a result of the bidder not being able to obtain regulatory approvals required for the consummation of the offer within the agreed drop-dead date on 15 July 2016. Instead, the bidder and Opera entered into an alternative private transaction, in which the consortium of bidders agreed to acquire certain parts of Opera's consumer business. Another TMT-deal worth mentioning from 2016 is IK VII Fund's acquisition of all issued shares in TeleComputing AS, a Billingstad-based provider of computer facilities management services, from Fc-Invest AS, controlled by Ferd AS, in a leveraged buyout.

Throughout 2015 and 2016, the Norwegian energy sector also witnessed some notable transactions. Traditionally, the Norwegian M&A market has seen an oversupply of oil, gas and supply industry deals. However, as oil prices continued to decline during 2015 and for parts of 2016, the activity within this sector, in particular during the first half of 2015, was rather muted. During the summer of 2015, the market started to witness an increase in deal activity on the exploration and production side. The drop in oil prices seemed to have led to a stampede by private equity sponsors looking for deals in the energy sector, and many sponsors took an interest in shopping for E&P assets at favourable price levels. This resulted in an increased interest for such assets in general, and the most noteworthy transaction within this segment so far, was announced in June 2016 when a €1.014bn merger between Det norske oljeselskap ASA and BP Norge AS, a Forus-based oil and gas exploration and production company, and a unit of BP PLC was announced. On completion, Det norske was going to be renamed Aker BP ASA. Concurrently, Aker ASA raised its stake to 40% from 29.992%, by acquiring a 10.008% stake, or 33.8 million ordinary shares, in Det norske. The purposes of the transaction were for Det norske oljeselskap ASA to strengthen its operations and to create synergies, and for Aker ASA to strengthen balance sheet, increase cash flow and for debt repayment.

Having said that, at the beginning of 2016, M&A-activity in the Oil & Gas sector was muted after a further collapse in oil prices during January and February 2016. This again resulted in further cool-down within related sectors, in particular for the Offshore and Services sectors. As a result, we have now started to see increased distressed deal activity, particularly within the Offshore Supply Vessel sector. The two most noteworthy transactions within this sector were Aegopodium AS' acquisition of the operations of Atlantic Offshore AS, an Agotnes-based provider of deep sea freight transportation services, and Solstad Offshore ASA's hostile takeover of Rem Offshore ASA through a merger.

With its 23 announced deals, the Norwegian private equity-related M&A volume for 1H 2016 experienced a clear drop in deal activity compared with the same period in 2015, when

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there were 30 announced deals. This was, strictly speaking, not surprising since declining oil and gas prices were expected to have a somewhat negative effect on the market for private equity deals. For 2015 in total, around 57% of the private equity transaction volume were new investments and add-ons; 8% were secondary; and around 35% were exits. For the first half of 2016, 48% of the total private equity transaction volume were new investments and add-ons; 13% were secondary; and 39% were exits. For the first half of 2016, only three deals had a disclosed deal value exceeding €100m, while six deals with a deal value of more than €100m were announced during 2015. Bain's and Altor's €1.35bn sale of EWOS was the most notable private equity exit in 2015. Also worth mentioning are: Permira IV, LP's €695m sale of Pharmaq AS to Zoetis Inc.; and Nordic Capital's €177m investment into yA Holding AS via Resurs Bank AB.

The most notable private equity transactions in the first half of 2016 were IK VII Fund's acquisition of TeleComputing, and Altor's sale of Curato.

In August 2016, it was also announced that Goldman Sachs' Merchant Banking Division and Altor had acquired Navico Holding AS from Altor Fund 2003. Other notable private equity transactions announced in 2016 include HG Capital's acquisition of Visma BPO for a deal value of €504m, and Ratos' acquisition of Plantasjen AS for a deal value of €318m.

During 2016, there have also been a few cross-border transactions announced involving Norwegian entities acquiring foreign targets. One of the most significant examples was Yara Fertilisers' €359m acquisition of Tata Chemicals Ltd, an Indian company. The purpose of the acquisition was for Yara to increase its footprint in the market, which will enable increased sales of premium products.

Another example of M&A transactions involving a Norwegian entity attempting to acquire a foreign target is Kongsberg Defence & Aerospace AS' acquisition of a 49.9% stake in the state-owned Patria Oyj, a Helsinki-based manufacturer of aircraft parts and auxiliary equipment, for €284m in cash, in a privately negotiated transaction. This transaction was announced in March 2017, and the purposes of the transaction were for Kongsberg Gruppen ASA to strengthen its operations, expand presence in new markets and strengthen its profitability and growth opportunities.

Key developments

Generally speaking, there have only been a few changes in Norwegian corporate and takeover law that may be of significant importance to the M&A activity. However, several changes that have been conducted over the last few years have had a general relevance to investors, in particular in Norwegian-listed companies. Still, there are some recent legal developments, proposed or expected changes, and trends that may have a bearing on how M&A transactions will be structured in the future under Norwegian law.

Merger control

During 2016, the Parliament has adopted several additional amendments to the Norwegian Merger Control procedure. These amendments result from an evaluation of the new rules implemented in 2014, under which the thresholds for competition filing under Norwegian law were amended, and several other changes were made to the Norwegian competition legislation. Under the existing rules (implemented from 1 January 2014) an acquisition, merger or other concentration involving businesses will have to be notified in Norway if the combined group turnover of the acquirer and the target in Norway is NOK 1bn or more, and at least two of the undertakings concerned each have an annual turnover in Norway exceeding NOK 100m. The Norwegian Competition Authority (NCA) is however also empowered to

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issue decrees ordering that business combinations falling below these thresholds still have to be notified, provided it has reasonable cause to believe that competition is affected, or if other special reasons call for investigation. Such decree must be issued by the NCA no later than three months from the date of the transaction agreement, or from the date control is acquired, whichever comes first.

When these revised thresholds were introduced, the Ministry further adopted a simplified short form notification somewhat similar to the EU system for handling certain transactions that do not involve significant completion concerns within the Norwegian market. However, in March 2016, the Parliament resolved to adopt a proposal for further expanding the scope of this simplified merger control procedure. As a result, from 1 July 2016, the market share thresholds for having to describe a market in detail are harmonised with those set out in Form CO of the Implementation Regulation under the EUMR. The simplified procedure will now be made available if the combined market share with horizontal overlap is less than 20% (previously 15%), or where none of the parties in a vertical relationship at either level has an individual or combined market share of 30% or more (previously 25%).

As of 1 July 2016, the Parliament has now also abolished the former Norwegian substantive test, which has been based on a substantial lessening of competition test (SLC), and instead resolved to align the Norwegian substantive test with the same SIEC-test (substantial impediment to efficient competition) as applicable under the EU rules. This means that Norway now has to apply the same 'consumer welfare standard' as applied by the Commission, instead of the 'total welfare standard' as previously applied under the Norwegian merger control regime.

Further, note that from 1 July 2016, the statutory timetable for clearance under the Norwegian merger control regime was also slightly amended. As a result, the total case handling time will now amount to 145 working days compared to 115 working days under the former regime. Also note that the NCA applies a strict approach to the marking of business secrets in the notification documents and the parties' substantiation of claims for such confidentiality. It is quite common that the NCA will argue that a notification is not complete due to the parties not having adequately substantiated a request for confidentiality. As a result, the process may be delayed. In situations where the NCA considers intervention and where acceptable remedies are not presented at an early stage, the notification process could very well take up to six months.

In March 2016, the Parliament also resolved to implement an independent appeal board to replace the Ministry to handle appeals in merger cases. At the same time, the King's Council's power to intervene in merger control cases was resolved to be abolished. The Ministry has proposed that the introduction of the independent appeal board shall first take effect on 1 January 2017.

Acquisition of Norwegian media companies

As from 1 July 2016, the Norwegian Media Authority's control over media ownership was abolished. This means that for the future, the review of changes in media ownership will exclusively become the responsibility of the Norwegian Competition Authority.

EU initiatives

In recent years, the EU has issued several new directives, regulations and/or clarification statements regarding the capital markets. Such EU initiatives will most likely come to have an impact, either directly or indirectly, on the regulatory framework for public takeovers in Norway. However, due to constitutional challenges with regard to transferring national

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authorities to a supranational financial supervisory system in the EU, several of these revised EU rules are not yet implemented. However, in June 2016, the Norwegian Parliament resolved to amend the Norwegian Constitution allowing the Parliament to consent to the inclusion of Norway in the European financial supervisory system. Consequently, most of the above EU initiatives will most likely come into effect also in Norway in the near future, following which the regulatory framework in Norway that relates to the capital markets will be realigned with what applies within the EU.

In this regard, it is worth mentioning that in 2015, the Government appointed an expert committee to evaluate and propose relevant amendments to the existing Norwegian legislation resulting from the EU amending the MIFID I, the Market Abuse and the Transparency Directive. The committee was requested to prepare three reports to the Parliament, of which the first was going to be delivered in December 2015, the second in June 2016, and the last report was going to be delivered by June 2017.

In February 2016, the committee issued its first report, in which it *inter alia* proposed to abolish the requirements for quarterly financial reporting from publicly listed companies. This proposal was the result of an amendment to the Transparency Directive (2004/109/EC) by Directive 2013/50/EU, under which the respective EU states are prohibited from requiring more frequent financial reporting from listed companies than semi-annually.

The committee has also proposed to amend the Norwegian Securities Trading Act (STA) so that the same materiality thresholds and disclosure requirements that apply for the acquisition of shares in listed companies also apply for derivatives with shares as underlying instrument, irrespective of such equity derivatives being cash-settled or settled by physical delivery of the underlying securities. The committee further proposed that both borrowing and lending of shares should become subject to the same notification regime for both the lender and the borrower. Soft-irrevocable undertakings will, however, still not be subject to such disclosure obligations. Note that the existing disclosure obligations under the STA also contain an obligation to disclose information in relation to "rights to shares", regardless of whether such shares have already been issued or not. This is a stricter disclosure and filing obligation than follows from the minimum requirements set out in the Transparency Directive. Consequently, the committee also proposed abolishing this rule. If the latter proposal is adopted by the Parliament, this means that there will no longer be any mandatory disclosure obligations under Norwegian law for warrants and convertible bonds that are not linked to any issued (existing) shares.

Further, note that the committee is currently still working on its second report to the Parliament. This was originally going to be delivered in June 2016, but has, from what we understand, now been postponed to January 2017.

Also, note that the EU Commission has issued a proposal for a new Prospectus Regulation intended to replace the existing Prospectus Directive (2003/71/EC). Both the Prospectus Directive and the existing Prospectus Regulation 809/2004 are implemented under Norwegian law, and these rules are set out in the STA and the securities trading regulation (STR). If adopted within the EU in its current form, the requirement of a prospectus or equivalent document will no longer apply to securities offered in connection with a takeover by means of an exchange offer, merger or a division, provided a document is made available that contains information describing the transaction and its impact on the issuer. Any amendments of the Norwegian legislation resulting from the proposed new Prospectus Regulation can only enter into effect in Norway after implementation under the EEA agreement, most likely at the earliest by mid-2017.

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Debt push-down

The Ministry of Trade, Industry and Fishery has issued a consultation paper in February 2016, proposing certain further easing of the Norwegian financial assistance prohibition rule (see below). As a general rule, Norwegian public and private limited liability companies have been prohibited from providing upstream financial assistance in connection with the acquisition of shares in a target company (or its parent company). This prohibition prevented Norwegian target companies from participating as co-borrowers or guarantors of any acquisition-financing facilities. However, in practice there have always been a number of ways to achieve at least a partial debt pushdown through refinancing the target company's existing debt, which should not be regarded as a breach of the prohibition against financial assistance.

Effective from 1 July 2013, the Norwegian Parliament amended the Norwegian Limited Liability Companies legislation, thereby easing Norwegian companies' ability to provide financial assistance through the introduction of a type of "whitewash" procedure.

Under this exemption rule, both private and public target companies can, subject to certain conditions, provide financial assistance to a potential buyer of shares in the target. The financial assistance must be granted on normal commercial terms and policies, and the buyer must also deposit adequate security for his obligation to repay any financial assistance received from a target. Further, the financial assistance must be approved by the target's shareholders' meeting by a special resolution. The resolution requires the same majority from the target's shareholders that is needed to amend the articles, which is (unless otherwise required by the articles) at least two-thirds of the votes cast and the share capital represented at the shareholders' meeting. In addition, the target's board must prepare a special report which must contain information on: (i) the proposal for financial assistance; (ii) whether or not the financial assistance will be to the target's corporate benefit; (iii) conditions that relate to the completion of the transaction; (iv) the assistance's impact on the target's liquidity and solvency; and (v) the price payable by the buyer for the shares in the target, or any rights to the shares. The report must be attached to the notice of the shareholders' meeting. The target's board will also have to obtain a credit rating report on the party receiving the financial assistance.

The rule's requirement for depositing "adequate security" for the borrower's obligation to repay any upstream financial assistance provided by a target in connection with M&A transactions will, however, mean that it becomes quite impractical to obtain direct financial assistance from the target company in most LBO-transactions, due to the senior financing banks' collateral requirements in connection with such deals. The reason for this is that the banks normally request extensive collateral packages, so that in practice, there will be no "adequate security" left, or available, from the buying company (or its parent company) for securing any financial assistance from the target group, at least for the purchase of the shares. While in theory a number of possibilities may still apply for securing such claims, the extent to which the offered security is "adequate" may mean that the target, in practice, has difficulty providing such upstream assistance, except if the new ultimate owners, or the vendors, are able to come up with some additional collateral. Consequently, the amended rules have so far had very little impact on how LBO financing is structured under Norwegian law after the new regime came into force, at least in private equity LBO transactions. This means that in most cases, the parties will continue to pursue debt pushdowns by refinancing the target company's existing debt, the same way as previously adopted. However, in the consultation paper from February 2016, the Ministry now proposes to abolish the requirement

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that a buyer (borrower) must deposit "adequate security" towards the target company if such buyer receives any form of financial assistance from the target in the form of security for the buyer's acquisition financing. Provided that the Ministry's proposal is finally adopted in its current form, it looks as if Norway in the near future also will have implemented a type of "whitewash procedure" that could work also for LBO-transactions.

Finally, also note that, from 1 July 2014, private equity sponsors must continue to ensure they observe the new anti-asset stripping regime (see below) when attempting to achieve debt push-downs under Norwegian law. These rules may limit the sponsor's ability to conduct a debt push-down, depending on the status of the target (listed or non-listed), the number of the target's employees, and the size of such target's revenues or balance sheet.

Proposed tax reform

In October 2016, the government released the 2017 Fiscal Budget proposal that to some extent follows up on the tax reform proposal issued by the Norwegian government in October 2016. In the 2017 Fiscal Budget, *inter alia*, the government has now proposed to reduce the corporate tax rate from 25% to 24%, to take effect from 1 January 2017. The sitting government also proposes a further reduction in the tax rate to 23% over the period from 2017 to 2018.

From 1 January 2016, a new rule was also adopted into the Norwegian tax code, which attempts to neutralise the effects of hybrid mismatch arrangements by denying corporate taxpayers the right to apply the Norwegian participation exemption method to distributions received from an entity, which has been, or will be, granted tax deductions on such distributions. Also note that from 1 January 2016, broken-deal expenses incurred in connection with takeover attempts (failed acquisitions) of shares in another company, for example expenses relating to financial, tax and legal due diligences, are no longer deductible for tax purposes under Norwegian law.

With effect from 7 October 2015, loans granted from a Norwegian company to any of its direct or indirect shareholders being private individuals (or such shareholders' related parties) are now taxed as dividends on the part of such individual shareholder. The justification for this rule is to counterattack tax planning and simplify the regulatory framework. This rule also applies on loans granted from third party lenders to such individual shareholders, provided the company in which such borrower owns shares, and/or another company within the same group of companies, provides security for such third-party loans.

Also note that from 1 January 2017, the government proposes to increase the tax on dividends received from, or capital gains derived from realisation of, shares held by Norwegian private individuals (in excess of the allowance for shareholder equity), but so that the government's proposal aims to maintain the overall marginal tax rate on dividends and capital gains. This shall be carried out by first taking the amount derived from such dividend distributions, capital gains etc.: multiplying the relevant amount by 1.24 (an increase from 1.15 for 2016); and that such grossed-up amount thereafter is to be taxed as ordinary income for such private individuals at a tax rate of 24% (reduced from 25% for 2016). In effect, this will increase the effective tax rate on such distributions and/or gains from today's 28.75% to 29.76%. The proposal was justified by a simultaneous proposal to reduce the Norwegian tax rate on ordinary income for both companies and individuals from 25% to 24%. By resolving to distribute extraordinary dividends for 2016, it will, nevertheless be possible for individual shareholders to achieve a 1.01% tax saving compared to distributing the same amount of dividend in 2017. Note, however, that it will be necessary to consider implementing measures (if possible) to avoid potential negative double-wealth tax effects.

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Instead of the original plan to implement VAT on financial services rendered against compensation, together with a special tax on financial institutions' income on margins, as we referred to in last year's edition of this publication, the government has now proposed to introduce a completely new tax for the financial services industry. The new proposal will mean that the corporate income tax for taxpayers within the financial services industry will remain at 25% instead of being lowered to 24%, as proposed for other businesses. At the same time, the government wants to introduce a 5% special payroll tax, which for most financial institutions will in effect mean that instead of 14.1% payroll taxes, the same institutions will have to pay 19.1% payroll tax. The new tax regime will apply to parties operating within the financial services industry that provide VAT-exempted services under Section 3-6 in the Norwegian VAT Act.

Further note that by its original proposal for a tax reform addressing certain tax evasion techniques, issued in October 2015, the government stated that it intended to implement further restrictions on the interest deduction limitation regime (see below) and to adopt a rule allowing it to introduce withholding tax on interest and royalty payments. In the proposal for the 2017 Fiscal Budget, the government did not for now, follow up on these previous proposals. This means that no additional restrictions under the interest deduction regime were proposed, and no withholding tax on interest payments and royalty were proposed. However, the government may resolve to reintroduce such proposals at a later stage.

It is further expected that the government will follow up and introduce further amendments based on recommendations made by OECD's project relating to 'Base Erosion and Profit Shifting', in particular with regard to the arm's-length principle, anti-hybrid rules, the definition of permanent establishment, etc. In this regard, also note that in March 2016 a professor, commissioned by the Ministry of Finance to propose a general anti-tax avoidance rule, issued his proposed text for such a rule. This proposal is currently under the consideration of the Ministry. The Ministry has also stated that it intends to submit a new consultation paper for amending the Norwegian controlled-foreign-companies (CFC) rules. Such consultation paper will, however, most likely not be issued until the beginning of 2017.

The interest limitation regime

From 1 January 2014, a bill is in place that broadly restricts interest deductions arising on related-party debt. The term 'related-party' covers both direct and indirect ownership or control, and the minimum ownership or control requirement is 50% (at any time during the fiscal year) of the debtor or creditor. Note that additional restrictions to this rule were implemented with effect from 1 January 2016.

The interest limitation regime will only apply if the net interest cost (both external and internal interest) exceeds NOK 5m during a fiscal year. The NOK 5m represents a threshold and is not a basic tax-free allowance, which means that if, or when, the threshold is exceeded, the limitation rule also applies to interest costs below the threshold.

According to the limitation rules, net interest expenses paid to a related party can be deducted only to the extent that the internal and external interest costs combined do not exceed 25% (reduced from 30% from 1 January 2016) of the taxable profit after adding back net internal and external interest expenses and tax depreciation. In reality, this is a type of taxable approach to the borrower's EBITDA. Note that when the net interest is paid, certain premiums and discounts connected to a loan will be considered as interest under the new limitation rule. The same goes for gains and losses on receivables issued at a higher or lower price than the strike price. Still, such gains and losses are not regarded

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as interest income or expenses for the person who acquires the debt in the secondary market. Also note that neither currency gains nor losses, nor gains or losses on currency and interest derivatives, will be considered as interest under the limitation regime.

Under certain circumstances, this rule will also apply to, and restrict, interest deductions on third-party debt from external lenders (typically from banks). According to the rules, if a related-party to the borrowing company has provided security for loans raised from an external lender, the interests paid to that external lender will (subject to certain exceptions) be considered as internal interest that becomes subject to limitation for deduction for tax purposes. The reason given for this is that the provision of security from a related-party may increase the borrower's borrowing capacity, and thus a higher interest deduction would be achievable than would be the case for an independent company. However, according to a regulation adopted by the Ministry of Finance on 24 April 2014, interests paid under a loan secured by a related-party will not become subject to the interest limitation rule if the security is a guarantee from the related-party of the borrowing company, and such related-party is a subsidiary owned or controlled by the borrowing company. The same exemption rule applies on loans from a third party secured by a related party of the borrowing company if such related-party security is either: (i) a pledge over that related party's shares in the borrowing company; or (ii) a pledge or charge over the related party's outstanding claims towards the borrowing company. With regard to security in the form of claims towards the borrower, it is not required that such claim is owned by a parent company. Negative pledges provided by a related party in favour of a third-party lender are not to be deemed as security within the scope of the interest limitation rule.

Any related party interest payments that are not deductible due to the limitation rules may be carried forward for a maximum time period of 10 years. Interest received will be classified as taxable income for the creditor company even if the debtor company is denied deductions due to the limitation rule. Note that group contributions and losses carried forward cannot be used to reduce income resulting from the interest limitation rule. The interest limitation rule applies on an annual basis: if the criteria for considering interest paid as internal interest is fulfilled only for parts of a year, then only the interest relating to such period will be considered as internal interest subject to the limitation rule.

Consequently, it is important to monitor the level of equity, external debt and internal debt, as well as expected taxable income and tax depreciation, to ensure that interest is deductible for tax purposes. Private equity funds, in particular, must revisit and review their financing structures in connection with acquisitions by their existing portfolio investments to understand the effects of the rules and to see if any potential negative effects could be mitigated. In addition, the Ministry of Finance has previously stated that it intends to continue its work to implement further restrictions under the limitation rule, also to consider if all external debt shall be included in the interest-limitation rule, i.e. disallowing tax deductibility on interest payments on external bank financing too. To what extent the government will propose such further restrictions will depend, among others, on the possibility of finding alternative ways to ensure that interest payments on external bank financing do not form part of any tax evasion or avoidance schemes and should in principle continue to be tax-deductible under Norwegian law. The government has also stated that it intends to take into account the final output of the OECD/G20 Base Erosion and Project Shifting Project involving interest deductions and other financial payments.

Note that on 25 October 2016, the EFTA Surveillance Authority issued a reasoned opinion in which it stated that the Norwegian interest limitation rules in their current form, violate

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the freedom of establishment and thereby violate Article 31 in the EEA Agreement. The reason being that the rules in their current form are deterring Norwegian companies from establishing a cross-border group relief scheme under which a company may make a "group contribution" with affiliated group members in other EEA States (or conversely, deterring companies from such States from establishing similar groups with affiliated group members in Norway). The interest limitation rules, in their current form, are in practice very unlikely to apply to wholly Norwegian groups of companies, and will never apply to groups that are entitled to grant each other group contributions. This gives rise, in economic terms, to a higher tax charge for groups of companies with a cross-border structure than for wholly Norwegian groups of companies. Therefore, cross-border intra-group interest contributions will *de facto* be subject to the interest cap rules to a greater extent (since the exception provided under group contribution rules is not available to them). The EFTA Surveillance Authority has now requested Norway to take the measures necessary to comply with the opinion within two months of its receipt.

Taxation of 'carried interests'

Under current tax law, there is no explicit Norwegian rule for taxation where the managers of investment funds receive a "profit interest" or "carried interest" in exchange for their services and receive their share of the income of the fund. The prevailing view up until recently has been that as long as such managers invest capital into the funds, the carried interest will be considered as capital gain and taxed at capital gains rates. However, during the last year the Norwegian tax authorities have initiated a number of administrative actions challenging the prevailing view by seeking to treat such capital gains as income, subject to ordinary income taxation at a higher tax rate.

In a dispute between the Norwegian tax authorities, Herkules Capital (a Norwegian private equity fund's advisory company) and three key executives employed by the advisory company, Oslo District Court issued a ruling in December 2013, rejecting the tax authorities' primary claim, namely that such "carried interest" should be considered as income from labour subject to income taxation. The court also rejected the tax authorities' argument that distributions from a private equity fund to its partners should be subject to additional payroll tax (14.1%). However, the court concurred with the tax authorities' alternative claim, namely that such profit is subject to Norwegian taxation as ordinary income from businesses at the then prevailing tax rate of 28% (now 27%, to be further reduced to 25% from 1 January 2016). The taxpayers, being the adviser and three key executives, had not argued that carried interest should be taxed as a capital gain allocated to the general partner, as the general partner (in this particular case) did not have any ownership interest in the fund.

This decision was appealed, and in January 2015, the Norwegian Court of Appeals overturned the District Court and upheld the Tax Authorities' original tax assessment, i.e. that the carried interest should be considered as salary income for the relevant leading employees. The Court of Appeal further concluded that distribution to the partners of such profits in this particular dispute was also subject to payroll tax (14.1%) under Norwegian law. Finally, the court ordered that the partners had to pay 30% penalty tax on top.

However, in a final ruling from November 2015, the Norwegian Supreme Court overturned the Court of Appeals and invalidated the Tax Authorities' tax assessment. The Supreme Court concluded that the carried interest should be considered as ordinary income from businesses at the then prevailing tax rate of 28%, but that such income could not be considered as salary income for the relevant leading employees.

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Leveraged holding companies

It should also be noted that in some previous cases, the Norwegian tax authorities have even tried to deny Norwegian incorporated companies' residency for tax purposes, particularly in cases of leveraged holding companies with tax losses. The risk of not being considered as tax-resident in Norway is particularly relevant for highly leveraged holding companies with limited activity beyond owning the shares of an operative company. Such holding companies have typically been used as an acquisition vehicle in M&A transactions (by being incorporated for the purposes of the acquisition). The income of such companies will normally just consist of group contributions or dividends from the target company which could be offset against its interest costs. To avoid such a view by the tax authorities, it is essential to fulfil all formal requirements set out in the Norwegian Companies Act, in particular with regard to board composition, board meetings and locations of such meetings. The board should meet physically in Norway to approve the financial accounts, and also to decide upon important issues for the company.

Effective from 6 October 2011, a parent company's right to deduct losses on receivables on related entities, where the creditor has an ownership of more than 90%, has been restricted. The limitation shall, however, not apply to losses on customer debt, losses on debts which represent previously taxed income by the creditor, or losses on receivables arising from mergers and demergers. This rule was introduced as a reaction to a trend in recent years of using highly leveraged holding companies as acquisition vehicles in M&A transactions. This technique was enabling investors to deduct losses on intra-group loans for tax purposes if the investment went bad, while, on the other hand, if the investment was successful, the investors' investment in shares, and dividend from such investments, would be largely tax-exempt.

Act on Alternative Investment Fund Managers

On 1 July 2014, the Norwegian Act on Alternative Investment Fund Managers (AIFM) entered into force. This Act implemented Directive 2011/61/EU (the AIFM Directive) into Norwegian law. The Directive seeks to harmonise the regulations of the various forms of investment management of alternative investment funds (AIF), which is any investment undertaking that seeks to raise capital from a number of investors with a view to investing it in accordance with a defined investment policy.

The Act applies to venture funds, hedge funds and private equity funds irrespective of their legal form and permitted investment universe. However, subject to certain defined criteria with regard to the size of the funds under administration, certain AIFMs are exempted from parts of this regulatory regime. Although most of the AIFM Act is not directed at M&A specifically, there are certain parts that are likely to have a sizeable impact on M&A transactions indirectly.

First, the Act imposes a set of disclosure obligations on the fund's manager. This disclosure obligation is triggered when an AIF acquires control (more than 50% of the votes) of a target company, that either: (i) has its shares admitted to trading on a stock exchange or another regulated market (irrespective of that listed target company's number of employees, revenues or balance sheet); or (ii) is a non-listed private or non-listed public company, but employs 250 or more, and either has annual revenues exceeding €50m or a balance sheet exceeding €43m. Under these circumstances, the AIF's fund manager is obliged to notify the Financial Supervisory Authority of Norway (FSA) about the transaction as soon as possible, and no later than within ten business days after the AIF has acquired control. In addition, the AIF is obliged to specify in such notice the number of votes acquired, the timing and conditions (if any) for obtaining control, including specification of the involved shareholders

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and persons entitled to exercise any voting rights on their behalf. For such non-listed target companies as set out above, the AIF's fund manager is also obliged to inform the target and its shareholders about any strategic plans for the target and any potential consequences for the target's employees. The AIF's manager is further obliged to request that the target's board informs the target's employees about the same. These disclosure requirements will not apply to target companies whose sole purpose is to own, acquire or administer real properties.

Secondly, if an AIF acquires shares in such non-listed companies set out above, and the AIF's portion of shares reaches, exceeds or falls below 10%, 20%, 30%, 50% or 75% of the votes, then the AIF's investment manager will have to inform the FSA about the transaction. Such information must be disclosed no later than within ten business days after the date when the disclosure obligation was triggered.

Thirdly, the Act imposes limitations on financial sponsors' ability to take part in post-closing asset stripping of listed target companies. In line with this, the Norwegian Ministry of Finance has implemented a regulation under the AIF Act that, under certain circumstances, limits the financial sponsors' ability to facilitate, support or instruct any distribution, capital reduction, share redemption or acquisitions of own shares by a listed target, for a period of 24 months following an acquisition of control of such target. This limitation rule is triggered if any such distributions (and so on), mean that the target's net assets (as set out in the target's annual accounts on the closing date of the last financial year) are, or following such a distribution would become, lower than the amount of the subscribed capital plus those reserves which may not be distributed under the law or the statutes. The limitation rule is also triggered if any such distributions (and so on) exceed the profit for the previous fiscal year plus any subsequent earnings and amounts allocated to the fund for this purpose, less any losses and other amounts that, in accordance with applicable law or statute, must be allocated to restricted funds.

The above limitations on distribution do not apply to a reduction in the subscribed capital, the purpose of which is to offset losses incurred or to include sums of money in a non-distributable reserve, provided that the amount is no more than 10% of the subscribed capital. The above anti-asset-stripping provision also applies to non-listed companies that fall within the thresholds set out in the legislation with regard to number of employees, revenue, etc. It must be assumed that this limitation rule is likely to have an impact on private equity funds' ability to conduct debt pushdowns in connection with leveraged buyout transactions.

Break-up fees and listed companies

During the past few years, break-up fees became an increasingly accepted feature in Norwegian public mergers & acquisitions. However, such fees have normally been lower than in many other jurisdictions, and used to take the form of cost coverage arrangements. In Arris' offer for Tandberg Television ASA (2007), the parties agreed a break fee of US$18m (1.54%). In Cisco's offer for Tandberg ASA (2009), a break fee of US$23m was agreed (0.83%). In Reinmetall's offer for Simrad Optronics ASA (2010), the parties agreed an inducement fee of €1.5m (1.99%). In West Face (Norway)'s offer for Interoil Exploration and Prod. ASA (2010), a break fee (cost coverage) of US$2m was agreed (4.71%). A break fee of US$1.5m (1.3%) was agreed in Finisar's offer for Ignis ASA (2011), and in Lamprell's offer for Maritime Industrial Services (2011) the parties agreed a break fee of US$5m (exclusive of value added or other such tax) (1.46%).

Norwegian takeover legislation does not specifically prohibit break-up fees. However, in October 2010, the Norwegian Corporate Governance Board published a revised edition of the Norwegian Code of Practice for Corporate Governance, amending some important

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provisions regarding takeover offers. According to section 7 of the OSE's Continuing Obligations, companies listed at OSE/Axess shall confirm the application of the Norwegian Code of Practice and shall explain deviations from the code. The 2010 edition of the Code of Practice imposed requirements that went beyond the requirements of the Norwegian Securities Trading Act (STA). As a reaction to recent years' trend regarding break-up fees, the code recommended that the board should exercise caution in agreeing to any commitments by the target company that make it more difficult for competing bids from third-party bidders to be made, or that may hinder any such bids. Such commitments, including commitments in respect of exclusivity (no-shop) and commitments in respect of financial compensation if the bid does not proceed (break fee), should be clearly and evidently based on the shared interests of the target company and its shareholders. In October 2012, the Norwegian Corporate Governance Board implemented additional restrictions, adopting a rule in the Code of Practice stating that any agreement with a bidder that acts to limit a company's ability to arrange other bids for the company's shares should only be entered into where it is "self-evident that such an agreement is in the common interest of the company and its shareholders". According to the new rule in the Code of Practice, this provision shall also apply to any agreement on the payment of financial compensation to the bidder if the bid does not proceed. Any agreement for financial compensation (break-up fee) to be paid to the bidder should be limited to the costs the bidder has incurred in making a bid.

As a consequence of these amendments to the Code of Practice (latest version dated 30 October 2014), the use of break-up fees has become less common in Norwegian M&A transactions compared to other jurisdictions (especially with respect to public acquisitions). Of the 15 public M&A offers launched in the Norwegian market during 2014, a break fee was agreed for 20% of these deals. This was actually an increase from the same period in 2013. Out of the voluntary tender offers announced in 2015, break fee provisions were agreed in 9% of these deals. These fees were around 1.05% of the offer price. And of the five public M&A deals launched in the Norwegian market up until October 2016, no break fee provisions were included in any of the transaction agreements. However, in one of these transactions, a reverse break-fee of around 3% of the offer price was agreed.

<u>Due diligence reservations</u>

In *Madlastokken vs. Otrium* (LG-2009-19469), the Gulating Court of Appeal ruled that the defendant Otrium (the offeror) was legally bound to buy the shares in a target company, even if Otrium had taken a due diligence reservation. The Court of Appeal stated that such due diligence reservation would not automatically grant an offeror or a buyer the right to terminate or withdraw from an offer, or from an agreement even if the bidder or offeror were not satisfied with their due diligence inspections. The Court of Appeal based its decision upon the fact that the defendant in this particular matter had not specified in the agreement/offer document what should be the legal consequences if the defendant was not satisfied with such investigations. Consequently, a due diligence reservation cannot under Norwegian law be considered as a magic formula to escape liability for the purchaser if it wants to withdraw from a transaction. If such reservations shall have the desired effects, it will be necessary for the buyer (offeror) to state this explicitly in the offer document/agreement.

<u>Non-recruitment clauses in takeover situations</u>

As from 1 January 2016, non-recruitment clauses between an employer and other businesses will be invalid, except when such undertakings are agreed in connection with takeover situations. After 1 January 2016, a non-recruitment clause can, however, only be agreed in takeover situations for a maximum period of six months from the date the parties resolve

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to terminate their negotiations, if such takeover negotiations fail. Non-recruitment clauses can further be agreed for a maximum time-period of six months from the date of transfer of business provided the employer has informed all affected employees in writing about such provisions.

At present, it is not obvious if the "letter of the new law" in fact also prohibits a seller and a buyer in a share purchase transaction from agreeing such non-recruitment clauses for longer time-periods, provided the target company itself (as the employer for the relevant employees) is not a direct party to such agreement. It is possible to argue that a non-recruitment clause in such share purchase agreement does not (at least directly) violate the new legislation as long as the non-recruitment clause only refers to the target company's employees, and such target company itself is not a party to the agreement. Note that there is a risk that non-recruitment clauses agreed for longer time-periods between buyers and sellers in such share sale-and-purchase transactions may still be invalid. The reason for this is that even if the target company itself (as the employer for the relevant employees) is not a direct party to such sale-and-purchase agreement, the effects of such clauses in share purchase agreements may still turn out to be the same as if a target company in fact had become party to such agreement. Consequently, it can be argued that non-recruitment clauses agreed for longer durations in share purchase agreements at least violate the spirit of the new legislation, and thus also must be considered prohibited.

Frustrating actions and shareholder activism

In a public tender offer situation, the target company is allowed to take a more or less cooperative approach. The board of the target company is restricted from taking actions that might frustrate the willingness or otherwise of an offeror to make an offer or complete an offer that has already been made. Such restrictions apply after the target has been informed that a mandatory or voluntary offer will be made. These restrictions do not, however, apply to disposals that are part of the target's normal business operations, or where a shareholders' meeting authorises the board or the manager to take such actions with takeover situations in mind. As a result, a fairly large number of Norwegian listed companies have adopted defensive measures aimed at preventing a successful hostile bid. However, advanced US-style 'poison pills' are currently not common in the Norwegian market.

If such measures do not apply – or can be overcome – the normal reaction pattern of a Norwegian hostile board would be to seek to optimise the position for its shareholders in other ways. In this regard, it should be noted that despite the restrictions on frustrating actions, several options remain, including: persuading shareholders to reject the bid; making dividend payments or using the Pac-Man defence; or finding a white knight or white squire.

Shareholder activism in its traditional form of proxy contests in connection with (or as a reaction to) M&A transactions, as lately seen re-emerging in the US, has so far not been very present in the Norwegian markets. However, so-called operational activism as a reaction from shareholders against a company management's way of running the business operations is more frequent, but not as frequent as in many other jurisdictions, due to the shareholder structures in Norwegian companies.

Currently none of the large international third party proxy advisory firms, which offer vote recommendations and sometimes cast votes on behalf of their clients, operate directly within Norway, and no explicit proxy voting regulations aimed at regulating such advisors' activities (conflicts of interests, etc.) are in place. However, such firms do also offer advice to clients (in particular, foreign hedge funds and institutional investors) who have invested large stakes in Norwegian investee companies. Consequently, the influence of such proxy

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advisors is present in Norwegian companies with a high percentage of foreign institutional investors. Based on recent years' continuing initiative from the European Securities & Markets Authority to review the role of proxy advisory firms (European Commission, 2011; ESMA, 2012), and through forces of global convergence, it is not unlikely that in the future Norwegian regulators will also find it necessary to introduce greater transparency and more specific regulations in this area.

Examples of aggressive use of derivatives and other accumulations of significant stakes in a target company by activist shareholders are, of course, also seen in Norwegian companies prior to, or in connection with M&A transactions, but it is not very common for activists to seek to interfere with the completion of announced transactions in the Norwegian market. Stealth accumulations through stake-building in Norwegian listed companies do, however, face certain challenges, such as the 5% disclosure requirement imposed by the Norwegian Securities Trading Act.

Governmental holdings

A special feature of the Norwegian financial markets is that the Norwegian government holds significant holdings in many of the companies listed on the Oslo Stock Exchange. At the end of December 2016, the Norwegian government controlled (directly or indirectly) 33.61% of the shares in such listed companies, measured in market value. It is worth mentioning that many of these investments are strategic and not just financial. The government has previously stated that it would like to keep an active ownership policy so long as company legislation and popularly accepted principles for corporate governance allow for this. Examples of such investments are the government's investments in: Statoil ASA (67%); DNB ASA (34%) (Norway's largest bank); Telenor ASA, the Norwegian telecom provider (53.97%); and Kongsberg Gruppen ASA (50.001%). Note that in 2014, the government asked for the Parliament's permission to reduce its ownership in several companies in which it is no longer considered natural that the Norwegian State is a long-term owner. At the beginning of 2015, the Parliament adopted a resolution granting permission to exit the government's holdings in the following companies: Ambita AS, Baneservice AS, Mesta AS, Veterinærmedisinsk Oppdragssenter AS, Entra ASA and SAS AB. Originally, the government had also asked for permission to exit its investments in Flytoget AS, and to reduce its holding in both Kongsberg Gruppen ASA and in Telenor ASA down to 34%. The Parliament approved a reduction of the government's shareholdings in Telenor ASA down to 34%, but did not approve its exit from Flytoget AS or a reduction in its shareholdings in Kongsberg Gruppen ASA. It is expected that going forward, the sitting Norwegian government will aim at more privatisation of government-owned companies and businesses, based on what is considered most economically beneficial for the State. However, the 2017 Norwegian Parliamentary Election may change the political landscape in this respect.

In addition, the Norwegian government has significant holdings in both foreign and domestic companies, invested through two government pension funds. The Government Pension Fund Norway constitutes a part of the Government Pension Fund, and has the aim of supporting governmental savings for financing future national insurance pension fund expenditure. Capital can be invested in shares listed on regulated markets in Norway, Denmark, Finland and Sweden, and in fixed-income instruments where the issuer is domiciled in these countries.

The Norwegian Government Pension Fund Global is one of the world's largest sovereign wealth funds. The fund was set up in 1990 as a fiscal policy tool to support long-term management of Norway's petroleum revenue. The capital is invested abroad to avoid overheating the Norwegian economy and to shield it from the effects of oil price fluctuations.

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The fund invests in international equity and fixed-income markets. It also has a mandate to invest in real estate. The aim is to have a diversified investment mix that will give the highest possible risk-adjusted return within the guidelines set by the ministry. As of 30 September 2016, total assets amounted to NOK 7,118bn.

The government also invests in non-listed Norwegian companies. Very often, such investments are carried out through government-owned investment companies, such as Argentum and Investinor.

Industry sector focus

The most active industry in 2015 was Industrials & Manufacturing, which accounted for 17% of the deal count for that year in the Norwegian market, while the Energy sector represented 14% of the deal count. Other particularly active industries included Technology, Media & Telecommunications together with the Business Services sector, in a shared position each with 13% of the total deal count. The Consumer sector and the Construction sector were also quite active, each representing 9% of the total deal count for 2015.

Entering 2016, Industrials & Manufacturing continues to hold first position, representing 20% of the total deal count for 1H 2016, followed by the Technology, Media & Telecommunication sector, representing 16%, and the Energy sector, representing 15% of the total deal count for 1H 2016. Other active sectors were the Consumer & Retail sector and the Construction sector, each representing respectively 12% and 10% of the deal count for the first half year. Based on the deal volume so far in Q4 2016, it looks as if the Industrial & Manufacturing sector will continue as the leading sector for transactions in Norway for 2016, followed by the Technology, Media & Telecommunication sector.

The year ahead

At the end of 2016, global growth is still low, but the OECD leading indicators signal some improvement into 2017, mainly driven by emerging economies. Having said that, global economic growth has been surprisingly weak since the financial crisis and it may look as if potential growth has slowed. Global interest rates are back up to the level before Brexit. Some experts predict that global interest rates will not rise much from their existing level for next year, but see a potential risk for some further rise in US interest rates.

Entering Q4, 2016 it seems as if the Norwegian economy so far has been better than expected after the drop in the oil prices. Most of the fall in oil investments seems to be tapering off. We anticipate that this will help the industries affected by the oil slump. Mainland GDP growth appears to be gradually picking up. Expansionary fiscal politics, low interest rates combined with increases in residential investment activity, are contributing to growth for the Norwegian mainland economy. Unemployment appears to have peaked and house prices have risen more than expected. The OECD has predicted that the Norwegian economy is projected to recover gradually, envisaging mainland output growth of 2.2% for 2017. Nevertheless, potential growth has fallen, which also reduces the neutral interest rate. The activity on the Norwegian West-Coast is in many instances still lower than a year ago, due to some regions having been differently affected by the drop in oil-related activity, and we believe that the Norwegian Central Bank will have to leave the interest rate lower for longer than it currently expects.

Still, the outlook for 2017 remains fairly mixed, as some experts predict that the outlook for oil investments will continue to slide 5–6% next year, but the pace of contraction is about to slow; it will continue to act as a drag on Norwegian mainland GDP growth, although the drag

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is expected to continue diminishing. One sector that expects continuing growth in investment activity is Manufacturing due to strong growth in export-orientated manufacturing. The Norwegian Central Bank's regional network also expects increased investment activity within the retail sector for 2017, while other service sectors report a broadly unchanged investment outlook for next year.

Most experts also seem to agree that unlike many other countries, Norway is in the lucky position of having great reserves in its policy tool chest that it can use for preventing recession and easing a structural shift in the economy. Consequently, it is expected that Norway will ride the storm within the Oil & Gas industry, and thereby escape recession. Nevertheless, there is no doubt that the last year's events have left Norway more exposed to the force of world events than in previous years. Therefore, the outcome may very well all depend on global macroeconomic developments.

For now, it seems as if there is slightly more optimism also in the Norwegian M&A market, driven by some large ongoing M&A projects. Globally, it seems as if there is a continuing strong acquisition appetite among CEOs. CEOs seem inclined to create new alliances to generate growth and acquire market shares. This is something that is expected to positively affect M&A activity, also for the Norwegian market.

On the other hand, prolonged economic challenges, with subdued growth, seem to be driving investment decisions in many countries. Despite some positive signals in the market, it seems likely that the macroeconomic environment will remain challenging within many sectors also during 2017, in particular for the Oil & Gas industry. Some experts have also been concerned that the M&A-market could be negatively affected following Brexit, but the author is not that concerned for this effect, at least not for Norwegian transactions. Even if Brexit might have contributed to the IPO market having become slightly more sensitive to volatility and general negative economic sentiment, we do not think Brexit will have a major effect on the market for trade sales in Norway. Over the next 12 months, we also expect to see an increasing amount of distressed deal activity, particularly within the Norwegian offshore rig-market and supply vessel-market, while we also expect oil and gas transactions to bounce back in the near-future.

Within particular sectors such as TMT, Industrials and Consumer Discretionary, we continue to see strong momentum for new deals. A lot of cash is waiting to be invested, and even if we have seen a number of private equity exits over the last few years, there also seems to be a continuing exit overhang in some equity sponsors' portfolios approaching end-of-lifetime for the funds holding such investments. It is safe to assume that some of these sponsors are experiencing increasing pressure to find solutions to the situation, which in the end, in most cases, will lead to some sort of M&A transaction.

Irrespective of which position one may take, the author believes that many investors will continue to view Norway as a good place to invest, due to its highly educated workforce, technology, natural resources and well-established legal framework for M&A transactions. A weaker Norwegian krone is also expected to continue contributing to high M&A activity levels, since foreign investors may feel this creates an extra opportunity for bargains.

Consequently, overall, we are cautiously optimistic for the Norwegian M&A market also for 2017. Nevertheless, we should not close our eyes to the fact that Norway for the moment is more exposed to the force of world events than in previous years, and the views that we have expressed above all depend on global macroeconomic developments.

The view reflected in this chapter is that of the author and does not necessarily reflect the view of other members of the Aabø-Evensen & Co organisation.

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Romania

Lucian Cumpănașu & Alina Movileanu
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Overview

Legal framework

The Romanian M&A pattern is similar to the worldwide one, being mainly shaped as share deals – mostly shares transfers/acquisitions and sometimes, mergers – while certain transactions are made as transfer of goodwill or traditional sale of targeted assets.

As a rule, M&As in Romania follow the same steps as in most jurisdictions: *(i)* signing of a letter of intent or even directly of a memorandum of understanding, generally along with a non-disclosure and non-competition agreement, followed by *(ii)* a due diligence phase (legal, tax, technical, etc.), which may be prior or subsequent to *(iii)* the execution of a promissory sale-purchase agreement, and finally *(iv)* the signing of the transaction documentation, including complex mechanisms, such as non-competition clauses, conditions precedent/ subsequent, corporate changes and registrations, permitting aspects, liability, regulatory aspects and so on.

As private companies are the main agents in M&As, such transactions are subject to the provisions of the Companies Law no. 31/1990, whereas the related registrations with the Trade Registry (which represent the publicity method for companies' operations) follow the rules established by Trade Registry Law no. 26/1990 and ancillary regulations. However, the particular regime of public companies falls under Law no. 297/2004 on capital markets and various secondary enactments, as well as under the supervision of the Financial Supervisory Authority. Investors doing business in Europe will anyway find the Romanian companies' regulations rather familiar, as these are the result of EU directives' implementation to Romanian law, which ensure aligned legislation throughout the EU.

Since noteworthy deals of recent decades have been a consequence of privatisation, and such procedure continues to be of interest as major companies are still state-owned, it may be relevant to also mention Law no. 137/2002 on privatisations, as having being the legal basis of successful M&As until now.

A major concern in M&A transactions is taxation, which is governed in Romania by the Fiscal Code and secondary legislation. In this respect, it is important to note that Romania has a new Fiscal Code and a new Fiscal Procedure Code, which have been in force since 1st January, 2016 and brought significant changes, some of which were due to become applicable as of 1st January, 2017 (which will be detailed in the section, "Key developments", below). In the meantime, the Fiscal Code became subject to new amendments, as a new Government has been vested at the beginning of 2017 (see "Key developments" below) and related new fiscal measures have been announced.

Competition law is also relevant to the M&A field, as concentrations between companies

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must be controlled, and competition must remain fair at all times. The applicable Romanian enactment is Competition Law no. 21/1996, which is generally applied in conjunction with related regulations and EU Competition Law, mainly addressing notification to the Competition Council or European Commission aspects and thresholds.

In any case, the legislation mentioned above is completed, where necessary, by the Romanian Civil Code, as generally governing private legal relationships, including contracts, liability, security interests or conflict of laws.

In addition, provisions specific to the particularities of each transaction may become relevant. This is, for example, the case for labour legislation within a goodwill transfer including employees, which benefit from a specific protection; in other cases, it is environmental law that is important, when the target company carries out activities subject to environmental authorisation. Sometimes, banking and financing regulations may also become relevant, in considering the increased M&A activity in the banking field and in terms of transactions involving target companies having banks as creditors, or even in deals where financing is concerned. Also, insolvency regulations may apply, if a transaction is done with respect to assets or shares of a company undergoing insolvency proceedings.

Highlights

Whilst the global M&A market is considered to have experienced a downturn compared to 2015, 2016 was still a good year for M&As in Romania, with US$ 3trn spent despite the geopolitical environment. Accordingly, the numbers pretty much aligned with those of 2015; a total of 70 transactions, generating a global figure of more than US$ 3bn (compared to US$ 3.65bn in 2015), the most attractive industries for M&As being retail, FMCG and real estate. Optimists even estimate the global value at €3.4–4bn, comprised of 85 transactions exceeding a €5m threshold, with a steady average of €43m per transaction.

These results come in a context where the year seemed to have started on the wrong foot, as the value of the transactions in the first semester was up to US$ 1.1bn, significantly below the US$ 2.1bn announced for the same period in 2015, and representing only a third of the year's total. However, the greatest of expectations were met and the second half of the year saw significant deals of hundreds of million euro, with a mere five totalling €1.3bn and representing 40% of the global value (some experts estimated that there were three transactions of over €500m, which resulted in €1.5bn, almost half of the grand total).

A novelty for the Romanian M&A market was the interest shown by major private equity funds, like KKR or CVC, who were reported to be considering the acquisition of the second largest retail network in Romania, Profi – which turned out to be the biggest deal of 2016. Such interest can legitimise hopes of bigger deals and substantial movements in the M&A field in Romania for the years to come, since there are still numerous possibilities of lucrative deals.

Significant deals and highlights

As stated, while the first half of 2016 registered a decrease in the M&A market compared to 2015, the fall brought significant transactions with a total value estimated around €650m, out of which the acquisition by Mid Europa Partners of the Profi 500 supermarket chain from Enterprise Investors amounted to €533m and was considered by far the biggest deal of the year.

Second on the podium in 2016 was the €300m Romanian share of the US$ 7.8bn transaction whereby Japanese brewer Asahi is buying the activities of SabMiller in five European

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countries, this including Romanian beer brands Ursus, Timisoreana, Ciucas, Stejar and Azuga, along with four production units. These divisions became available for sale because of the competition conditions imposed for the transaction whereby SabMiller was acquired by AB InBev in a deal exceeding US$ 100bn.

Third place in the top transactions of 2016 was occupied by the agreement for the acquisition of a 30% stock of shares of E.On Distribution Romania – energy network operator and natural gas distributor for the Northern part of Romania – by Allianz Capital Partners, in a transaction ranging between €185m and €250m (some specialists estimated an even higher number, *i.e.*, €270m).

It is worth noting that the medical industry has not stayed still in 2016, with Regina Maria health network (acquired by Mid Europa Partners fund in 2015) focusing on growth and acquiring Ponderas Academic Hospital in Bucharest (estimated at €20m), Helios Medical Center in Craiova (value not available) and Dr. Grigoras Centers in Timisoara (€1.5m).

In the meantime, Medlife, the largest medical network in Romania, went public and sold on the stock exchange up to 44% of its shares, within an IPO qualified as the biggest in Romania in 2016. Medlife also extended its interests in dental medical services, acquiring the majority shareholding of Dent Estet, a well-known local clinic, with a turnover around €5.5m, Medlife also announcing its plans to open one to two new dental clinics every year.

Still on the stock exchange transactions, another sound deal was the exit from national gas company Romgaz of Fondul Proprietatea, a joint stock closed-end investment company, set up some 10 years ago by the Romanian Government, which gave shares to individuals eligible for indemnification for properties they were deprived of under the communist regime and which couldn't be restituted in kind. The transaction consisted in the sale of 22.5 million shares for US$ 6.09 per share, closing at more than US$ 137m.

It is also relevant to mention a significant move in real estate M&A, respectively the acquisition by real estate group NEPI of Shopping City Sibiu from Agro Group, within another transaction surpassing €100m, making it one of the top five deals of the year. NEPI also consolidated its interest in Bucharest Mega Mall shopping centre, acquiring the missing 30% of shareholding for approximately €70–75m.

Moving to the FMCG field, it is rumoured that, after the acquisition of Albalact – the leader of the Romanian dairy market – the French giant Lactalis is poised to buy Covalact, another renowned local dairy brand which had a €45m turnover in 2015, within a transaction estimated around €30–40m, which seems to be awaiting the approval of the Competition Council.

On a different page, Polish Enterprise Fund VII, a private equity fund managed by Enterprise Investors, acquired the largest games and toys Romanian retailer, Noriel, with a turnover of €30m in 2015, in a transaction whose value was not disclosed, but estimated around €20–25m.

Also not disclosed was the value of the deal by means of which Swiss-held Repower, operating in the energy distribution field, sold its Romanian operations to Met Group, a Swiss company as well.

All in all, 2016 had style in terms of M&A, starting with the sale of McDonalds' Romanian business to Maltese-based Premier Company – the 67 restaurants, 19 McCafe coffee shops and local franchise being sold for €65.33m – and closing at €3bn, a hand of cards comprising four queens of more than €100m each, and an ace worth €533m. It is fair to say that 2016 was also outstanding for first-time moves in Romania by strategic investors; American giant

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PPG acquiring Deutek paint and coating manufacturer for €40–50m and thus opening the path for its peers to invest in Romania.

Key developments

One of the most important amendments in the Romanian legislation during 2016 was the entering into force of the new Fiscal Code, along with the related Fiscal Procedure Code, which were meant to reform the Romanian fiscal system. These new enactments were received with both high expectations and reluctance, since some of the new measures were meant to boost investment, while others were considered by practitioners to set some limits to business development.

The biggest changes brought by the new Fiscal Code consist in the decrease of the (general) VAT rate from 24% to 20% (which was further decreased, becoming 19% as of 1st January, 2017) and the decrease of the tax on dividends from 16% to 5%. As an incentive for investments, 2016 also came with a benefit for natural persons obtaining additional income from other sources than dividends, *i.e.*, an exemption to the amounts due as health insurance contributions (otherwise due by any person earning an income) – this exemption was limited to 2016 only, but the new government recently decided that it will be again applicable from 1st February, 2017. At the same time, a new rule for social and health insurance contributions will come into effect. As such, while the principal amounts subject to the relevant contributions quotas were supposed to be limited to five average salaries, such thresholds were eliminated, with the addition that no contributions are due for investment income if the respective persons have another source of income (for which these contributions are payable, without any threshold).

Other changes brought to the Romanian fiscal regulations at the beginning of 2017 include: (i) eliminating the tax on special constructions (the so-called "*pillar tax*"), which had generated an increase in the expenses of renewable energy businesses at the time of its approval in 2013; and (ii) eliminating the time limit for exemption from the tax on re-invested profit and extending such benefit to investments in informatics programs.

Romania is also trying to align its legislation to global tendencies in doing business, hence approving in the first semester of 2016, a law on business clusters. Thus, business clusters became entitled, through a state aid scheme, to certain fiscal facilities, such as (under specific conditions) exemption from taxes on lands and/or constructions pertaining to the business clusters or exemption from building/demolition permit taxes, if referring to the aforesaid category of lands and/or constructions.

Another enactment meant to bring Romania in line with the most advanced countries, so far as payment technologies are concerned, is the so-called "cash-back law", which was the subject of controversy during 2016 and finally entered into force as of 1st January, 2017. This law states that any retail business having a yearly turnover of at least €10,000 must accept payments with bank cards, which entails each small shop having a POS and a related contract for payment services with a banking/payment institution. The major innovation comprised in this law is the possibility for businesses accepting payments with bank cards to act, under certain conditions and subject to express limitations, as ATMs for their clients – practically, the POS would also become an ATM, the necessary cash coming from the cash desks of the respective retailers.

The controversial law on *datio in solutum* (giving in payment), which was passed at the end of 2015, but refused promulgation by the President and sent back for revision to Parliament, finally entered into force in 2016. For clarity purposes, we reiterate that, according to such

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law, those individuals having debts to banks resulting from secured loans which they can no longer repay may give the real estate asset subject to security (securing the respective loans) as a payment for the debt, in which case the debt would be entirely and finally settled. However, some of its provisions were challenged in front of the Constitutional Court, which decided in October, *inter alia*, that the courts of law should verify if the hardship principle is applicable to the case subject to their judgments. Accordingly, the Constitutional Court practically added a new condition, not initially provided for by the law at hand, but meant to ensure a certain balance between consumers and banking institutions in terms of applicability of such law.

Also widely questioned was a law passed in 2016 stating that 51% of certain basic food products sold by supermarkets, such as meat, eggs, vegetables, fruit, honey, dairy and bakery, should be local (more precisely, should come from the "short chain" of supply). This law was to come into effect on 15th January, 2017, but its applicability norms, essential for the implementation of the general legal provisions, have not been adopted yet, while the law itself drew the attention of the European Commission, which threatens Romania with an infringement procedure for breach of free market regulations. Therefore, the applicability of such rule is still in question and a definitive answer is to be offered by 2017.

Finally, it is worth noting that, as per a new enactment which was recently adopted by the Parliament and promulgated by the President, the registration of a limited liability company shall no longer be subject to incorporation taxes, which up to now have been due to the Trade Registry for the registration proceedings.

Industry sector focus

In a nutshell, 2016 was a year for strategic investments, investors placing their winning bets on retail, real estate, industry, as well as on FMCG and healthcare, in fewer transactions with higher values – the number of transactions decreased from 123 in 2015 to 70, but the total was roughly the same, which may lead to the conclusion that the M&A Romanian market is on the right path to reaching maturity and stability.

If retail gave only one major deal, *i.e.*, the acquisition of Profi supermarkets by Mid Europa Partners, real estate generated an impressive activity, with 17 relevant deals reported by the experts, estimated at a value of over €550m, which represents an impressive share of the global value of M&A in Romania.

Notwithstanding, the FMCG industry was the most active one, with deals totalling over €850m (in an optimistic evaluation), out of which more than €120m was spent by French group Lactalis on the acquisition of two major dairy companies in Romania. Industry reported eight transactions, while the hotel and catering (HoReCa) sector can pride itself on only one, yet major deal (McDonald's sale).

With Allianz Group's participation in the E.On Distribution and RePowers's sale, the energy market regained part of its previous importance, but it is still far from its old glow, despite over €250m worth of transactions encompassed by only three deals.

In any case, one of the most active industries remains that of medical services, reporting 187 private hospitals plus one under construction (versus 367 public hospitals altogether) and five deals with values between €50m and €1m. Thus, even more investments are anticipated from the major players in this industry, making it one of the most dynamic at the moment, especially because Romania has a public healthcare policy and related system in a rather delicate shape, making room for far more opportunities in the private arena and legitimising hopes that the health insurance system will be privatised at a certain point.

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For its part, the banking domain announced six transactions, mainly consisting of sales of non-performing loans, notably with values ranging from €10m to €75m.

The year ahead

After two favourable years, each with at least one transaction surpassing half a billion euro, specialists estimate that the Romanian M&A market will continue its positive trend in 2017 as well, even anticipating another year with an outcome exceeding €3bn. The said record transactions opened the gate for analysts to hope for and anticipate new similar deals, as Romania appears to have found its way on to the map of big investors. In addition, local entrepreneurs behind valuable local brands (*e.g.*, Altex, electronics retail, or Supremia, condiments) seem to be waiting for the right moment or offer to make their exit.

A sector specifically dynamic during the last years, that of medical services, is particularly expected to generate new transactions in 2017, as this sector has been experiencing substantial growth, resulting in a consolidated market. Also, a significant increase in the income of private medical facilities may be expected in 2017, since the Romanian Government has just issued an ordinance approving the deductibility of private health insurance for employees up to a limit of €400 per year.

On the other hand, the IT and agricultural sectors have been waiting for some time to become protagonists of top transactions, experiencing only small deals, while setting grounds for steady business. Hence, it is considered that there is a rather high potential for these sectors to attract strategic investment in 2017.

Other speculations refer to the potential interest in investment opportunities of top investment funds – which have been avoiding Romania until now in terms of M&A – considering that KKR or CVC were said to be looking into the Profi deal.

The year ahead may be an interesting one on the stock exchange as well, with the awaited IPO of Hidroelectrica and the hope of listing RCS&RDS, a major player in the telecom industry, a boost which was generated by the successful listing of Medlife at the end of 2016.

All in all, the year ahead seems bright for Romanian M&A, as it is a market which grew with small but steady steps in 2015 and with good macroeconomic perspectives, generating reasonable hopes of increased dynamics.

* * *

Sources

The information in this chapter is based on various articles in the business and financial press, company and financial websites, and specialist reports.

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Russia

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Overview: legal background

General

Russia is a country with a civil law system. The Civil Code of the Russian Federation (the "**Civil Code**") is, therefore, a document of the utmost importance, establishing a legal and regulatory framework of M&A transactions. The other important laws are Federal Law No. 208-FZ dated 26 December 1995, "On Joint Stock Companies" (the "**Law on JSCs**") and Federal Law No. 14-FZ dated 8 February 1998, "On Limited Liability Companies" (the "**Law on LLCs**"), regulating the most commonly used forms of companies in Russia.

On the one hand, reliance on statutory law promotes stability. On the other, the courts are not always prepared to accommodate the needs of market players if they are in doubt that it may contradict the letter of the law. However, in the first decade of the century, the involvement of supreme courts in interpretation of statutes became more active. The trend was set by the Supreme Arbitration Court of the Russian Federation and, following its "merger" into the Supreme Court of the Russian Federation in 2014, was taken up by the latter. This has enhanced the role of court practice and, in its absence, makes the market over-cautious towards the application of any innovative regulation.

One of the main features of M&A in Russia is that it is mostly a private deal market. Mergers and public takeovers are rare and most transactions are structured as sale-and-purchase of shares. For years, the other main feature of M&A in Russia was the preferred way of structuring transactions through foreign holding companies and foreign joint ventures. A more favourable tax regime in certain foreign jurisdictions was one of the reasons of such preference. Other important reasons behind it were the possibility to choose foreign law as the governing law of transaction documentation, and the possibility to apply internationally recognised legal instruments which are easier to enforce in foreign jurisdictions. Until recently, Russian law did not offer the effective risk-allocation instruments crucial for M&A transactions, such as warranties and representations, indemnities, call and put options, and shareholders' agreements.

The recent reform of the Civil Code introduced the long-awaited legal concepts and instruments and thus contributed to the change of the legal landscape in Russia. Before the reform of the Civil Code, the use of Russian law in M&A activity was limited primarily to small and mid-size transactions where the use of sophisticated modern legal mechanisms was not required, or to transactions (even of large scale) where the application of foreign law was not possible for legal or political considerations. It would be fair to note that, as a matter of past practice, in more substantial deals the market players preferred to structure transactions in a way that would allow the application of foreign law. The most frequent

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choice was English law. Various sources in the legal community provide different estimates, but all agree that in the past 20 years the percentage of M&A deals involving Russian assets governed by Russian law has been far below 50%.

Having said this, one has to admit that Russian law has been making huge progress in recent years. A huge multi-stage civil law reform was launched by the Russian Government in 2008 and has already perfected the existing legislation to a considerable extent. The last significant bundle of amendments to the Civil Code was adopted and entered into force in 2015 and since then has already undergone the revision in 2016. The reform of the Civil Code was followed by material changes of the Law on JSCs and the Law on LLCs. The latest amendments to these laws, altering the regulation of major transactions and interested party transactions, were passed on 3 July 2016. Further harmonisation of these laws and the Civil Code is required and more amendments are expected. Lawyers of Ivanyan & Partners were involved and continue to be involved in drafting some of the amendments to the Civil Code and other laws.

The combined effect of the Civil Code reform, significant amendments to the Tax Code of the Russian Federation (the so-called "**Law on Controlled Foreign Companies**") which entered into force in 2015, as well as continuing political tensions on the international scale, coupled with sanctions of the United States and the European Union introduced against Russia over the Ukrainian crisis, may be expected to continue influencing the choice of Russian law for Russian M&A transactions. In particular, the Russian state-controlled giants such as Gazprom, Rosneft, Rostec Corporation, Aeroflot, United Shipbuilding Corporation, Sberbank, VEB, VTB Bank and Rusnano, accounting for a significant part of the Russian economy, may often find themselves limited in their options due to the policy of the Russian Government and the restrictive sanctions imposed by the United States and the European Union.

Merger control

The Federal Antimonopoly Service of Russia ("**FAS**") continues to remain the main merger authority and regulator in Russia. Starting from 2006, it has introduced and further perfected a comprehensive regulatory framework for anti-monopoly clearance of M&A transactions. A primary law in this sphere is Federal Law No. 135-FZ dated 26 July 2006, "On Protection of Competition" (the "**Competition Law**"). Among other things, it sets forth the criteria for acquisition transactions requiring clearance with FAS.

Criteria and thresholds for notifying FAS of acquisition transactions have not been changed. Pre-completion clearance by FAS is required for initial acquisition of more than 25% of the voting shares of a joint stock company (more than ⅓ of participatory interest in the charter capital of a limited liability company), and then for increase of the share up to more than 50%, and further up to more than 75% (over ½ and ⅔ of participatory interest in the charter capital of a limited liability company respectively).

Clearance by FAS is required for the above transactions if the below double-criteria test is passed (the "**Double-criteria**"):

(i) the purchaser and the target, together with their groups of persons (the "group of persons' is defined rather broadly), exceed materiality thresholds either by the aggregate book value of assets on a worldwide basis or by annual turnover on a worldwide basis (RUB 7bn for the assets and RUB 10bn for the turnover); and

(ii) the aggregate book value on a worldwide basis of all companies within the target's group exceeds RUB 400m (this amount was increased from RUB 250m in 2016).

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If a transaction is structured as an acquisition of a foreign company, such a transaction will be subject to FAS clearance if:

(i) the Double-criteria are met;

(ii) as a result of such transaction (or a series of transactions) a purchaser acquires rights to determine the course of business of a Russian subsidiary or right to carry out functions of its executive body; or

(iii) as a result of such a transaction a purchaser acquires control over 50% of a foreign company with annual turnover in Russia over RUB 1bn.

New rules require that entrance into joint venture agreements between competing entities shall also be subject to merger clearance by FAS, if the aggregate book value of assets of the parties thereto (or assets of their groups of persons) exceeds RUB 7bn or their annual turnover exceeds RUB 10bn.

Intra-group transactions are not required to be notified to FAS if they are entered into between:

- members of the group of persons disclosed on the official website of FAS at least 30 days before closing of such transactions; or
- a parent company and its controlled subsidiary or affiliated entities under common control of more than 50% of voting rights.

Depending on the complexity of the deal and the number of persons in the groups of the purchaser and the target, it may take from 1.5–3 weeks to prepare a submission for FAS. Once all necessary documents are submitted, the approval is normally granted within one month, which can be extended by another two months.

Transactions entered into in breach of the Competition Law may be challenged in court by FAS if the latter proves that such transactions have restricted or may restrict competition.

Foreign investments into sensitive sectors of the Russian economy are controlled through a special law restricting acquisition of control over companies of strategic importance for Russia by foreign individuals, companies and states – Federal Law No. 57-FZ dated 29 April 2008, "On the Procedure of Foreign Investment in Companies Having Strategic Significance for the Preservation of National Defence and State Security" (the "**Foreign Strategic Investments Law**" or "**FSIL**"). Business sectors that are 'strategic' include, among others: the development of large deposits of certain mineral resources (such as oil, gas, gold, copper), the nuclear industry, the military sector, aviation, some of the natural monopolies (e.g. oil and gas pipeline transportation services), data encryption services, telecommunication services, port services and large circulation mass media.

The FSIL provides for a much broader definition of "control" as compared to the Competition Law. Whereas the definition of control for the purpose of economic concentration is based on formal criteria, the FSIL extends this definition to the situations where a foreign person *de facto* controls a target company, even in the absence of legally binding instruments, or enjoys (by virtue of a contract or constitutional documents of a target company) only powers to "veto" certain decisions or actions ("negative control" powers). Any transaction aimed at acquisition of control over a strategic company requires prior approval of the governmental commission presided over by the Prime Minister. Consideration of an application may take up to 4–6 months following its submission to FAS or longer, as the commission holds meetings on an *ad hoc* rather than on a regular basis. The consequences of non-compliance with the FSIL are quite material: transactions entered into in breach of the FSIL are null and void and the acquirer is restricted to vote shares purchased in breach of the FSIL.

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Although the Competition Law and FSIL remain two key laws that allow the Russian government to influence inbound transactions, another important law in the context of M&A in Russia is Federal Law No. 160-FZ dated 9 July 1999, "On Foreign Investments in the Russian Federation". This law provides that governmental approval is required for any transaction whereby a foreign state or an international organisation, or any person controlled by the foreign state or by the international organisation, acquires direct or indirect control over 25% of shares in any Russian company, even if it is not strategic and does not have any assets. According to a clarification made by the Russian Supreme Arbitration Court in 2013, this rule applies even if a foreign state or its controlled entity is a founder of a new Russian company with a share exceeding 25%. FAS supported this view in its clarifications published on 6 December 2013.

Foreign investments in such sectors as banking and insurance are subject to special rules and require prior approval of the Bank of Russia should certain thresholds be crossed.

Other M&A regulation

The Law on JSCs sets forth various instruments for buying out minority shareholders of public companies. Those instruments include mandatory and voluntary tender offers, and the right to squeeze-out minority shareholders under certain circumstances.

In general, the existing rules provide for the obligation of the acquirer of more than 30%, 50% or 75% of voting shares in a public stock company to make an offer to purchase the shares in that company from other shareholders. For the acquirers of more than 95% of voting shares there is, in certain circumstances, a possibility of squeezing out the remaining minority shareholders. The relevant rules are generally close to those in other European jurisdictions and require, *inter alia*, independent appraisal of shares and issuance of a bank guarantee. At the same time, these rules provide less flexibility in using instruments of buy-out. For instance, a mandatory tender offer may not be conditional; it is only possible to apply squeeze-out procedures if a majority shareholder has acquired at least 10% of voting shares as a result of sending a voluntary or mandatory tender offer.

Overview: the largest M&A deals and market trends in 2016

2016 was another hard year for the Russian economy. The sanctions first introduced against Russia by the United States and the European Union over the Ukraine crisis in 2014 were expanded in 2016 and survived into 2017. With GDP contracting by 3.7% and the value of the ruble dropped almost 30% in 2015, small wonder that the World Bank expected the Russian economy to continue to contract in 2016. At the end of 2016, though, the World Bank adjusted its initial forecasts and confirmed only insignificant negative growth of the Russian economy in 2016. As oil and gas prices continue recovering and positively affect domestic demand, slow yet positive growth is expected from 2017 onward.

The depressed economy naturally resulted in decreased M&A activity. According to AK&M Information Agency, the aggregate value of the top 30 largest M&A transactions executed in Russia in 2016 was estimated at US$25.7bn, which represents an almost 25% decrease from US$33.7bn in 2015. Notably, however, the number of transactions has slightly increased and reached 391 transactions as compared to 382 within the same period in 2015.

In the AK&M transaction rating, the telecommunications sector, with the aggregate value of the two largest transactions at US$8.9bn, was placed first by transaction value. However, this is not fully representative of the Russian market as both listed transactions were outside Russia (in Italy and Pakistan) and involved subsidiaries of the Russian telecoms giant VimpelCom.

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Setting aside telecoms, the energy/oil & gas sector was the most active by transaction value, pushing down real estate and construction. Trade and retail took third place.

The AK&M rating demonstrates the decrease of activity in the manufacturing sector, with only five transactions listed in machine building, metallurgy, chemicals and other production sectors.

One more trend of the year is an increase of M&A transactions involving debt restructuring. There are numerous examples; in particular, in the real estate business: Russian Capital Bank acquired assets of the developer SU-155 (transaction evaluated at US$4.9bn); Sberbank acquired the 200,000m^2 President Plaza in Moscow from a business controlled by Ruslan Baisarov (estimated at US$350m); and VTB Group acquired the Eurasia business center in Moscow City (US$754m) from a company controlled by Suleiman Kerimov.

An example from another sector is the acquisition by Gazprombank of a 49% stake in Elga coal project from Mechel in exchange for paying off some of the coal and steel company's debt to Sberbank. The reported value of the transaction is RUB 34.3bn (about US$577m as of the date of this article).

Noteworthy transactions

Despite the US and the EU sanctions, Russia boasts three of the largest 2016 international M&A transactions in the upstream oil and gas sector:

- the acquisition of a stake in Rosneft by Glencore and Qatar Investment;
- Rosneft's purchase of a controlling stake in Bashneft; and
- an Indian consortium's acquisition of a 34.9% stake in Vankorneft from Rosneft.

The privatisation of Rosneft, the crown jewel of the Russian oil industry, is beyond any doubt the transaction of the year on the Russian M&A market generally. The 19.5% stake in Russia's largest oil producer was purchased from the Russian state by a consortium of commodity trader Glencore Plc and Qatar's sovereign wealth fund, at a price around US$11bn. The Russian Federation retained the controlling stake, with BP holding a 19.5% stake. The media declared the deal to be the biggest foreign investment in Russia since the 2014 Ukraine crisis.

The second major oil and gas transaction is the purchase by Rosneft of a majority stake in another major oil producer, Bashneft for US$5.2bn.

Another significant transaction involving Rosneft was the US$2.9bn sale of 23.9% of Vankorneft to a consortium of Indian companies led by Oil India Limited and including also Indian Oil Corporation Limited and Bharat PetroResources Limited. Vankor is the largest oil and gas field discovered in Russia in the past 25 years. Rosneft retained a 61.1% stake in the company.

In the gas industry we can note the sale, by Russia's biggest independent gas company Novatek, of 9.9% of the Yamal LNG project to China's Silk Road Fund for €1.087bn. Following the deal, Novatek retained a 50.1% stake and French Total and China National Petroleum Corporation held 20% each.

Silk Road Fund purchased 10% in SIBUR, Russia's largest integrated gas processing and petrochemicals company. This is the second large investment by the Chinese in the company, in addition to the 10% purchased by China's Sinopec in 2015. Reportedly, the value of the 2015 transaction was US$1.34bn. The selling shareholders were not disclosed.

Mikhail Prokhorov's Onexim Group sold its 20% stake in Uralkali PJSC, the world's biggest producer of potash, to Belarusian businessman Dmitry Lobyak. The transaction price was not disclosed and was estimated at around US$1.7bn based on the market value.

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Russia's largest independent electricity generator, EuroSibEnergo, part of En+ Group, acquired a 40.29% stake in JSC Irkutskenergo from PJSC "Inter RAO" and its fully owned subsidiary, Inter RAO Capital. The value of the transaction was announced as RUB 69.5bn (around US$1.6bn), payable in cash. Irkutskenergo is headquartered in Siberian Irkutsk and sells electric power and capacity in the wholesale market, and heat in the regional market.

In the real estate sector, the most notable transaction was the purchase by a real estate developer PIK Group of another significant player, Morton Group. The US$2.6bn transaction created a national industry leader listed both domestically and in London.

Key legal developments

Corporate law

The reform of the major transactions and interested party transactions regulation is a key development in Russian corporate law in 2016. The new rules, effective as of 1 January 2017, amended all major aspects of such transactions, including their content, price limits, approval and contesting procedures for both most popular forms of companies – LLCs and JSCs. Below we discuss the most notable of the new provisions.

- *Major transactions*

Changes introduced to the regulation of major transactions for JSCs and LLCs are generally similar. For both types of companies a major transaction is now generally defined as a transaction which: (i) is 'beyond the scope of normal business activity of the company'; and (ii) involves assets with the transaction price or balance sheet value of at least 25% of the balance sheet assets value on the last accounting date. A major transaction may be in the form of either: (a) a transfer of title to assets; (b) a lease of assets; or (c) a transfer of intellectual property rights.

The Law on LLCs and the Law on JSCs provide criteria for transactions falling within the normal scope of business and therefore not requiring approval as major transactions. In order to be exempt, a transaction must qualify as: (i) normally executed by the company or other companies engaged in similar activities, regardless of whether the company executed such transactions before; provided that (ii) the transaction does not result in either (a) termination of the company's operations, or (b) a change in the nature of the business, or (c) a change in the scale of the business of the company.

By way of exception, the law does not require approval as major transactions:

(i) of the company in which the sole shareholder (participant) also acts as the chief executive officer;

(ii) of LLCs whereby a participatory interest in the company is transferred to the company as required by law;

(iii) of JSCs relating to initial public offering of their shares;

(iv) to transfer assets as part of a corporate reorganisation such as a merger or accession;

(v) executed as required by law or a Governmental regulation;

(vi) with the price established by law or the Governmental regulation;

(vii) executed pursuant to a standard form contract;

(viii) executed as a result of the company making a mandatory public offer to purchase shares from the shareholders of a public joint stock company; or

(ix) contemplated by a preliminary agreement duly approved by the company.

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The approval procedure for major transactions was amended for both JSCs and LLCs, with a more complex procedure introduced for JSCs. The Law on JSCs now provides that if a major transaction requires approval of shareholders, the board of directors or, in its absence, the chief executive officer, shall prepare a report indicating the potential consequences of the transaction for the company and assessing its feasibility.

Both the Law on JSCs and the Law on LLCs now permit the counterparty to remain anonymous in the approval decision, if the counterparty may not be established as of the approval date.

The laws now provide an option to include in the approval resolution a general framework of the commercial terms, to approve a number of similar transactions, and to specify alternative transactions terms.

A standard general one-year validity term of the approval is now established. The term may be changed in the approval resolution.

A new approach to contesting major transactions lacking the required approval was introduced. As of 1 January 2017 only shareholder(s) (participants) holding at least 1% of voting capital can challenge transactions on this basis. Further, the right was extended to board members acting individually. The company itself preserved the right to challenge major transactions as well.

There is no more need to show that the contested transaction resulted or may result in losses or other negative consequences for the claimant shareholder (participant) or for the company. Moreover, the claimant shareholder (participant) may now contest all transactions including those whose approval could not have been influenced by the claimaint's voting. Balancing this off, the burden of proof with respect to bad faith behaviour was shifted to the claimant. The latter is now required to prove that the company's counterparty knew or should have known that the transaction was a major transaction for the company and that it was not duly approved.

- *Interested party transactions*

The most notable change in regulation of interested party transactions is that private companies, both in the form of LLC and JSC, are now free to totally exclude the approval requirement for interested party transactions, or introduce in the articles an approval procedure different from the one set out in the law. The default statutory rules were revamped as described below. The changes are generally similar for both LLCs and JSCs, and were aimed to make life easier for the management of major companies by reducing the number of transactions that require approval.

An interested party transaction was redefined and is now linked to the definition of "control" instead of the affiliation test. This resulted in an increase of the participation test from 20% to over 50% as described below. Broadly, a transaction shall be treated as an interested party transaction if there is: (i) an interest of a member of the governing body of the company; or (ii) an interest of the "controlling person". The "controlling person" is the person controlling directly or indirectly over 50% of votes or able to appoint over 50% of the board of directors or another collegial body, or able to appoint the sole executive body of the company. The Russian Federation, a subject of the Russian Federation or a municipality will not be regarded as a "controlling person" for this matter.

The threshold was preserved at a 20% level for strategic enterprises and for state-controlled JSCs.

The law now includes a broad list of transactions exempt from the approval procedure. The exemptions are generally similar to those applicable to major transactions discussed above.

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An important broad exemption covers similar transactions entered into on similar terms, "within the scope of normal business activity". It applies if the company had entered into similar transactions on numerous earlier occasions within an extended period and such earlier transactions did not qualify as an interested party transaction.

Another notable exemption covers transactions involving assets with a transaction price or balance sheet value not exceeding 0.1% of the balance sheet asset value of the company as of the last reporting date. In order to control transactions of companies with significant value of balance sheet assets, the law provides that the transaction value of such transaction shall not in any event exceed the threshold set by the Bank of Russia. As of the date of this article, the Bank of Russia has not approved the thresholds, although a draft regulation has been made public.

An interested party transaction can now be ratified after closing unless a general director, a member of a management or supervisory board or a shareholder (participant) holding at least 1% of the voting share capital of the company has required preliminary approval of the transaction. However, persons who have interest in a transaction must still give prior notice to the company.

The value of interested party transactions which are subject to approval by shareholders and can't be considered at a board of directors' level was increased from 2% to 10% of the balance sheet asset value of the company (with certain exceptions).

As before, only those directors or shareholders who are not interested in the transaction requiring approval shall cast votes for these purposes. With respect to public companies, the law (as changed) only allows a not-interested director to vote if, in the preceding year: (i) such director or his/her family members did not hold management positions in the company; and (ii) such director was not a "controlling person" of the company or of its management company.

An important amendment deals with the calculation of the number of votes required for approval of interested party transactions by shareholders of JSCs. Previously a decision on approval of interested party transactions required a simple majority of all shareholders of the company not interested in the transaction. In public JSCs, the requirement often made approval of transactions burdensome due to failure of a sufficient number of minority shareholders to attend shareholders' meetings. Starting from 1 January 2017, the voting test was switched from the total number of disinterested shareholders to the shareholders *present at the meeting*. It should be noted that the related quorum requirements were not amended to reflect the new voting procedure, which may affect the practical use of the amendment. We would expect that this is a technical oversight which will be solved in due course.

The voting procedure for transactions that qualify simultaneously as a major and interested party also changed. Earlier, such transactions required approval only as interested party transactions. Following the amendments, the transactions of LLCs that are simultaneously major and interested party, will require a double approval: (i) as a major transaction; and (ii) by a simple majority of disinterested participants.

In JSCs, the shareholder approval procedure for transactions that are both major and interested party will depend on the value of the transaction. Transactions with value exceeding 50% of the company's balance sheet value of assets will require a double approval of: (i) ¾ of votes of shareholders present at a meeting; and (ii) a simple majority of votes of disinterested shareholders present at a meeting. Where the value of the transaction is between 25 and 50% of the company's balance sheet value of assets, the shareholders will only need to approve the transaction as an interested party deal.

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The procedure for challenging interested party transactions of LLCs and JSCs is generally similar. The persons entitled to challenge the transaction are the same as those entitled to challenge a major transaction. Unlike major transactions, interested party transactions may only be contested if they were adverse to the interests of the company. To a certain extent, this is balanced by a presumption that a transaction is against the interests of the company if (i) the approval is missing and, simultaneously, (ii) the company failed to provide to the claimant information on the transaction. The claimant will also have to prove that the counterparty knew or should have known that the transaction was an interested party transaction for the company and that it was not duly approved.

Civil law reform – Guidelines of the Supreme Court of the Russian Federation

More than a year has passed since the laws on obligations were significantly amended as part of an extensive civil law reform. In 2016, the Supreme Court of the Russian Federation officially interpreted some of these new rules in its Ruling No. 7 dated 24 March 2016, "On certain matters of application of general provisions of the Civil Code of the Russian Federation with respect to the obligations and its performance" (the "**Ruling**").

- *Claims for damages*

Damages and contractual penalties remain the principal remedies for a breach of a contract governed by Russian law. However, for a long time the Russian courts tended to dismiss claims for damages in case of failure to prove the amount of damages, and to reduce contractual penalties upon request of a defendant or at their own initiative.

The Ruling made significant steps towards facilitation of contractual claims for damages that were earlier quite burdensome to substantiate. In particular, it: (i) introduced a presumption of intent in case of misconduct; (ii) shifted the burden of proof on the defendant in certain cases (such as the proof of absence of wilful misconduct); (iii) provided for an implied causal link mechanism; and (iv) limited the ability to reject the claim, for the reason that the exact amount of damages was not substantiated. Although it is too early to predict how promptly the lower courts will start consistently applying these new guidelines and overcome the old trend on damage claims, the attention of the Supreme Court to this matter is *per se* a positive sign.

- *A Russian law indemnity*

The Civil Code (as amended in 2015) allows the parties of an outstanding obligation to agree that one party shall compensate to the other party losses arising in connection with certain circumstances. This instrument is viewed as an indemnity known to common law. The Ruling, however, narrowed the application of this instrument by stipulating that losses recoverable via such "indemnity" (a) shall relate to performance, amendment, termination or subject matter of the obligation existing between the parties of the indemnity, and (b) shall not represent a breach of that obligation. The clarification confirms the view that the obligation to compensate losses may not cover losses that have no connection with the obligation between the parties.

Another issue affected by the Ruling is the level of certainty required for determining the amount of losses subject to compensation. Article 406.1 of the Civil Code provides that a contract shall specify the amount of losses to be compensated or set out a method of calculation of such losses. This provision was sometimes interpreted as a requirement to set out in advance the exact amount of losses. The Ruling clarified that an agreement of the parties to compensate "all actual losses" or any part of them shall be sufficient to satisfy the requirements of the Civil Code.

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- *Culpa in contrahendo – fault in contracting*

The doctrine of *culpa in contrahendo* exists in many legal systems and provides for an obligation not to induce a negotiating partner to act to his detriment before a firm contract is concluded.

Article 434.1 of the Civil Code provides that upon entry into contract negotiations and in the course of their conduct, the parties shall have the duty to act in good faith. In particular, the parties shall not enter into negotiations in the absence of an intention to conclude an agreement. Providing the other party with incomplete or inaccurate information, or failure to provide material relevant information as well as a sudden and unjustified termination of negotiations, were mentioned in the law as examples of bad faith acts. The Ruling also clarified that the entry into negotiations with the intention to obtain confidential information or with the intention to prevent conclusion of a contract with a third party shall also be treated as a bad faith behaviour.

A party that conducts or interrupts negotiations in bad faith has the duty to compensate the other party for the losses caused by such behaviour. Such losses include expenses borne by the other party in connection with the conduct of negotiations and in connection with the loss of the possibility to enter into a contract with a third party.

The Ruling clarified certain issues with respect to the application of the new provisions. In particular, it explained that liability for bad faith negotiations shall be treated as a liability in tort but the presumption of tortfeasor's fault shall not apply in this case and the claimant shall prove the bad faith of the counterparty. The Ruling also mentioned that the mere fact of termination of negotiations without indicating a particular motive is not sufficient to constitute bad faith.

Taxation

- *Tax secrecy regime amendments*

From May 2016, Russian tax authorities can make the information which used to be a tax secret of a taxpayer, subject to the consent of the taxpayer, publicly available.

Information which it is suggested to be made public includes information on the amounts of unpaid taxes, as well as outstanding penalties and fines for tax violations. Revenue of a company, expenditure in financial accounts, amount of taxes and fees paid during the year and number of employees for the year preceding the year of publication of such information, will not be subject to tax secrecy regime, either.

The availability of this information will ease pre-transaction due diligence.

- *New thin capital rules*

From 1 January 2017, new thin capitalisation rules were implemented. In general, Russian thin capitalisation rules apply where a debt (which is determined in the tax legislation as a controlled debt) to a related foreign company is three or more times greater than debtor's equity capital. Furthermore, one of the following conditions shall be met in order to qualify a debt as controlled and to apply thin capitalisation rules:

(i) the debt should be owed to a related foreign party (25% affiliate);

(ii) the debt should be owed to an entity which is related to a foreign participant of the debtor; or

(iii) the debt should be secured or guaranteed by the above related parties.

One should note that although Russian tax law determines a number of factors which are used in order to qualify a person as related, the new version of the thin capitalisation rules

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is designed quite carefully, and application of these rules is excluded where parties can be qualified as related through corporate government bodies.

It is highly important to note that the courts are entitled to apply thin capital rules to other debts if a debt has been artificially structured in a way which allows the application of thin capitalisation rules to be avoided.

Several important exceptions have been introduced from 2017 to limit the impact of these new rules. In particular, thin capitalisation will not apply where:

(i) a debt secured by related parties is owed to a non-related bank and the relevant guarantee was not used for the debt settlement;

(ii) a debt is owed to Russian related parties which do not have an outstanding comparative debt to a foreign related party; or

(iii) a debt of a Russian debtor to a foreign related company has resulted from the issuance of Eurobond by this foreign related company.

- *Disclosure of beneficiaries*

From 1 January 2017 the Federal Law No.115-FZ dated 07.08.2001, "On Countering Legalization (Laundering) of Proceeds of Crime and Financing of Terrorism" (the "**AML Law**"), imposed new obligations on legal entities in respect of disclosure of their beneficiaries, in particular, the obligations: (i) to take measures on collection of information on beneficial owners and to update such data at least once a year; (ii) to possess and store information for a period not less than five years from its receipt; (iii) to provide, upon request of tax authorities, the available information or a report on measures taken to identify the information about the beneficial owners; and (iv) to disclose the information about beneficial owners in their statements. The participants and controlling entities will be required to provide such information to the competent authorities upon company's request.

For the purposes of the AML Law a "beneficial owner" shall mean a natural person who ultimately, directly or indirectly (through third parties), has dominant participation of over 25% in the capital of a legal entity or is able to control its actions otherwise.

The penalty for failure to comply with this above requirement varies from 30,000 to 40,000 rubles for company's officers, and from 100 to 500 thousand rubles for legal entities.

- *Transfer pricing*

From 1 January 2017 the transfer pricing regulation will not apply to interest-free loans between Russian related parties as well as to operations involving the provision of guarantees or other collateral if all the counterparties are Russian companies and are not banks.

- *Utilisation of tax losses*

A period for carrying losses forward is no longer limited to 10 years. Starting from 2017, it will be possible to carry forward losses up to complete exhaustion thereof. However, for the tax years 2017–2020 a temporary restrictive provision has been introduced which allows not more than 50% of the company's income to be reduced by way of carrying losses forward.

<u>Dispute resolution</u>

- *Arbitration*

On 1 September 2016, new Federal Law No. 382-FZ "On arbitration in the Russian Federation" came into force (the "**Arbitration Law**") which, together with certain ancillary ("satellite") regulations, introduced a new regime for establishing commercial arbitration institutions in Russia.

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In application to M&A transactions, the greatest value of the Arbitration Law was that it put an end to the discussion as to whether corporate disputes may be referred to commercial arbitration (and not only to the state arbitrazh courts) or not. The Arbitration Law expressly allowed consideration of a substantial amount of corporate disputes by commercial arbitration, but only by institutional arbitration with the permanent seat in Russia ("**Permanent Arbitration Institution**"). Moreover, with very few exceptions, in order to function Permanent Arbitration Institutions shall, first, be approved the Government of the Russian Federation based on recommendations of the special council formed by the Ministry of Justice of the Russian Federation.

As a matter of fact, no Permanent Arbitration Institutions are functioning in Russia at the moment save for the International Commercial Arbitration Court and Maritime Arbitration Commission of the Chamber of Commerce and Industry of the Russian Federation. They will be able to consider corporate disputes once they approve corresponding rules.

The coming year will show whether the arbitration reforms give enough of an incentive to develop independent arbitration institutions in Russia capable of resolving disputes arising out of or in connection with M&A deals.

* * *

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Serbia

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Overview

Overview of the Serbian regulatory field

The most important piece of legislation in terms of M&A transactions in Serbia is the Companies Act. Other laws that are of relevance are: (i) the Takeover Act; (ii) the Capital Markets Act; (iii) the Law on Contracts and Torts; (iv) the Competition Act; and (v) the Labour Act. Additional by-laws, guidelines and regulations of competent authorities provide for further, more detailed rules. Matters regarding acquisition of assets or shares of companies undergoing insolvency proceedings are governed by the Bankruptcy Act, whilst the Privatisation Act is applicable to transactions involving state-owned companies.

Authorities that may play a role in the course of an M&A deal include the Commercial Registry, the Securities Exchange Commission, the Central Securities Registry, the Commission for Protection of Competition and the Privatisation Agency, as well as several regulatory agencies, depending on the sector in question.

The mechanics of an M&A transaction differ greatly and depend on the legal form of the target company (public or private joint stock company or a limited liability company), ownership of the target company (private, social or state-owned). The latter two trigger the application of the above-mentioned Privatisation Act (which is presented in more detail below under 'Key developments'), and the sector in question (the most notable regulated sectors are banking, insurance, leasing, media and telecommunications).

Acquisitions of limited liability companies are, as a rule, less complex, as a smaller portion of mandatory rules need to be abided by. Joint stock companies, both public and private, which have more than 100 shareholders and equity surpassing €3m as targets, also trigger the application of the Takeover Act, i.e. takeover bid rules, while the Capital Markets Act only applies to transactions involving public joint stock companies listed on an organised market in Serbia. Takeover bids (mandatory and voluntary) have to be open for at least 21 days, but no longer than 45 days. This maximum term can be extended in cases of bid amendments to 60 days, and may be extended to 70 days in cases of competing bids and takeover battles.

Regulated sectors have an additional set of specific rules that may make it necessary to secure additional approvals or notify the regulator of the planned transaction. These rules need to be observed primarily for their potential as deal-delayers. Failure to comply with such rules may lead to the nullity of the transaction or suspension, or revocation of the licences obtained to carry out business.

The possibility that an M&A transaction will be notified to the Serbian Commission for Protection of Competition, i.e. that a merger clearance becomes necessary, is highly likely

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as the turnover thresholds are set relatively low. At the same time, obtaining a merger clearance may be one of the more time-consuming aspects of a deal – decisions are issued in Phase I within one month of filing having been completed, while Phase II can take up to additional four months. A standstill obligation must be respected until a clearance is obtained.

Transactions are predominantly structured as share or asset-for-cash deals. Securities for cash or hybrid deals are generally possible, but are not common practice. Share-for-share deals are not often encountered either, with the Securities Exchange Commission issuing an opinion that such deals are not compliant with the securities' regulations.

Transactions are commonly preceded or followed by status changes (*statusna promena*) or changes to legal form (*pravna forma*). It is common for public joint stock target companies to undergo a delisting process or a change of legal form process; for example, transformation from a joint stock company to a limited liability company. This enables more flexible legal treatment and avoids the application of the securities and takeover regulations.

Serbian foreign exchange rules can potentially have a big impact on the structuring of a deal as well, especially in terms of payments, lending and collaterals which are cross-border in nature. Such transactions are prone to numerous limitations introduced by the Foreign Exchange Act and subject to scrutiny of the stringent National Bank of Serbia.

Overview of the Serbian M&A market in 2016

In general, the Serbian M&A market was rather calm in 2016, especially in comparison to the previous two years that were each marked with one big takeover, worth approx. €1bn and €0.6bn respectively (in 2014 that was the takeover of the SBB/Telemach telecom group by the US investment fund KKR, and in 2015 the takeover of Danube Foods Group, a group of branded consumer goods companies, by a private equity firm Mid Europa Partners, now operating under the name My Brands). The reason for such a slow year can largely be found in the fact that 2016 was an election year in Serbia, which might have acted as a deterrent for investors due to volatility of the political, and thus economic, situation in the country. Direct foreign investments into the Serbian market did not, however, entirely halt but were largely made in a form other than M&A (e.g. green-field investments).

Significant deals and highlights

The most significant M&A transactions took place in the first half of 2016.

In April 2016, after a long public tender procedure, Chinese steel company HeSteel reached a deal with the Republic of Serbia for the purchase of Železara Smederevo, state-owned steel mill company. The deal took the form of asset purchase and its value was estimated at €46m, with the Chinese investor taking on an additional €300m to invest in the development of the mill.

The second important deal was the takeover of Niška Mlekara, a dairy producer, by the biggest dairy producer in Serbia, Imlek, a member of the mentioned My Brands Group. The acquisition of 100% stake in Niška Mlekara was initiated in October 2015, but was delayed until March 2016 when the Serbian Commission for Protection of Competition cleared the transaction in Phase II after an investigation into whether the transaction would lead to the strengthening of the dominant position of Imlek in the market for dairy products. The significance of the deal does not lie in its value (less than €3m), but rather in its repercussions on the dairy market given the dominant position of Imlek.

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Another significant deal was the takeover of the sugar factory Te-To Senta (previously in the hands of the Italian SFIR) by Serbian Sunoko, another sugar producer, estimated at €25-30m. This deal was also interesting from a competition law perspective as it was believed it led to the creation of a dominant position on the market. The transaction was ultimately cleared, subject to conditions.

Foreign investments in 2016, like in the previous years, were mostly characterised by further expansion of foreign companies already present in Serbia or by new market participants entering the market and building their presence from the ground up. The trend of investing in the automotive industry maintained its pace, given the large portion of realised investments in recent years. An important global player, Lear Corporation, a world-class automotive seating company, has initiated the process of significant investments in Serbia that is intended to continue in the next couple of years. The 2016 investment alone is estimated at €30m.

Key developments

In the last couple of years, one of the prime goals of the Serbian government has been the implementation of reforms that aim to attract investors and establish an appealing business environment. In order to enable this, several important laws were amended throughout 2014 (e.g. Labour Act, Privatisation Act, Bankruptcy Act, and Foreign Direct Investment Act, Planning and Construction Act and Energy Act), while 2015 saw legislative activity in the areas of the Companies Act, Privatisation Act and Bankruptcy Act, and a new Investments Act enacted at the end of October 2015.

In 2016 legislative activity of the National Assembly in this department has not been as high as in the previous years.

Most notably, further amendments of the Privatisation Act, which has been shaped since 2014 in order to enable the privatisation of hundreds of state-owned companies, were made at the very end of 2015 and came into force in February 2016. Among other things, the amendments have in several instances made the regime of privatisation of the *big subjects of privatisation* different from the regular regime. Big subjects of privatisation are defined as entities whose annual turnover in the year preceding the year in which the privatisation process began exceeded RSD50bn. It is clear that only the largest state-owned companies will qualify as big subjects of privatisation. The differences in mechanism boil down to the general rules prescribed for own treasury shares, conditions for termination of the privatisation agreement, and the legal consequences of termination not being applicable to the process of privatisation of large entities. In this way, the state probably wants to leave itself more room for manoeuvre in the coming negotiations for the privatisation of the biggest state-owned entities, and retain the ability to afford more favourable terms to potential investors. Another significant change also brought about the winding-up of the Privatisation Agency, whose jurisdiction is now in the hands of the Ministry of Economy.

The Capital Markets Act was also amended in 2016, with more significant changes of both this act and the Securities Act to come by the end of 2016. The aim of the intended changes is to prevent fraud on the stock exchange and make the stock exchange more stable and transparent. Through these changes, the state seeks to make the stock exchange more appealing to companies and incentivise them to go public and generate capital in this way, rather than through banking loans. Ultimately, the development of the stock exchange is supposed to lead to third generation investments.

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Industry sector focus

Below is an overview of several industry sectors, with data on the non-M&A investments made in 2016. These sectors, being the most appealing ones in Serbia, may also become an interesting environment for M&As in the coming years.

Food & Agriculture

Food & Agriculture is one of the strongest components of the Serbian economy. The export-oriented food and agriculture sector has contributed to the development of the whole region. The trade balance of agricultural products is in constant surplus, while Serbia ranks as the biggest exporter of food products among Central European Free Trade Agreement (CEFTA) countries.

Fruit production is one of the key sub-sectors of Serbia's economic development, according to the data from 2014. Serbia exports €57.6 *per capita,* making it 13th in the world in the field of the fruit production. Also, Serbia is the largest provider of frozen fruit to the French and Belgium markets, and the second-largest on the German market in 2015. An excellent raw material base, a network of free trade agreements, a long tradition of high-quality food production and strong regional brands are key reasons why world class companies have come to Serbia; the agro-food sector accounts for a massive proportion of foreign direct investment, both in terms of value and the number of projects. Due to unused soil and perfect climate conditions, Serbia is estimated to be able to produce three times as much food in the future as it does today. Taking into account rising global food demand, Serbia may well become an even more important international player.

By means of a set of free trade agreements, Serbia serves as a platform for the duty-free export of foodstuffs to a market of roughly 1 billion people. In addition to being the only country outside the Commonwealth of Independent States (CIS) that has a free trade agreement with the Russian Federation, Serbia has also signed such agreements with the European Union and a number of other countries. This particular fact makes it a bridge between East and the West and a hub for the Euro/Asian market.

Over the past decade, the Serbian food industry has repeatedly topped the list of most attractive sectors for foreign investors. United States' Pepsico, German Nordzucker, Austrian Rauch, United Kingdom's Salford and Ashmore, Denmark's Carlsberg, and Belgium's AB InBev, as well as many others, have established factories in Serbia in order to supply local, but also other EU markets, as well as the ever-growing Russian market.

The sector is also benefiting from the huge investment of Mid Europa Partners and their ambition to further enhance the value of My Brands Group.

The value of investments in the food and agriculture sector in 2016 is estimated at €523m. Some of the biggest investors in the sector include the Belgium multinational company Anheuser-Busch InBev NV (€400m), French Somboled-Dukat Lactalis group (€26m − dairy products), Austrian Gierlinger Holding (€20m), Italian MK Fintel Wind – (€15m), German Dr Oetker (€10m), and Italian company Ferrero (€8m).

Also, in 2016, Salim Group − one of the world leaders in food production − established its factory in Serbia (first factory of the Group in Europe), and the estimated value of the investment is €11m.

According to the available data on investments into the food and agricultural sector until now, it is safe to assume that this sector will remain particularly appealing to investors in the coming period, perhaps also in the form of M&A.

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Automotive industry

Considering data that it represents 10% of Serbian exports, around 14% of the value of foreign investments, and the fact that it employs more than 40,000 workers, the automotive industry is certainly one of most important industrial sectors in Serbia at the moment.

Being the only country outside of the Commonwealth of Independent States that has a Free Trade Agreement with the Russian Federation and due to a number of free trade agreements, Serbia can serve as a manufacturing hub for duty-free exports to a market of more than 1 billion people that includes the European Union, the United States of America, the Russian Federation, Kazakhstan, Turkey, South East Europe, the European Free Trade Agreement members and Belarus. This makes Serbia particularly interesting in terms of the location of production facilities, which can be seen in the automotive industry.

Some of the investments in this sector in 2016 worth mentioning include an investment of the Czech company Mitas, amounting to €14m; German NORMA Group also invested €12m in the sector; Canadian MAGNA Seating made investments in the amount of €11m; Italian Lames €8m; French Hutchinson €7m; and German IGB Automotive €5m.

To date, more than 70 factories have been built in Serbia by international investors, with total capital value over €2.1bn, so taking into account the customs-free regime and all the other benefits of investment in Serbia, it is more than likely that the trend of investing in this sector will continue.

Textiles

Textile and garment production has a long history and an admirable tradition of fruitful collaborations with foreign partners. Over the last 10 years, the Serbian fashion industry has evolved from a domestic, manufacturing-based industry into a design-oriented sector operating in the global marketplace. Over 1,500 companies employing 30,000 personnel operate in the Serbian textile industry, which includes garment, textile and leather production. This accounts for nearly 2% of the total number of companies and 2.9% of the total number of employees in Serbia, or 8.7% of employees in the manufacturing sector. The companies involved in textile and garment production generate 0.7% of Serbia's total turnover.

The fact that the textile industry is highly dependent on imported materials creates extensive opportunities for investments in this field. In order for Serbian textile producers to benefit from existing agreements with the EU, it is necessary for all the raw materials used in the production of textiles and garments to be either of Serbian or EU origin. Since importing raw materials from the EU raises the price of the final product, it would be significantly more cost-efficient for the raw materials to be of Serbian origin. Any investments in the production of domestic raw materials would have a quick return, as any raw materials produced locally would almost certainly guarantee the sale of these items.

Many business opportunities can be found in the production of ready-made garments. The industry has a large capacity for cut, make & trim (CMT), with quality levels and delivery times which can satisfy even the most demanding clients. Serbia has traditionally cooperated with many foreign partners and has been one of the leading garment manufacturers for luxury brands. Fashion industries in France, Germany and Italy have made extensive use of production capacities in Serbia, whilst capitalising on highly qualified and low-cost labour. Clients have included Gucci, Hugo Boss, Valentino, Dolce&Gabbana, Benetton, Tommy Hilfiger and many more. Moreover, competitive advantages offered by Serbian companies include design, full-package and private labelling capabilities, as well as the

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ability to offer collections to customers whilst at the same time guaranteeing reliable and high-quality productions.

Compared to other countries in the region, Serbia is well known for having a large number of domestic companies with their own brands. These companies are able to set up an OEM model of cooperation with foreign companies, which includes taking responsibility for material sourcing and logistical coordination, and can provide production services such as finishing and packaging for final delivery to retailers. Serbian companies with their own brands are quite interested in the OEM model of cooperation, in particular in those markets where they are not currently selling their own products. The OEM model offers a decisive competitive advantage to the Serbian garment production industry over other countries in the region.

In terms of the number of investment projects and jobs created, the textile industry ranks quite highly on the list of attractive sectors. Companies such as Benetton, Calzedonia, Golden Lady, Pompea and many more extensively use Serbian production facilities as secondary manufacturing sites for the production of high-quality garments. Moreover, the fact that Calzedonia, Golden Lady, Pompea and others have already reinvested in Serbia speaks volumes about Serbia's role as a valuable partner and host in this rapidly growing market.

The largest foreign direct investment in the textiles industry was recorded in the area of hosiery production, primarily due to Serbia's status as a most favoured nation, granted to it by the US in 2004/2005. As a result, tariff rates for hosiery manufactured in Serbia are lower than tariff rates for hosiery manufactured in the EU. It is for this reason that Italian hosiery firms such as Golden Lady and Calzedonia, as well as Germany's Falke, are manufacturing their products in Serbia.

Significant investments in the textile sector in 2016 include the investment of the Italian Flash SRB in the amount of €40m; Italian Fiorano Calzedonia (€30m); Italian Andriana Tex (€11m); and Italian Fulgar (€9m).

Taking into account that the number of textile factories is increasing from year to year, it is expected that the Serbian textile industry will soon be one of the top sectors in Serbia as well as one of the top textile industries in the region.

The year ahead

Legislative changes enacted and intended for 2016, and the ones already made in previous years, are meant to pave the way for a more productive year in terms of M&A transactions. This especially holds true for public M&As in light of the developing Privatisation Act.

Most of the companies the government has lined up for privatisation are loss-making companies and will probably, without the help of foreign investors, end up going into bankruptcy proceedings. However, the ones that are expected to attract serious interest are Mining and Smelting Complex Bor (copper mine), PKB Corporation (agriculture), pharmaceutical company Galenika, fertiliser manufacturer HIP Azotara, and furniture maker Simpo. The highly anticipated privatisation of the incumbent telecommunications operator Telekom Srbija, state-owned commercial bank Komercijalna Banka, insurance company Dunav Osiguranje, and Belgrade's Airport Nikola Tesla, are still not close to being finalised and are continuously postponed. It can be expected that more significant developments in the field will occur in 2017, being the post-election, and thus politically and economically more stable, year.

Besides the expected privatisation processes, it seems that mergers can be expected in the banking sector as well in 2017.

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Singapore

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Overview

Singapore – Laws and regulations relating to M&A

The laws and regulations relating to mergers and acquisitions ("M&A") in Singapore are found in various specific rules and regulations, and in general principles of contract and company laws.

For companies incorporated, registered in Singapore or carrying on business in Singapore, the laws and regulations applicable to M&A are primarily contained in the Companies Act, Chapter 50 of Singapore ("Companies Act"), the Securities and Futures Act, Chapter 289 of Singapore ("SFA") and their relevant subsidiary legislation.

Real estate investments trusts ("REIT") are subject to the SFA and Code on Collective Investment Schemes issued by the MAS. Business trusts ("BT") are subject to the Business Trusts Act, Chapter 31A of Singapore.

The Companies Act applies to both private and public companies and generally deals with rules and regulations relating to the establishment of companies, basic governance rules including maintenance of capital, director's duties and liabilities, compulsory acquisition, schemes of arrangement and amalgamations.

The SFA deals with securities offerings, licensing and business conduct of providers of capital markets services, substantial shareholder notifications, rules relating to scripless shares and market conduct rules (e.g. insider trading prohibitions and market manipulation). It is worthwhile noting that in Singapore there is no distinction between private and public securities offerings although there are specific exemptions available from compliance with the securities-offering regime.

In addition, public companies, REIT and BT which are the subject of takeovers, schemes of arrangement, trust schemes or schemes of amalgamation are also subject to the Singapore Code on Take-overs and Mergers ("Code") issued by the MAS pursuant to the SFA. While the Code is drafted with listed entities in mind, it is stated clearly in the Code that the specific rules and general principles set out in the Code can also apply to unlisted public companies, REIT and BT with 50 or more shareholders or unitholders and net tangible assets of S$5m or more.

Listed entities are also subject to the rules of the Singapore Securities Exchange Trading Ltd ("SGX") set out in its listing manual ("SGX Listing Manual"). The SGX Listing Manual has one set of rules for entities listed on its Main Board and another for entities listed on Catalist (which is for companies with smaller market capitalisation, etc.). Both sets of rules are broadly similar and deal with continuing listing and disclosure obligations,

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interested party transactions, acquisitions and disposals and routine shareholder matters.

We have set out below the more common structures utilised in Singapore for M&A in private and public M&A. It should be borne in mind, though, that certain structures set out below can be utilised by both private and public companies (such as the scheme of arrangement or amalgamation), depending on how the transaction is sought to be effected.

In addition, all M&A transactions in Singapore must consider the application of the Competition Act, Chapter 50B of Singapore which is enforced by the Competition Commission of Singapore, as the Competition Act prohibits, amongst other things:

(i) agreements which have as their object or effect the restriction, distortion or prevention of competition within Singapore;

(ii) conduct which amounts to the abuse of dominant position in any industry in Singapore; or

(iii) mergers resulting in, or which may result in, a substantial lessening of competition in any industry for goods or services in Singapore.

Other industry-specific legislation such as the Banking Act, Chapter 19 of Singapore, Insurance Act, Chapter 142 of Singapore, and the Financial Advisers Act, Chapter 110 of Singapore, may also impact an M&A involving entities governed by these legislation. Where there are entities in other regulated industries, any conditions imposed by the regulatory authority would also need to be considered.

Common structures for private M&A

In Singapore, private M&A transactions would most commonly be effected by one of the following structures:

(i) an acquisition of shares with voting rights by way of a sale and purchase agreement;

(ii) an acquisition of a business or assets by way of a business or an asset purchase agreement; or

(iii) a joint venture whereby two or more parties cooperate for a particular common business goal either by participating in an incorporated or registered vehicle or by way of an unincorporated arrangement.

Common structures for public M&A

In Singapore, public M&A transactions can be effected, amongst others, by one of the following structures:

(i) a takeover of a public listed company, REIT or BT by way of a general offer for all of the voting shares or units in a public listed company, REIT or BT effected in accordance with the Code;

(ii) a scheme of arrangement (which is a legislative procedure to restructure a company) under section 210 of the Companies Act, which has to be approved at a scheme meeting by a statutorily-imposed majority in numbers and holding three-fourths in value and sanctioned by the High Court of Singapore, at which point it is binding on all shareholders;

(iii) a scheme of amalgamation under sections 215A-J of the Companies Act which allows two or more Singapore incorporated companies to amalgamate and continue as one company through a voluntary amalgamation process; or

(iv) a trust scheme constituting an acquisitions of units in a BT.

Of these, (i) and (ii) are the most common structures.

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Significant deals and highlights

According to reports, while the number of M&A deals in Singapore increased, deal values actually fell in 2016. Amongst the largest deals was the acquisition of Asia Square Tower 1 by the Qatar Investment Authority from Blackrock for S$3.4bn.

On the public M&A front, take-privates and delistings from the Singapore Exchange were a common theme in 2016. According to a *Business Times* report in December 2016, a total of 26 companies were delisted from the Singapore Exchange. Seven companies with a market capitalistation of more than S$1bn were delisted, including Neptune Orient Lines ("NOL"), SMRT Corporation, China Merchants Holdings (Pacific), Biosensors International, Tiger Airways, Sim Lian Group and Osim International. Other than NOL, these delistings were initiated by the existing shareholders of the respective companies.[1]

Key developments

Key developments impacting M&A in Singapore going forward include the coming into effect of the changes to the Code in March 2016.

<u>Code changes</u>:

The key changes to the Code are as follows:

(a) <u>Providing certainty in cases of competing offers</u>

To provide greater certainty on the applicable procedures and timelines where there are competing offers, amendments have been made to: (i) clarify that the offer timetables will be aligned to that of the latest offer; and (ii) prescribe a default auction procedure, if neither offeror has declared its final offer price in the later stages of the offer period.

(b) <u>Encouraging pro-active offeree boards</u>

To encourage offeree company boards to take a more active role in safeguarding shareholders' interests, amendments have been made to clarify that: (i) soliciting a competing offer or running a sale process does not amount to frustration of the existing offer; and (ii) an offeree board may consider sharing available management projections and forecasts with the independent financial adviser.

(c) <u>More timely disclosure</u>

To ensure that shareholders and investors are apprised of material information on a timely basis, the Code will now require earlier disclosure of any material change to information previously published in an offer.

(d) <u>Codifying and streamlining existing practices</u>

The Code has been amended to: (i) clarify the standards that are required of pre-conditions in a pre-conditional voluntary offer; (ii) allow the offeree company to post the offer document at an earlier date in a pre-conditional offer; and (iii) clarify how the offer value for a different class of shares (e.g. preference shares) should be calculated.

In addition, the secretariat of the SIC has started a periodic newsletter, "Take-overs Bulletin", in 2016 for participants in take-overs and mergers. The aim of the bulletin is to provide market participants with: (i) a better understanding of the Code; (ii) guidance on procedures to comply with the Code; and (iii) updates on regulatory developments.

<u>Budget proposals for tax incentives for M&A</u>

The M&A scheme was first introduced in 2010 (and now extended to 2020) to encourage companies to consider M&A as a strategy for growth and internationalisation and is

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relevant for any company incorporated and tax resident in Singapore.

In the 2016 Budget,[2] the following changes were proposed to the M&A scheme which took effect for acquisitions made from 2016:

Revised tax benefits under the M&A scheme

(a) The M&A allowance rate of 25% is capped at S$20m for qualifying share purchases.

(b) The cap on the value of qualifying acquisitions for the M&A allowance per Year of Assessment is now S$40m.

(c) Stamp duty relief on the transfer of unlisted shares has been correspondingly capped at S$40m on the value of qualifying M&A deals.

Industry sector focus

According to data from corporate finance advisory firm Duff & Phelps reported in *The Straits Times*[3], the biggest contributor to M&A deal values in 2016 Singapore was the real estate sector at close to 30%, overtaking the technology sector which was last year's leader, now slipped to third place after the industrial sector. The report also said that private-equity and venture-capital investments in Singapore companies this year increased in value to US$3.5bn compared to US$2.2bn, US$2.4bn and US$0.9bn for 2015, 2014 and 2013, respectively.

The year ahead

Going forward in 2017, take-privates and delistings should continue to dominate the local M&A scene. The major shareholders of both Global Logistics and United Engineers are reported to have commenced processes to maximise value for their stakes in the listed companies. Whether these companies and others will be taken private and delisted in 2017 remains to be seen.

According to the *Singapore Business Review*,[4] Singapore may see a subdued M&A uptick in 2017. Citing a report by Intralinks Deal Flow Predictor, the top three sectors predicted for M&A activity are TMT, Industrials and Healthcare. M&A activity may be spurred by the need for survival and long-term profitability, which in turn may result in consolidation of players in industries affected by cost-cutting and where players are over-leveraged. Another potential driver for M&A activity in Singapore is likely to be companies unlocking value, boosting weak profits or streamlining operations through divestments, which in turn mean more assets may be available for disposal. With the depressed property market and property stocks trading low, property players and REITs may particularly be subjects of interest. In summary, despite the concerns about the effect that the weakening economy and market volatility may have on Singapore-led M&A activity, there appear to be some grounds for cautious optimism.

* * *

Acknowledgment

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Endnotes

1. Based on *The Business Times* report on 21 December 2016.
2. Singapore Budget 2016 and Singapore Budget Synopsis 2015, PwC.
3. Data from Duff & Phelps as reported by *The Straits Times* on 13 December 2016.
4. Based on the *Singapore Business Review* report on 17 November 2016.

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Spain

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Overview

The Spanish economy has continued growing during 2016 as it did over the past two years. This positive trend suggests that the economic recovery initiated by mid-2013 is consolidating. Foreign political turmoil, such as Brexit or the uncertainty following the U.S. elections, have shown, so far, no material effects or direct impact on the Spanish economy during 2016. Although there are no official figures yet, the Spanish Government projected a 3.3% GDP growth for 2016 (a similar growth rate was reached in 2015, which represented one of the major growth rates in the Eurozone).

This growth is a result of an increase in domestic consumption, reflecting a higher confidence and overall better perception of real economy. In addition, the Spanish Government has put in place budgetary austerity and labour market reforms that led to an improvement of the Spanish economy. Unemployment is still a big concern; Spain has consistently reduced unemployment since 2013. As of December 31, 2016, the unemployment rate reached 18.4%, which is 2.3% lower than the unemployment rate seen on December 31, 2015. In June 2016, the unemployment rate was below 20% for the first time in the last six years.

Spain has found the path to stability and growth but left behind a rather complicated situation, making it, once again, a very interesting market for investors. Prices, valuation criteria and EBITDA multipliers of target companies and assets remain stable, allowing buyers and sellers to easily align positions.

The Spanish M&A market

Transactional activity is usually linked to general economic conditions and the deal-making environment. This was the case again in 2016, when Spanish M&A transactions totalled €111bn, which is 11.0% higher than the €100bn seen in 2015. In addition, M&A deals increased by 3.1% in number from the already elevated levels seen in 2015, which recorded a 10.5% increase compared to 2014.

Mid-market transactions (i.e. between €100m and €500m) reached €26.7bn and showed a 43.5% increase compared to 2015. Large-sized (i.e. for amounts over €500m) and small-sized transactions (i.e. transactions for amounts lower than €100m) showed a slight increase in value of 4.5% and 1.1% respectively, but a decrease in number of 6.5% and 1.1% respectively, compared to 2015, reaching a total of €72.4bn and €12.4bn.

The robust increase shown in 2016 was encouraged by factors similar to those presented in 2015: continued economic growth; low interest rates and increased market liquidity; negative inflation; foreign trade balance; and stable risk premium for the Spanish sovereign debt.

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Inbound investments increased both in number – reaching 459 transactions – and in volume, reaching a peak of €34.2bn during 2016. The number of foreign acquirers of Spanish companies increased by a remarkable 9.3%. The ranking per country investing in Spain, considering the aggregate value, was led by the UK with €5.4bn, followed closely by the US and France, with €5.3bn and €4.2bn, respectively.

Outbound investments remain positive. During 2016 the number of outbound investments reached 222 transactions, representing an increase of 25.4%. The UK with €20bn, Portugal with €2.6bn and the US with €2.5bn, were the top three target countries for Spanish corporates.

The most active sector in terms of M&A deals was real estate, with 519 deals closed of the total number of M&A deals during 2016, which represents an increase of 11.6% compared to 2015. The upward trend that began in 2014 continued throughout 2016. In general terms, the real estate market continues growing as big banks keep unloading assets and tax structures such as Spanish Reits (SOCIMIS) and collective investment vehicles remain appealing to domestic and foreign investors.

In recent years, foreign investment funds have been the main players in large real estate transactions or transactions with an underlying real estate component, such as sales of loan portfolios (both performing and non-performing) or property acquired by Spanish financial institutions through mortgage foreclosures. Years of credit bubbles and the crisis that followed in certain markets left a considerable number of asset-secured non-performing loans (NPLs) or NPLs-to-be in the hands of financial institutions and later in the hands of 'bad banks' or equivalent government entities. In Spain, financial institutions and the Spanish bad bank (*Sociedad de Gestión de Activos Procedentes de la Reestructuración Bancaria,* or SAREB for its acronym in Spanish) are estimated to hold around €200bn in this type of asset which they are now ready to sell. New accounting standards and capital requirements (particularly those deriving from the intended adoption of IFRS 9 Financial Instruments for Spanish financial institutions) may also accelerate sales by financial institutions.

These transactions have been characterised by offering portfolios of highly discounted assets to international investment funds, for the purpose of either clearing the balance sheets of the owners (financial entities), or simply transferring their asset balances prior to their exit from the Spanish market.

Significant deals by sector

- *Real estate:* the most active sector during 2016, with 519 transactions. An example of a major transaction in the real estate sector was the acquisition by Inversora Carso, S.A. de CV of Fomento de Construcciones y Contratas, S.A. for a value of €5.7bn. Other significant real estate deals were the acquisition by Merlin Properties SOCIMI of Metrovacesa (€3.8bn); the acquisition by China Tianying Inc of Urbaser, S.A. (€2.2.bn); and by Amancio Ortega (private investor) of Torre Norte Castellana S.A. (€490m). In addition to the foregoing, there were significant asset-secured NPL transactions that are worth mentioning: (i) Blackstone Group acquired a NPL portfolio from Banco Popular Español, S.A. for loans to the value of €620m; (ii) Hayfin Capital Management LLP acquired several secured credits from Sareb, for a par value of the loans of €158m; and (iii) Apollo Group Management acquired a portfolio of real estate assets and secured credits (hotels as underlying assets) owned by Caixabank, S.A. with a nominal value of €350m.

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- *Technology and Clean Energy:* technology and clean energy were the second-most relevant sectors by number of transactions during 2016, with an aggregate of 355. The merger of the wind power generation business unit Gamesa Corporación Tecnológica, S.A. with Siemens AG for a total value of €6.6bn resulted in the leading wind power generation company in the world. Other significant deals in these sectors during 2016 were:
  - the acquisition of a 35% stake in Gestamp Automoción by the Riberas Family from ArcelorMittal S.A. for €885m;
  - the acquisition of a 53% stake of Industria de Turbo Propulsores, S.A. by Rolls Royce Plc from SENER Grupo de Ingeniería, S.A. for an amount of €720m;
  - the acquisition of Xfera Móviles (Yoigo) by Masmovil Ibercom, S.A. from Telia Company AB, Actividades de Construcción y Servicios, S.A., Fomento de Construcciones y Contratas, S.A. and Abengoa, S.A. for an amount of €612m;
  - the acquisition of 23 onshore wind farms and a 49% stake of Renovaveis, S.A. by EFG Hermes Private Equity for an amount of €550m;
  - the acquisition of Borawind Energy Management, S.L. by Corporación Masaveu, S.A., from Bridgepoint bdc Ltd. for an amount of €500m; and
  - the acquisition of Privalia Venta Directa, S.A. by Vente-Privee.com S.A. for an amount of €500m.
- *Financial sector:* The financial sector was the third-most relevant sector in number, with 159 deals. Some significant transactions were: (i) the acquisition of Barclaycard consumer business by Wizink Bank S.A. from Barclays Plc. for an amount of €1.2bn; (ii) the acquisition of Banco BPI by Caixabank S.A. for an amount of €907m; and (iii) the acquisition of Akula Soluciones Financieras, S.A. by Lindorff Group AB from Banco Santander for €294m.
- *Healthcare:* In the healthcare sector the most significant transactions were: (i) the acquisition of CVC Capital Partners Ltd. of Quironsalud from HELIOS kliniken GmbH for €5.7bn; and (ii) the acquisition of Hologic Inc.'s participation in the joint venture Hologin Inc Nat Screening unit by Grifols, S.A. for an amount of €1.7bn.
- *Oil, gas and energy supply:* In the traditional energy sector: (i) the acquisition of a 20% stake of Gas Natural Fenosa, S.A. by Global Infrastructure Partners from Repsol, S.A. and Criteria Caixaholding, S.A. for an amount of €3.8bn; and (ii) the acquisition of a 60% stake of Enel Green Power España, S.L. by Endesa, S.A. from Enel SpA for an amount of €1.2bn were significant deals during the period.

Legal framework

The general principle that governs private transactions in general and M&A transactions in particular is the parties' free will. The Spanish Civil Code (*Código Civil*) specifically foresees this principle, establishing that the contracting parties may establish any covenants, clauses and conditions deemed convenient, provided that they are not contrary to the laws, morals or to the public order.

Based on the abovementioned principle, M&A transactions may be structured in different forms. The most common structure in an M&A transaction is a share deal (i.e. the acquisition of the shares of the target company). Real estate transactions, however, are more commonly structured as an asset deal in which Spanish special purpose vehicles (SPVs) owned by Spanish or foreign holding companies directly purchase the assets.

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Another type of transaction commonly seen in the Spanish market is leveraged buyouts (LBO). The regulation of financial assistance has a relevant impact in this kind of transactions. The general rule is that Spanish S.Ls may not advance funds, grant credits or loans, provide security or furnish financial assistance in order to purchase their own quotas or the quotas created or the shares issued by a company of the group to which they belong. With regards to the S.As, they may not advance funds, grant credits or loans, provide security or furnish financial assistance in order to purchase their own shares or the quotas created or the shares issued by their direct controlling companies and/or other upstream controlling companies by a third party.

Infringement of this prohibition shall be subject to a penalty to be imposed upon the infringing company's directors or managers or persons with powers to represent the company committing the infringement: (i) following examination of the proceeding by the Ministry of Economy and Tax, with a hearing for the interested parties and in accordance with the procedure regulations for the exercise of sanctioning authority (in case of S.L.); or (ii) by the National Stock Exchange Commission (*Comisión Nacional del Mercado Valores* or CNMV for its acronym in Spanish) which is the Spanish counterpart to the Securities and Exchange Commission, of an amount up to the par value of the quotas assumed or shares subscribed, purchased or accepted as security by the company or purchased by a third party with financial assistance from the company.

Notwithstanding the above, there are two (2) specific exceptions to the general prohibition of providing financial assistance, which are only applicable to S.A.s:

1. Employees: for the purpose that the employees may acquire shares of the employer company or for the acquisition of shares or quotas of another company in the group to which the employer company belongs.
2. Banks and other credit institutions: in the ordinary course of businesses within their corporate purposes, this is paid for out of the company's available assets.

Listed below is a brief summary of the legislation applicable to M&A transactions:

- Capital Companies Act (*Ley de Sociedades de Capital*), published by Royal Legislative Decree 1/2010, of 2 July, which regulates the different forms of companies in Spain. Public limited companies (*sociedades anónimas,* or S.A. for its acronym in Spanish) and limited liability companies (*sociedades de responsabilidad limitada,* or S.L. for its acronym in Spanish) are the most common types of companies in Spain. The Capital Companies Act covers the general legal framework for both S.A.s and S.L.s, among other, less common forms of companies.

  The main characteristics of an S.A. are:

  1. Minimum capital stock: €60,000.
  2. Payment upon incorporation: At least 25% of the par value of the shares.
  3. Share titles: Share certificates and book entries.
  4. Transfer of shares: Freely transferred.

  The main characteristics of an S.L. are:

  1. Minimum capital stock: €3,000.
  2. Payment upon incorporation: Fully subscribed.
  3. Share titles: Public deed of incorporation, capital increase or decrease, acquisition of shares, among others.
  4. Transfer of shares: Not freely transferable (unless acquired by other shareholders, spouse, ascendants, descendants or companies within the same group).

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- Stock Market Securities Act (*Ley del Mercado de Valores*), as amended and restated by Royal Decree 4/2015, and the Royal Decree 1066/2007, which regulates the capital markets in Spain including IPOs, listing of securities, takeovers, public offerings and other transactions related to listed securities; the stock market is supervised by the CNMV.
- The Corporate Restructuring Act number 3/2009 of April 3 (*Ley de Modificaciones Estructurales*), which regulates mergers, cross-border mergers, demergers, splits, transformation, transfers of business and the international transfer of registered office.
- Antitrust Act 15/2007 (*Ley de Defensa de la Competencia*) and regulations thereof, as well as the applicable European Union regulations and directives.
- SOCIMI Act number 11/2009 of October 26 that regulates the SOCIMI regime. The main attraction of the SOCIMI regime is its favourable tax treatment. The real estate income for SOCIMIs is taxed at a zero corporation tax rate (instead of the general rate of 25%), provided that the requirements of the SOCIMI regime are met, which can be summarised as follows:
  - adopt the form of an S.A.;
  - have a minimum share capital of €5m;
  - have only one class of shares;
  - include in its corporate name "SOCIMI, S.A."; and
  - trade (within certain time frame) its shares on a regulated stock market (such as the *Alternative Stock Market*, or "*MAB*").

  Once the SOCIMI regime is consolidated, these companies must distribute a high level of dividends and they must invest in certain kinds of assets.

  The requirement of the SOCIMI regime must be complied within two years following the date in which the election of the SOCIMI regime took place.
- Private Equity, venture capital Act number 22/2004 of November 12 governs private equity, venture capital and closed ended entities for collective investments, meaning any entity with a defined investment policy and with the purpose of distributing its profits among investors. This regulation simplifies the intervention regime of the CNMV, making it easier to register newly formed entities when they are going to be managed by an existing registered entity. The changes significantly reduce the costs and timeframe for registration. A number of new types of entities were introduced by this Law, allowing a greater flexibility in determining the type of investment vehicle. For the first time in Spain there is also a special regime for selling shares abroad. With the aim of making the market more accessible, this law introduces ratios, not reducing the percentages, but allowing assets with new characteristics the possibility of being included as permitted assets for such purposes. This is the case for participative loans and shares of other venture capital or private equity entities.
- Spanish Civil Code (*Código Civil*) published by Royal Decree, dated 22 July 1889, which, amongst others, regulates the general legal framework for contracts and obligations.
- Commercial Code (*Código de Comercio*) published by Royal Decree, dated 22 August 1885, which regulates relations between companies and commercial contracts in general, as well as sale and purchase agreements, deposit and loan agreements, and other legal figures that may have a direct impact on M&A deals.

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- Insolvency Act (*Ley Concursal*) that regulates bankruptcy and restructuring procedures in Spain.
- Workers' Statute Act (*Estatuto de los Trabajadores*), revised by Royal Legislative Decree 2/2015. This Act is important because, amongst other matters, it establishes that the change of the company's work centre or an autonomous productive unit's ownership will not extinguish the employment relationship on its own. In that respect, the new employer is subrogated (as ongoing concern) to the labour and social security rights and obligations of the former, including pensions commitments.

Some significant legal changes

Law 31/2014 of December 3, amending the Capital Companies Act which entered into force at the beginning of 2015 to enhance corporate governance matters. The changes introduced by this new law amending the Capital Companies Act can be grouped under two main headings:

- *Shareholders' meetings:* reforms geared towards expanding the powers of the shareholders' meeting, strengthening minority shareholders' rights and ensuring transparency in the information received by shareholders.

  The powers of the shareholders' meeting of all corporations were amended to include the acquisition or disposal of essential assets or their contribution to another company, as partially provided for in current recommendation three of the Unified Code for listed companies. Unlike recommendation three, the statutory reform does not require that the acquisition or disposal entail an actual change in the corporate purpose, it being sufficient for the transaction to involve essential assets. The law presumes that an asset is essential where the amount of the transaction exceeds 25% of the total value of the assets listed in the last approved balance sheet.

  In the case of all corporations, the interpretational doubts over the calculation of majorities have been clarified according to the following rules:

  - *Ordinary resolutions:* simple majority (more votes for than against).
  - *Special resolutions:* absolute majority (more than half of the shareholders present in person or by proxy at the meeting), unless, on second call, there are shareholders representing at least 25% but less than 50% of the subscribed voting capital, in which case two-thirds of the capital present in person or by proxy at the meeting must vote for the resolution.

  Reforms aimed at maximising the material protection of the corporate interest and of the minority shareholders applicable to all corporations:

  - Unifying all cases for challenging resolutions under one general system for annulment of resolutions with a one-year time limit for doing so (three months in the case of listed companies), except for resolutions contrary to public policy (no time limit).
  - Clarifying that resolutions adopted in breach of the shareholders' meeting or board regulations are voidable.
  - Expressly providing that the corporate interest is also damaged, even though the resolution does not cause damage to the company's assets if it is imposed in an abusive manner by the majority. It is deemed that a resolution is imposed in an abusive manner where it does not meet a reasonable need of the company and is adopted by the majority in its own interest and to the unjustified detriment of the other shareholders.

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Reducing from 5% to 1% the percentage of share capital that must be held by shareholders to challenge resolutions adopted by the board or any other collective managing body. In the case of listed companies, it is set at 0.1%.

- *Boards of directors:* reforms aimed at tightening the legal rules on directors' duties and liability, promoting diversity on boards in terms of gender, experience and expertise, introducing the role of 'coordinating director' – where one person holds office as chairman and as chief executive officer – and for listed companies, shortening the term of office of directors to four years, clarifying the rules on compensation and directors' approval by the shareholders' meeting, or making the nominations and remuneration committee legally mandatory, like the audit committee. The main changes to the directors' duties and liabilities are:
  - *Duty of diligence:* this has completed the rules by establishing different regimes, having regard to the functions entrusted to each director, and enshrining in legislation what is known as the 'business judgment rule', the aim of which is to protect the entrepreneur's discretion in matters of strategy and making business decisions. The law also makes explicit the right and duty of directors to request the necessary information to make informed decisions.
  - *Duty of loyalty:* this has improved the order and description of the obligations flowing from such duty, completing the current list – above all, in the area of conflicts of interest – and extending it to *de facto* directors in a wide sense. It has also extended the scope of penalties beyond indemnification for damages caused, so as to also include provisions on returning ill-gotten gains.

    In particular, it develops the rules on the imperativeness of, and exemption from, the duty of loyalty, stipulating that the rules on the duty of loyalty and on liability for its breach are imperative and cannot be limited in the bylaws. This notwithstanding, the company may grant individual exemptions, authorising a director or a related person to perform a certain transaction with the company, to use certain corporate assets, to take advantage of a specific business opportunity or to obtain an advantage or compensation from a third party. The authorisation must necessarily be resolved by the shareholders' meeting where it relates to an exemption from the prohibition on obtaining an advantage or compensation from third parties, or where it relates to a transaction whose value exceeds 10% of the corporate assets.
  - *Rules on liability:* to extend the rules on directors' liability to similar persons and to facilitate company actions for liability against directors, reducing the ownership interest needed to qualify for standing and permitting; in cases of breach of the duty of loyalty, such an action should be filed directly without having to wait for a resolution by the shareholders' meeting.

In addition, Law 27/2014 amends the corporation income tax rules. This amendment has impacted the taxation of private equity and venture capital entities. A new exception regime is established for dividends and gains encouraging divestitures of non-strategic holdings that would have been unthinkable with the old system because of onerous tax costs and implications. The neutrality regime for mergers, spin-offs, contributions in kind and security exchanges is now directly applicable to such divestitures. The requirement of a "valid economic reason" for the transaction does not disappear. However, even if a "valid economic reason" is not found to exist for tax purposes, not all of the benefits of the neutrality regime are disallowed. Regrettably, however, there is a new regime for the

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limitation of the deduction of interest on the financing for the acquisition of shares, which has created a certain confusion over its application.

The year ahead

The outlook for M&A markets is promising and 2017 is expected to be an active year. 2016 has maintained the positive path followed in recent years, when there was a clear recovery of the M&A Spanish market. Spain has seen a slight change in the kind of transactions, with an increase of bigger deals and stronger confidence shown by international investors in Spain and its economy. Although in today's market and economic volatility it is not easy to accurately forecast the beyond the quarter, we could say that:

Investments will be focused in the same sectors as the last year: real estate, technology, finance and energy.

There will be bigger deals. The industry will keep divesting but, gradually, investments will occupy a major percentage of their strategies, especially abroad. After the financial crisis, most investors realised the importance of maintaining a diversified portfolio, especially if we are talking about the geographic scope.

Big corporates have already taken notice of Spain's better situation. Generally, industry and foreign investors will continue to progressively trust in Spain and the Spanish market again. Latin American investors do not lose sight of the opportunities in Spain because it is an "entry point" to the European Market.

Should a proper and ambitious tax policy be implemented, Brexit may present an opportunity to consider Spain as a safe harbour to locate European headquarters for foreign financial institutions and funds.

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Switzerland

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Overview

Statutory and regulatory M&A framework in Switzerland

The purchase and sale of corporate entities, and of their assets and liabilities, are mainly governed by the Swiss Code of Obligations (which includes corporate law and the statutory provisions on the purchase and sale of goods). In addition, the Swiss Merger Act establishes a comprehensive set of rules for corporate restructuring such as mergers and demergers.

Public takeovers by way of cash or exchange (or a combination thereof) offers are governed by the Financial Markets Infrastructure Act (FMIA), which came into force on 1 January 2016 and replaced the respective provisions in the Federal Act on Stock Exchanges and Securities Trading (SESTA) and a number of implementing ordinances. Within this framework, the SIX Swiss Exchange (SIX) is responsible for issuing regulations regarding the admission of securities to listing as well as the continued fulfilment of the listing requirements. The Federal Takeover Board (TOB) and the Swiss Financial Market Supervisory Authority (FINMA) are responsible to ensure the compliance of market participants with the Swiss takeover regime. Decisions of the TOB may be challenged before the FINMA and, finally, the Swiss Federal Administrative Court.

If a transaction exceeds a certain turnover threshold or if a restructuring has an effect on the Swiss market, the regulations of the Federal Act on Cartels and other Restraints of Competition also need to be considered. Any planned combination of businesses has to be notified to the Competition Commission (ComCo) before closing of the transaction in case certain thresholds regarding the involved parties' turnovers are met or in case one of the involved parties is dominant in a Swiss market and the concentration concerns that market, an adjacent market or a market that is up- or downstream thereof. The ComCo may prohibit a concentration or authorise it only under certain conditions and obligations. The ComCo's decision may be challenged before the Swiss Federal Administrative Court and, finally, before the Swiss Supreme Court.

Beyond, foreign buyers (i.e., foreigners, foreign corporations or Swiss corporations controlled by foreigners) need to consider the Federal Law on Acquisition of Real Estate in Switzerland by Non-Residents (the so-called *Lex Koller*). They have to obtain a special permit from cantonal authorities in order to purchase real property or shares in companies or businesses owning real property, unless the property is used as a permanent business establishment. On 1 July 2015, a new Swiss law entered into force with the aim to prevent money laundering and tax evasion. Among other things, the new legislation states that entities acquiring (alone or in concert with third parties) bearer or registered shares representing at least 25% of the share capital or voting rights in a non-listed Swiss stock corporation must disclose their

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beneficial owner to the target company. Also, each acquisition of bearer shares in a non-listed Swiss stock corporation has to be reported to the company, regardless of the amount of acquired bearer shares.

Overview of M&A activity in 2016

After a moderate M&A market in 2015, the year 2016 started with only 59 transactions (-45%) in the first quarter which, however, generated a total volume of US$ 52.1bn (+66%). The main reason for this reluctance is still seen in the aftermath of the decision of the Swiss National Bank to discontinue the minimum exchange rate of CHF 1.20 per EUR.[1] While only six out of the biggest ten transactions in the first quarter reached the US$ 500m threshold, the deal between Syngenta and China National Chemical Corporation with a volume of over US$ 43bn is the largest transaction in the history of Switzerland. With 164 transactions (-9%) and a transaction volume of US$ 74.2bn (+94%), the first six months were stronger regarding transaction volume, mainly due to the Syngenta deal.[2] Among others, the decision of Great Britain to leave the European Union in June 2016 caused great uncertainty and was one of the main reasons for the continuing reluctance of investors.[3] At the same time, the overall low financing costs supported the transaction volumes.[4] Compared to the second quarter, the third quarter developed moderately with 80 transactions and a transaction volume of UD$ 9.3bn.[5]

Overall, the number of mergers and acquisitions grew 2016 in Switzerland as well as worldwide. In Switzerland, the volume of M&A transactions was the second-highest since 2007. The number of transactions with Swiss participation grew by 3.4% (from 350 to 362 deals). The total transaction value increased by more than 40%, from US$ 84.9bn in 2015 to US$ 119.1bn in 2016.[6]

Significant deals and highlights

Syngenta AG / ChemChina

The acquisition of Syngenta AG by China National Chemical Corporation, a subsidiary of ChemChina, with a transaction volume of over US$ 43bn, was the largest transaction in 2016 in Switzerland as well as globally,[7] and is the largest transaction in the history of Switzerland. It is, further, the largest investment made by a Chinese investor in Europe.[8]

The acquisition of Syngenta is targeted to enable further expansions of Syngenta, especially in China. ChemChina is thus intending to maintain the corporate governance structure of Syngenta, and profit from the available know-how.

Due to the required approvals of different national merger control authorities, especially the Committee on Foreign Investment in the United States and the European Commission, the closing of the transaction was delayed multiple times. Only at the end of October 2016, the European Commission announced an in-depth investigation with a focus on the question of whether this transaction may reduce the competition in crop protection products and the supply of certain input chemicals in Europe.[9]

Gategroup / HNA Aviation

The growing intention of Chinese investors to invest in Europe is further documented by the acquisition of gategroup, a leading provider of products and solutions related to airplane passenger, by HNA Aviation, with a transaction volume of over US$ 1.5bn.

Kuoni Reisen Holding / EQT

Another notable deal was the acquisition of Kuoni Reisen Holding by EQT with a transaction volume US$ 1.4bn. With the investment made by EQT, a European leading private equity house, Kuoni aims to further strengthen its position as a leading travel service provider.

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Sika AG / Compagnie de Saint-Gobain SA

Already at the end of 2014, the shareholders of Schenker-Winkler Holding (SWH), which has the majority of voting rights in Sika, sold all their shares in SWH to Saint-Gobain, a leading French company in the construction materials market. The acquisition of SWH met great resistance by multiple parties. Among others, the main question raised by the board of directors of Sika was whether the share transfer restriction of the articles of association of Sika covers the transaction of shares in SWH. The board of directors, which took the position that this clause applies, denied its approval to the transaction and reduced the voting rights of SWH for certain agenda items during the past shareholders' meetings. As a consequence, the decisions taken in those shareholders' meetings were challenged by SWH in court.

With its decision dated 27 October 2016, the Cantonal Court of Zug denied all requests of SWH and supported the view of Sika. The court mainly argued that the transaction at hand directly influences the economic independence of Sika, which is why the transfer restriction covers the transaction of shares in SWH to Saint-Gobain.

However, the decision of the Cantonal Court of Zug is not final and SWH is going to appeal before the High Court of the Canton Zug and eventually before the Swiss Federal Supreme Court.

Key developments

On 1 January 2016, the new Swiss Financial Market Infrastructure Act (FMIA) and its implementing ordinances containing rules specifically related to listed companies entered into force. On the one hand, the FMIA adopted various existing provisions, especially of the Swiss Stock Exchange Act, without material changes. On the other hand, the FMIA also provides some new provisions. Among others, under the FMIA not only the beneficial owner of shares in a listed company has a duty to notify its participation triggering a certain threshold, but also the person who has the discretionary power to exercise the voting rights associated with such shares. Such duty of notification, however, only applies to companies whose shares are at least partially listed in Switzerland.

Further, the decision of Great Britain to leave the European Union in June 2016 had an influence on the behaviour of the Swiss M&A-market and caused great uncertainty. Despite the fact that the withdrawal from the European Union is certain, the effective economic and legal consequences remain unclear.

Industry sector focus

Affected by the strong Swiss franc in the aftermath of the dissolution of the minimum exchange rate of CHF 1.20 per EUR, especially the tourism, industrial and retail sectors are struggling with a high price pressure. The ongoing pressure of change and adjustments in those sectors may lead to further structural changes and higher M&A activities.[10]

The year ahead

On an international level, the election of Donald Trump as new president of the US in November 2016 created further uncertainty in the Swiss and European markets, as he has repeatedly announced his plans to renegotiate existing trading agreements. The following year 2017 will show whether he is turning this plan into action, and what impact this is going to have on European markets.

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The major projects of recent years to revise Swiss corporate law are still ongoing and continue to occupy market participants. After the implementation of the ordinance against excessive compensation in listed joint stock companies in 2014, the Swiss parliament is expected to discuss a newly drafted revision early in 2017. The enactment of the revised corporate law can, however, not be expected in 2017.

* * *

Endnotes

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Turkey

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Overview

Turkey, an industrial hub and commercial centre at the crossroads between Europe, West Asia and Africa, has been an attractive country for investments and business operations over recent decades. According to data released by the Central Bank of the Republic of Turkey, the total flow of foreign direct investments to Turkey from 2005 to 2015 was approximately US$ 160bn. As of June 2016, around 50,000 companies with foreign capital operate in Turkey.

Since 2012, economic growth has moderated due to weaker private demand arising from election-related uncertainties, troublesome geopolitical developments, concerns over the Turkish Government's handling of certain corruption allegations, and significant currency and financial market volatility. As a result, the M&A environment in Turkey has been adversely affected.

At the same time, however, over the past decade a more local regulatory environment has been strongly and favourably influenced by Turkey's status as a candidate for full European Union membership, a status it obtained at the Helsinki Summit of 1999. The European Union accession process, for which negotiations began in October 2005, has been a significant driver of reforms in Turkey, with Turkey's movement towards further integration into the European Union helping it to establish and embrace European Union regulations and standards. For example, Turkey has codified various modern European laws, whilst maintaining its own legal traditions (which can be traced back to the adoption, after the founding of the Republic in 1923, of laws modelled after those existing at the time in Switzerland, Germany, France and Italy).

The principal laws and regulations presently governing M&A transactions in Turkey are the Turkish Commercial Code No. 6102 (the "**TCC**"), the Turkish Code of Obligations No. 6098 (the "**TCO**"), the Capital Markets Law No. 6362, the Corporate Tax Law No. 5520 and the Law on the Protection of Competition No. 4054. Whilst the TCC governs the mechanics of share transfers, shares and corporate governance, the TCO regulates the contractual rights and obligations of the parties involved as buyers, sellers and co-investors in M&A transactions.

Comprehensive revisions of TCC, which came into force on 1 July 2012, introduced significant reforms. The goal of the changes was further integration of Turkey with international capital markets, increased transparency of its companies, sustainable shareholder democracy and Turkey's alignment with other aspects of European legislation. These reforms have brought about certain novelties for Turkey, *inter alia*, the possibility to hold virtual board and general assembly meetings, restrictions to powers obtained via privileged shares, more efficient

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share capital protection, the use of convertible instruments, and provisions regulating company groups. Whilst these innovations were generally aimed at improving the business environment, some of them introduced restrictions on certain practices such as financial assistance, the extension of loans from a company to its shareholders, transactions between affiliate companies, etc. that were not at arm's length. Also, the above referenced rules governing company groups have introduced a framework aimed mainly at the increased protection of minority shareholders and creditors of companies controlled by holdings.

Agreements entered into in connection with M&A transactions are frequently subjected to the jurisdiction of the Turkish courts. But just as often, disputes arising from such transactions are referred to local or international arbitration. Turkey ratified the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the so-called New York Convention) as long ago as 2 July 1992. Since then, arbitral awards obtained in other contracting states are to be recognized and enforced in Turkey, as long as they do not contravene Turkish public order.

One key source of concern about M&A transactions in Turkey is the uncertainty about the availability of court awards requiring the specific performance of certain contractual obligations. Although such relief is available in principle, Turkish courts are reluctant to make use of this remedy, with the result being in practical terms that creditors are forced to resort to the use of claims for monetary compensation instead. Lawyers in general, but also M&A experts, often find themselves in the position of having to come up with creative solutions to address foreign investors' needs regarding certainty of performance by the counter parties.

One further source of concern specific to Turkey is the need to 'ring-fence' potential liabilities arising from the past business practices of acquisition targets. This is the driver behind the fact that so many asset deals are done here, when structuring such deals as a share transaction may have been much easier and/or effective.

The tax regime or regimes applying to an investment has a significant impact on how the transaction is structured. For example, the involved parties' (i.e. the seller and the buyer's) own home countries' tax regime can become a motive for tax optimisation. Depending on the type of the investment vehicle used, the assets it holds, the holding periods and various other factors, certain benefits or exemptions may or may not apply. Very often, transactions are structured to accommodate some or all of these factors.

Turkey's competition/antitrust regime is to a large extent influenced by those that exist in the European Union. Transactions whose completion might have an adverse impact on competition in Turkey must be approved by the Turkish Competition Board. Approvals of public authorities are also needed for certain regulated sectors (namely energy and media). Finally, an acquisition target may have undertaken contractual obligations obliging it to seek the approval of the counterparty, which is often the case when such counterparty is in a much stronger negotiation position (e.g. it is a financer, public client, important customer).

Significant deals and highlights

The total value of M&A transactions in Turkey was roughly US$ 7.7bn in 2016 and involved 248 transactions. Although the number of transactions did not considerably change from the previous year, the total dollar value of the deals done decreased by 53% year-on-year. The value of deals done involving foreign investors decreased even more, by 67% year-on-year. Interestingly, the investments of venture capital firms and angel investors increased, while those of private equity funds decreased from 2015 to 2016.

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The ten largest M&A transactions of 2016, based on disclosed values, are briefly summarised below:

- Acquisition of 100% stake of Mars Entertainment by CJ Group and IMM Private Equity for consideration paid of US$ 688m *(Sector: entertainment)*.
- Acquisition of 100% stake of Menzelet and Kılavuzlu Hydroelectric Power Plants by Akfen (through Akörenbeli) for consideration paid of US$ 402m *(Sector: energy)*.
- Acquisition of 100% stake of Osmangazi Elektrik Dağıtım & Perakende by Zorlu Enerji for consideration paid of US$ 360m *(Sector: energy)*.
- Acquisition of 100% stake of six Wind Power Plants (Hatay Sebenoba, Manisa Karakurt, Balıkesir Şamlı, Ayvacık, Kapıdağ and Belen/Atik Wind Power Plants) for consideration paid of US$ 259m *(Sector: energy)*.
- Acquisition of 100% stake of Borajet by SBK Holding for consideration paid of US$ 258m *(Sector: aviation)*.
- Acquisition of 100% stake of Almus and Köklüce Hydroelectric Power Plants by Gül Enerji for consideration paid of US$ 252m *(Sector: energy)*.
- Acquisition of 25% stake of Alternatifbank by the Commercial Bank (P.S.Q.C.) for consideration paid of US$ 225m *(Sector: financial services)*.
- Acquisition of a non-disclosed stake of Rönesans Holding by IFC for consideration paid of US$ 215m *(Sector: construction)*.
- Acquisition of 100% stake of TP Petrol Dağıtım A.Ş. by Zülfikarlar Holding for consideration paid of US$ 159m *(Sector: energy)*.
- Acquisition of 10% stake of TAB Gıda by Goldman Sachs, EBRD and Credit Suisse for consideration paid of US$ 150m *(Sector: restaurants and hospitality)*.
- Acquisition of 40% stake of Mado by Venture Capital Bank and Al Sraiya Holding for consideration paid of US$ 150m *(Sector: food and beverage)*.*

**Source: Deloitte Annual Turkish M&A Review 2016*

Key developments

Dramatic global developments, including the 'Brexit' of the United Kingdom from the European Union, the presidential elections of the United States, and global political unrest and turbulence, have caused a decrease in global transaction values in 2016 of 20% when compared to 2015 ***(Source: Merger Market)***. Turkey, in addition to being negatively affected by last year's events, experienced the trauma of a failed coup attempt on 15 July 2016 and is still trying to re-establish its social, economic and political equilibrium.

That said, the Turkish Government has made and is making great efforts to promote industrialisation and investment financing through various PPP-schemes, including the Build-Operate-Transfer model and increased public procurements, in recent years.

In addition, the Turkish Parliament introduced the important Law Amending Certain Laws for Improvement of the Investment Environment No. 6728 on 15 July 2016 (which entered into force on 9 August 2016) (the "**New Investment Law**"). The main purpose of the New Investment Law is to encourage new investment in Turkey by reducing transactional costs and otherwise creating a more investor-friendly environment.

And, in fact, these amendments have introduced significant and meaningful changes to various laws, including among others the Stamp Tax Law No. 488. For example, in order

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to decrease the tax burden associated with investments, the New Investment Law introduces an exception for papers formerly subjected to an expensive proportional stamp duty, pursuant to which the stamp tax obligation is limited to only one set of original transaction documentation (whereas before each set was subject to the tax). The New Investment Law also provides for an exemption from stamp duty for papers related to the transfer of shares of a number of investment vehicles, including joint stock companies and limited companies. Also, undertakings related to sanctions, such as forfeitures and penalties, are exempt from stamp tax (unless they are the sole subject of the agreement). All of these amendments, and more that are not summarised here, will enable companies to significantly reduce the stamp duty associated with M&A transactions.

The New Investment Law also introduces certain amendments to other laws including, *inter alia*, the TCC, the Execution and Bankruptcy Law No. 2004, the Law on Collection Procedure of Public Receivables No. 6183, the Income Tax Law No. 193, Tax Procedural Law No. 213, the Value Added Tax Law No. 3065, the Corporate Income Tax Law No. 5520, the Law of Checks No. 5941, and the Financial Leasing, Factoring and Financing Companies Law No. 6361.

Industry sector focus

The eight major industry sectors attracting, in recent years, the most attention by actual and potential investors in Turkey, are discussed below. Some of them are expected to experience similar growth over the coming years:

- **Finance:** Since 2008, the financial services sector has been growing 20% annually in terms of asset size. At the same time, Turkish banks are some of the most solid in Europe, with significantly better capital adequacy ratios than their European counterparts. Accordingly, given the need of Turkish businesses for a variety of financial services, this sector provides meaningful opportunities for newcomers.

  Examples of recent M&A activity in the Turkish finance sector:

  - BBVA bought a 24.9% stake in Türkiye Garanti Bankası for US$ 5.8bn in November 2010, purchasing shares from Doğuş Holding and General Electric Co.
  - In 2015, BBVA acquired an additional 14.89% stake of Türkiye Garanti Bankası, resulting in its total stake in Türkiye Garanti Bankası amounting to 39.90%.
  - BBVA has recently agreed to acquire an additional 9.95% stake of Türkiye Garanti Bankası from Doğuş Group for consideration of approximately TL 3.3bn in February 2017. After completion of this deal, BBVA will hold a 49.85% stake of Türkiye Garanti Bankası.
  - In 2015, Qatar National Bank acquired a 100% ownership interest in Finansbank for consideration of US$ 3bn.
  - One of the significant deals of 2016 was the participation of EBRD and IFC in Odea Bank through a subscription to a TL 1bn capital increase. As part of this capital increase, the IFC and EBRD invested the TL equivalent of US$ 110m and US$ 90m, respectively.
  - Also, the acquisition of a 9.95% stake in Fibabanka by TurkFinance B.V., a Turkey-based fund of Abraaj Group, is a good example of the type of activity seen in Turkey last year.
- **Energy:** Turkey is performing well in terms of fulfilling the electricity needs of a developing country, while executing major energy pipeline projects to solidify its

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position as an energy hub. Turkey's limited domestic energy sources have resulted in its dependency on energy imports, primarily of oil and gas. Given this, the primary aim of Turkey in recent years has been to increase its energy security by, among other things, increasing the share of energy it produces using renewables. Alongside its significant geothermal power capacity and potential, Turkey also places great emphasis on developing wind and solar-sourced energy. Accordingly, the investment environment for renewable energy in Turkey is expected to improve in both the medium and long term. Privatisations are expected to continue through tenders for renewable energy generation projects in 2017.

Recent examples of M&A activity in this sector include:

- In 2013, Enerjisa acquired Toroslar Elektrik Dağıtım and İstanbul Anadolu Yakası Elektrik Dağıtım (AYEDAŞ) for consideration of some US$ 1.7bn and 1.2bn, respectively, and Torunlar acquired Başkent Doğalgaz for a consideration of around US$ 1.1bn through privatisation processes.
- One of the main drivers of the increase in total deal volume in the energy sector was Goldman Sachs' acquisition in 2015 of a 13% stake in Socar Turkey for a total consideration of US$ 1.3bn.
- In 2016, the energy sector continued to be an attractive one for both Turkish and foreign investors, and has been the source of 54% of total deal volume generated by Turkish investors mainly, a number attributable to privatisations. Significant deals in 2016 included acquisitions involving the Menzelet, Kılavuzlu, Almus and Köklüce Hydroelectric Power Plants, and TP Petrol Dağıtım.
- Additionally, OMV has initiated the process to sell its stake in Petrol Ofisi, and recently announced it has received several bids in 2016 that it is presently considering.

- **Healthcare:** With the construction of 15 modern urban hospital campuses, with a total 24,000 bed capacity, and the establishment of 'Free Health Zones' to increase health tourism, Turkey is aiming to become the health care centre of the region. Simultaneously, Turkey is expected to experience continued economic expansion, and the rising incomes that result, which, in turn, will create more demand for health services and related products. These increases are reflected in robust projections of increases in healthcare spending in the future.

  One of the major recent deals in this sector was the 2011 acquisition of 75% of Acıbadem Sağlık Hizmetleri by Integrated Healthcare Holdings for US$ 1.26bn. In 2016, healthcare has remained as one of the most attractive sectors for investors and several significant deals took place, *inter alia*, the acquisition of 100% stake of A Plus Sağlık Hizmetleri A.Ş. by Acıbadem Sağlık Hizmetleri. In addition, IFC recently agreed to invest €80m in a project bond that will support the construction of next-generation healthcare facilities in Elazığ, a city in eastern Turkey that is fast becoming a medical hub. This 20-year bond, which totals €288m, is the first project bond financing of a hospital under a public-private partnership (PPP) in Turkey.
- **Transportation and logistics:** The Global Competitiveness Index ranks Turkey 23rd worldwide in transport infrastructure, with the expectation it will climb these rankings during the coming years given the country's ambitious infrastructure development plans. These plans include major airport, ports, high-speed trains and highway projects. The Turkish Government has set challenging targets it hopes to achieve by

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2023 in an effort to further improve its transportation and logistics infrastructure, and is expected to pursue these aggressively. These targets include substantial expansion of the total road and railway networks and annual passenger and freight loads.

With respect to M&A deals targeting the transportation sector, in 2007 KKR bought shipping company U.N. Ro-Ro İşletmeleri for about €910m. It then sold its share in 2014 to Esas Holding and Actera Partners, in a deal allegedly worth some €700m. One of the largest privatisation projects in 2011 was the tender of İDO (İstanbul Deniz Otobüsleri), which was acquired by Tepe-Akfen-Souter-Sera for consideration of US$ 861m. Another notable deal amongst transactions with disclosed values was the acquisition of a 13% stake in Kumport Port by CIC Capital. Last year, one of the significant deals in this sector was the acquisition of a 30% stake in MSC Gemi Acenteliği by United Agencies Limited, for consideration of US$ 138m.

- **Information and communication technologies:** Many small and large-scale business opportunities are expected to emerge as the country adapts its infrastructure and applications to the recently adopted 4G technology. A young population and high penetration of mobile phone usage ensures a thriving market for new, value-adding services and e-commerce solutions. In 2016, Turkish and foreign investors showed particular interest in investing in this sector. According to the Turkish Prime Ministry's Investment Support and Promotion Agency, IT spending on hardware, software, IT services and telecommunication services in Turkey are expected to increase to US$ 30bn by 2017, increasing this sector's size to US$ 160bn, with expected market growth of around 15% each year until 2023.

  Although the volume of transactions in the technology, digital and e-commerce sectors is still low, the number of transactions has significantly increased in recent years. One of the notable transactions in the e-commerce industry was the acquisition in 2015 of Yemeksepeti.com, an online food delivery portal, by Delivery Hero Holding GmbH for US$ 589m. Also, in 2015 the Abraaj Group acquired a 25% stake in hepsiburada.com for consideration said to be around US$ 400m.
- **Automotive:** This sector contributes 8% to Turkey's total economic output, with 7 out of 17 producers in the sector ranked among the 25 largest manufacturers in the country, while employing some 300,000 workers. The Turkish automotive industry, which meets and exceeds international quality and safety standards, is highly efficient and competitive and Turkey will continue to be an attractive production hub in the near and more distant future, a reality that will only be enhanced by the recent devaluation of the Turkish Lira (with the result being that Turkish products will become more competitive on world markets).
- **Real estate:** This sector will continue to be attractive for the foreseeable future as, among other developments, some 6.7 million residential buildings are expected to be re-built during the next 20 years, a boost caused by recently started urban renewal projects, and an increasingly well-educated and well-paid population that will considerably increase demand for new residential housing.

  Several large M&A transactions in this sector have taken place in the recent years, including the acquisitions in 2013 of a 50% stake in Optimum İstanbul Shopping Mall and Ankara Optimum Shopping Mall by GIC Real Estate for consideration of US$ 117m and US$ 165m respectively, and the 2015 acquisition of a 50% stake in Marmara Forum Shopping Mall by the Blackstone Group (for an undisclosed value). One of the largest transactions in the sector (according to the values disclosed in press

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statements) in 2015 was the acquisition of Beykoz Gayrimenkul by Allianz Sigorta for US$ 187m.

- **Agriculture:** Turkey aims to jump two ranks, from seventh, to become one of the top five countries in terms of agricultural production by 2023, with a projected 8.5 million hectares of irrigated land and a contribution to Turkey's GDP of US$ 150bn. Whilst Turkey's natural conditions and geographic diversity ensure favourable conditions for significant growth in the agricultural sector, the growing population in the country and the region surrounding it stimulates, and will continue to stimulate, demand for Turkish products. Improving the efficiency of those participating in this sector, by the increased use of more advanced technologies, remains high on the country's agenda.

The year ahead

The year 2017 is expected to be a challenging one for those making and considering making investment in Turkey, due to such factors as volatile growth rates, high levels of international debt, and political fights over monetary policy. In light of the recent devaluation of the Turkish Lira, we expect a growing appetite from investors of all sorts, given Turkish assets will become cheaper. That said, in the short term, investors and their investments may face a number of uncertainties.

In this regard, we note that there are numerous undercapitalised companies in Turkey, which may result in a possible flood of acquirers of distressed assets into the market. A meaningful reshuffling of Turkish assets amongst investors can be expected. Nevertheless, whilst short-term investors may take a more cautious stance *vis-à-vis* Turkey, long-term investors should continue to find good opportunities for entry into the Turkish market.

In addition, and perhaps just as importantly, the Turkish Government has made it clear it is giving and will continue to give priority to infrastructure investment, both to help the country through the present period of economic uncertainty but also to ensure Turkey's long-term economic development.

Finally, and perhaps having an important impact on Turkey's future economic development, it is worth noting that a new Turkish Sovereign Wealth Fund has been established by way of the Law on the Establishment of Turkish Sovereign Wealth Fund No. 6741 (the "**Wealth Fund Law**"). According to the Wealth Fund Law, the aim of the Turkish Sovereign Wealth Fund is: (i) to contribute to the variety and depth of the available capital market instruments; (ii) to provide for the reinvestment of public assets into the economy; (iii) to attract external sources of finance; and (iv) Government participation in large-scale investments.

The Turkish Sovereign Wealth Fund is expected to generate long-term and low-cost financing for strategic, large-scale investments, contributing meaningfully to Turkey's development. The Fund was set up with initial capital of TL 50m. The Turkish Government is aiming for the Fund ultimately to manage as much as US$ 200bn of assets. As part of this planned asset expansion, the Turkish Government's stakes in Turkish Airlines, certain major banks and the fixed-line telecommunication's operator Turk Telekom, were recently transferred to the Fund.

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Overview of the M&A market in 2016

Global overview

Globally, 2016 was a strong year for M&A. Although overall deal value – $3.6trn – was 17% down on 2015 (a record year), this was a good showing after multiple economic and political events last year affected confidence.[1]

The value of withdrawn M&A deals reached an eight-year high in 2016 at $805bn.[2] US regulators blocked several deals from 2015, in part to limit "tax inversions" (which allow companies to reduce their tax bills by choosing to domicile in a jurisdiction with lower tax rates). One casualty was US drug maker Pfizer's $160bn acquisition of Allergan.[3]

Asian companies have been keen to invest in Europe. China National Chemical Corp.'s pending $45.9bn purchase of Swiss Syngenta AG would be the largest ever outbound deal by a Chinese company.[4] In 2016, Chinese firms announced more than double the 2015 record of $106bn foreign acquisitions.[5]

Yet Chinese authorities, worried about local currency depreciation and the debt levels of state-owned enterprises, are clamping down on outbound investments worth more than $10bn, at least until the end of September 2017.[6] Chinese authorities may also be reacting to the increased political sensitivity overseas – particularly in the US – of Chinese cross-border investment.

United Kingdom ("UK") overview

The UK has so far confounded expectations in some quarters that a vote to leave the European Union ("**EU**") would immediately harm inward investment.[7] It is true that overall deal value has fallen significantly: according to Thomson Reuters, UK M&A in 2016 totalled $177.5bn (£144.5bn), against 2015's record $394.8bn (£321.5bn). Yet inward investment now contributes much more to the whole: $143.7bn (£117bn) against the $85.9bn (£69.9bn) annual average for the five years to 2015. The sudden depreciation in sterling has made UK assets cheaper to foreign buyers. Meanwhile, domestic M&A fell to $33.7bn (£27.4bn) from an average of $53.4bn (£43.5bn) over the five years to 2015. There were only 1,355 UK domestic deals in 2016, fewer than at any time in two decades.[8]

- *Main market vs AIM*

The level of firm offers subject to the Takeover Code (the "**Code**") has remained steady: 51 in 2016 and 52 in 2015, but 2016 saw a slight shift away from Main Market offers, which now make up only about half of the total (26).

More significant has been the steep decline in the overall value of bids. There were fewer firm bids with a value of over £1bn announced in 2016, with only five offers having a value

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of over £1bn compared to 14 offers with a value of over £1bn in 2015. Also there has been a flight from AIM: according to the London Stock Exchange, 103 companies left AIM in the 11 months to November 2016, bringing the number of firms listed on AIM below 1,000 for the first time since 2003.[9]

- *Private equity*

Last year, private equity and other funds backed more bids: of the 51 firm offers in 2016, 18 (35%) were from private equity houses and other types of fund, up from 15 (29%) in 2015. Eight were for Main Market companies and ten were for AIM companies. Eight were structured as schemes of arrangement and ten as offers.

Private equity houses have had successful fund raisings, making a lot of capital available at historically low borrowing rates, much of which may still be available to invest. If private equity houses remain confident in the economy, given the political background, 2017 may see increased activity.

Significant deals and highlights

Biggest UK deals of 2016[10]

	Deal Value	Announcement Date	Bidder	Target	Target Sector	Public/ Private
1.	$30.2bn	18 July 2016	Soft Bank Group Corp (“Soft Bank”) Japan	ARM Holdings Plc (“ARM”) (98.55% stake) UK	Technology	Public
2.	$22.4bn	15 December 2016	Twenty-First Century Fox Inc (“Fox”) USA	Sky Plc (“Sky”) (60.9% stake) UK	Media	Public
3.	$14.8bn	16 March 2016	Deutsche Boerse AG (“DB”) Germany	London Stock Exchange (LSE) Plc (“LSE”) UK	Financial Services	Public
4.	$14.4bn	8 December 2016	A consortium led by Macquarie Infrastructure and Real Assets USA	National Grid Gas Distribution Ltd (61% stake) UK	Energy, Mining and Utilities	Private
5.	£1.2bn	18 March 2016	J Sainsbury Plc (“Sainsburys”) UK	Home Retail Group Plc (“Home Retail”) UK	Retail	Public

Overall in the UK, bidders have been particularly active in the technology, media, retail and financial sectors, and this section reviews the most high-profile deal in each.

Technology

Soft Bank’s acquisition of ARM is the second-largest UK technology targeted M&A deal on record, and one of the first after the UK’s vote to leave the EU.

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This deal is of particular significance because, following the changes introduced to the Code in 2015 – which sought to distinguish between post-offer undertakings and post-offer intention statements – it is the first time a bidder has given post-offer undertakings under Rule 19.5 of the Code. In the scheme document, Soft Bank gave a number of post-offer undertakings including that, by the fifth anniversary of the scheme becoming effective, it would (i) double the number of UK ARM group employees, (ii) keep the proportion of technical to non-technical employees in line with ARM trends, and (iii) keep ARM's global headquarters in Cambridge.

The use of post-offer undertakings may have greater importance in the coming years in light of Brexit, to safeguard UK jobs and technical capability.

Media

Fox's offer for Sky was controversial because it would increase the concentration of media ownership by one individual. It was announced as a pre-conditional all-cash offer for Fox to purchase the remaining 61% of Sky it did not already own. This deal is subject to the receipt of (i) EU competition clearance and, if necessary, Secretary of State approval, and (ii) various other anti-trust and foreign investment approvals, and other regulatory consents in other jurisdictions.

Under the scheme of arrangement, Sky shareholders would receive a loan note with a principal amount equal to the cash consideration due. The obligations under the loan notes would be guaranteed by Fox and the loan notes would have a mandatory redemption date of no earlier than the third business day after issue, and no later than 14 days after the scheme effective date. If the effective date of the scheme of arrangement has not occurred by 31 December 2017, Sky shareholders will be entitled to receive a special dividend of £0.10 per share in 2018 (about £172m) for the elongated timetable for completing the bid.

A notable feature of this deal is the existence of a co-operation agreement between Fox and Sky, whereby Fox undertook to pay Sky £200m on the occurrence of a break payment event (i.e. if the deal falls through). In 2016, a co-operation agreement was entered into between the bidder and target in relation to 15 firm offers under which the parties agreed to co-operate to obtain regulatory clearances.

Financial services

DB and LSE's recommended merger is controversial: the deal was not made conditional on the referendum outcome because the companies considered it beneficial for its customers and shareholders regardless. Yet many believe the post-deal structure will weaken the UK in European financial markets after Brexit, since LSE shareholders would own 45.6% and DB shareholders would own 54.4% of the merged company.

The merger is to be implemented through a new UK holding company which will acquire: (i) the LSE, by a scheme of arrangement, governed by the Code; and (ii) DB, by making a securities exchange offer to all shareholders of DB. The scheme and the offer are inter-conditional.

The European Commission (the "**Commission**") initiated an in-depth investigation into the proposed merger in September 2016 and raised objections in December 2016. One of its concerns was that the combination of LSE's and DB's clearing houses could eliminate competition in a number of areas, including bonds, derivatives and repurchasing agreements; adversely affect competing trading venues that depend on clearing services provided by LSE's clearing house; and adversely affect competitors in post-trade markets, such as collateral management, settlement and custody services. In response, LSE formally offered to divest its French clearing house business LCH.Clearnet SA to Euronext NV for €510m.[11]

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At the time of writing, the Commission has not yet issued its final decision on whether the deal may go ahead. It has until 3 April 2017 to decide.

Retail

Sainsbury's offer for Home Retail was the largest firm offer by value announced by a UK bidder and accounted for approximately 48% of the aggregate value of firm offers announced by UK bidders in 2016.

It was announced as a contractual offer and did not initially have the recommendation of the Home Retail board. Following a revision of the offer, on 1 April 2016, it was announced that the Home Retail board intended to unanimously recommend the acquisition, to be effected by a scheme of arrangement, after which Home Retail would make a capital return to its shareholders from the net cash proceeds.

Key developments

An introduction to the Code

The Code is issued and administered by the Takeover Panel. The Code applies to all takeover and merger transactions, where the offeree company is a public limited company (or, in limited cases, a private company), has its registered office in the UK, the Channel Islands or the Isle of Man and, *inter alia*, its securities are admitted to trading on a regulated market (such as the Main Market) or a multilateral trading facility in the UK (such as AIM).

Rule 9 of the Code requires that any person who acquires an interest in shares which, together with shares in which persons acting in concert with him are interested, (i) carry 30% or more of the voting rights of a company, or (ii) carry not less than 30% but not more than 50% of the voting rights of such company, will normally be required to make a general offer to all of the remaining shareholders to respectively either (i) acquire their shares, or (ii) if any further interests in shares are acquired by any such person, or any concert party. A Rule 9 offer must be made in cash and at the highest price paid by the person required to make the offer, or any concert party, for any interest in shares in the company during the 12 months before the offer announcement.

Rule 9 of the Code further provides, *inter alia*, that where any person who, together with concert parties, holds over 50% of the voting rights of a company and acquires an interest in shares which carry additional voting rights, then they will not normally be required to make a general offer to the other shareholders to acquire their shares. However, the Panel may deem an obligation to make an offer to have arisen on the acquisition by a single member of a concert party of an interest in shares which (i) increases his individual interest to 30% or more of a company's voting rights, or, (ii) if he already holds more than 30% but less than 50%, an acquisition which increases his interest in shares carrying voting rights in that company.

A concert party arises where persons acting together pursuant to a formal or informal agreement co-operate to obtain or consolidate control of, or to frustrate the successful outcome of an offer for a company, subject to the Code. Control means an interest, or interests, in shares carrying, in aggregate, 30% or more of the voting rights of a company, irrespective of whether such interests give *de facto* control.

Code changes in 2016

On 12 September 2016, the Code's rules on the communication and distribution of information during an offer were changed.

Rule 20.1 (*Equality of Information to Shareholders and Persons with Information Rights*) was amended to clarify that the offeror or offeree should publish "information and opinions

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relating to an offer or a party to an offer" in an RIS announcement to make it equally available to all offeree shareholders, as nearly as possible at the same time and manner, in accordance with General Principle 1 of the Code. The Rule also extended the requirements to certain relevant materials, even if they do not contain any material new information or significant new opinion.

A new Rule 20.2 (*Meetings and telephone calls with shareholders and others*) was introduced to set out safeguards for meetings and telephone calls between certain persons interested in any relevant securities of an offeror or the offeree, or engaged in investment management or advice. New Rules 20.3 (*Videos*) and 20.4 (*Social Media*) were also introduced to regulate the use of videos, webcasts, audio-only communications and social media by an offeror or an offeree to communicate information relating to an offer, or a party's financial performance. Minor amendments were made to Rule 26 (*Documents to be Published on a Website*), including the timescale for making such publications.

Rule 20.5 (*Advertisements*) (previously Rule 19.4) now clarifies that the prohibition on advertisements captures any advertisement published during an offer unless an exemption applies, and deletes certain unnecessary exemptions. Finally, Rule 19.2 (*Responsibility*) was amended to remove the requirement for advertisements published in connection with an offer to include a director's responsibility statement.

The Market Abuse Regulation ("MAR")

MAR[12] establishes a common EU-wide regulatory framework for reducing market abuse: insider dealing, the unlawful disclosure of inside information and market manipulation. It came into effect on 3 July 2016 and replaced the Market Abuse Directive[13] (**"MAD"**), now repealed. Most of the changes are procedural rather than substantive.

MAR has enhanced the issuer's obligation to inform the public as soon as possible of inside information concerning that issuer. It also permits delaying disclosure in certain circumstances, but immediately after the inside information has been disclosed, an issuer must: (i) notify the FCA of the delayed disclosure; (ii) identify the persons who decided to delay; (iii) state the time and date when the decision to delay was made; and (iv) on request from the FCA, explain in writing how each of the conditions (permitting the delay of disclosure of inside information) were met.

MAR places greater prescriptive requirements on the content and format of insider lists than MAD, and requires issuers to: (i) take all reasonable steps to ensure that persons added to an insider list acknowledge in writing the duties and sanctions for breach of the rules; and (ii) notify an employee in writing that they have been added to an insider list.

Finally, MAR prohibits persons discharging managerial responsibilities ("**PDMRs**") from trading in the issuer's securities on their own account during a 'closed period' (30 calendar days before the announcement of the issuer's interim or year-end financial report). Under the UK implementing legislation, PDMRs should notify the issuer and the FCA of all transactions conducted on their own account which exceed €5,000 in aggregate. Notification is triggered by: (i) the purchase, sale, subscription or exchange of a financial instrument; (ii) the pledging or lending of a financial instrument; (iii) transactions on behalf of a PDMR or closely associated person; or (iv) transactions under life insurance policies, where the PDMR or closely associated person has discretion to make investment decisions.

Persons with Significant Control ("PSC")

From 6 April 2016, the majority of UK incorporated companies and limited liability partnerships (LLPs) are required to maintain a register of PSCs. A PSC is someone who:

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- holds, either directly or indirectly, more than 25% of the voting rights or aggregate nominal share capital;
- holds, either directly or indirectly, the right to appoint or remove a majority of the board of directors;
- has the right to exercise, or actually exercises, significant influence or control over the company; or
- has the right to exercise, or actually exercises, significant influence or control over the activities of a trust or firm which is not a legal entity, but would meet any of the above conditions if it were an individual.

The rules are contained in the Small Business, Enterprise and Employment Act 2015 and are designed to make ownership and control of UK companies more transparent. The price of failure to take action may be significant.

The information included in this register must be filed with Companies House annually and is available for public inspection. UK companies with shares quoted on certain markets (e.g. the Main Market, AIM and ISDX) are not obliged to maintain a register, but their UK incorporated subsidiaries must comply.

Competition law – General

It is essential to consider competition law in the early stages of planning a deal. Two initial points to highlight: first, internal company documents explaining a deal's commercial rationale can be disclosable in merger control proceedings and may affect how competition authorities perceive a deal, so should be prepared carefully. Second, it may not be apparent or easily discoverable in due diligence whether the target has violated competition law (for example, through participation in a cartel) yet this may have substantial financial and reputational implications (as well as professional or even criminal implications for individuals involved) if/when those violations are later uncovered.

EU merger control

The one-stop shop

The original EU Merger Regulation[14] ("**EUMR**") established the "one-stop shop" for assessing structural transactions[15] (known as "concentrations") between firms that met certain turnover thresholds ("**Community dimension**"). In such cases, the EU's jurisdiction ousts the Member States', and so reduces the parties' overall regulatory burden.

Article 4(5) of the updated EUMR[16] introduced the principle of "upward referral" by which parties can request the Commission to take over a case that would otherwise fall into the jurisdiction of three or more EU Member States. After Brexit, and subject to any transitional provisions and the shape of a future UK-EU deal, a transaction falling within the UK and only two EU member states' respective jurisdictions will no longer qualify for upward referral.

Establishing Community dimension

Primary thresholds:

- the combined aggregate worldwide turnover (in the preceding financial year) of all the undertakings concerned exceeds €5bn; and
- the aggregate community-wide turnover of each of at least two of the undertakings concerned exceeds €250m.

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Secondary thresholds:

- the combined aggregate worldwide turnover of all the undertakings concerned exceeds €2.5bn;
- in each of at least three member states, the combined aggregate turnover of all the undertakings concerned exceeds €100m;
- in each of those three member states, the aggregate turnover of each of at least two of the undertakings concerned exceeds €25m; and
- the aggregate Community-wide turnover of each of at least two of the undertakings concerned exceeds €100m.

Where the primary and secondary thresholds are not met, there is no Community dimension if each of the undertakings achieves more than two-thirds of its aggregate EU-wide turnover within one and the same member state. The deal may then fall within the jurisdiction of one or more EU member states. In any case, mandatory filings may also be required under the competition laws of countries outside the EU.

If a public bid falls within the EUMR, the offeror may submit a notification after announcement. From the date the Commission accepts a notification as complete, it has 25 working days to decide in first phase. If the parties submit commitments to resolve identified competition issues, this period can be extended to 35 working days. At the end of Phase I, the Commission may clear the merger (with or without commitments) or open a Phase II investigation, which can take a further four to seven months.

Interaction with the Code

Rule 12.1(b) of the Code requires that it must be a term of the offer that it will lapse if – before the later of (i) the first closing date or (ii) the date when the offer is declared unconditional as to acceptances (the "**Lapse Date**") – the Commission decides either to initiate (i) a Phase II investigation or, (ii) following a referral by the Commission back to the Competition and Markets Authority ("**CMA**"), there is a subsequent reference for a Phase II investigation by the CMA.

UK merger control

The CMA may investigate a merger if it believes that a relevant merger situation has been created and that this results, or may result, in a substantial lessening of competition. A relevant merger situation occurs when:

- two or more enterprises cease to be distinct (or there are arrangements in progress which, if carried into effect, will lead to enterprises ceasing to be distinct); and
- either:
    - the value of the UK turnover of the enterprise proposed to be taken over exceeds £70m in the preceding financial year; or
    - as a result of the merger, a 25% share of the supply of goods or services of a particular description is created or enhanced in the UK or in a substantial part of it.

The merging parties are not legally required to notify the CMA of a proposed transaction. If they do not, the CMA may still investigate, impose remedies or even block the deal. In practice, therefore, many qualifying takeovers are notified.

The EUMR does not impose filing fees on the parties; whereas UK merger control does for all qualifying mergers, based on the value of the UK turnover of the target:

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Fee	Charge band
£40,000	Turnover of the target is £20m or less
£80,000	Turnover of the target is more than £20m but less than £70m
£120,000	Turnover of the target is more than £70m but less than £120m
£160,000	Turnover of the target is more than £120m

From 1 April 2014, the only way to notify the CMA of a takeover is by formal Merger Notice. Where the parties can satisfy the CMA that there is a good faith intention to proceed with the transaction, they are encouraged to enter into pre-notification discussions.

Once the CMA has confirmed that the Merger Notice is complete, it has 40 working days in Phase I either to clear the merger (with or without conditions) or to open a Phase II investigation.[17] If no Merger Notice is submitted, the CMA may initiate an investigation within four months of completion of the takeover. The CMA can then seek and enforce undertakings from the parties to a takeover instead of a reference for a Phase II investigation.

At the end of Phase II, the CMA will either clear the transaction, prohibit it, or approve it subject to conditions (typically, undertakings). If the takeover has already taken place, the CMA has wide powers to require divestments or prohibit the transaction altogether and require the parties to unwind it.

Interaction with the Code

As noted above, a Rule 9 offer must contain a term that it will lapse if the CMA opens a Phase II investigation. If the CMA then clears the deal, the offer must be reinstated, on the same terms and at not less than the same price, as soon as possible.

Brexit and UK competition law

Brexit will change UK law, including competition law and merger control, in ways that depend on the UK's post-Brexit relationship with the EU. Before the referendum and in the immediate aftermath, many speculated about future "models" for this relationship, whether the "Norway" model (EEA), the "Swiss" model (EFTA), the Canada or the Turkey models. After the UK government stated that it was prepared to leave the single market and the customs union, talk of different models is currently off the table in favour of a bespoke UK-EU deal.

As noted above, the EUMR creates a 'one-stop shop'. After Brexit, particularly a 'hard' Brexit (involving leaving the single market), the UK is likely to lose the benefit of this principle, and the merging parties would potentially be required to notify their transaction both to the Commission and to the CMA where the transaction meets both the EU and the UK thresholds. This could lead to increased transaction costs, both in terms of adviser costs and merger filing fees.

A 'hard' Brexit could also increase uncertainty for companies, as separate notifications to the Commission and the CMA may lead to conflicting decisions from the two authorities. For instance, the UK might legislate to take into account public interest considerations in mergers beyond those currently permitted under Article 21(4) of the EUMR. These considerations could include safeguarding R&D capability in important sectors such as the pharmaceutical industry, or the retention of manufacturing capability in the UK.

The loss of the 'one-stop shop' may also increase the burden on the CMA. For instance, it is estimated that up to 50 additional merger transactions, most of which are likely to be large and complex, could fall within the CMA's jurisdiction, creating a significant resourcing

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challenge. It could meet this challenge by charging significant, but proportionate filing fees for large mergers. In other words, adding one or more charging bands to the filing fees sliding scale in the table above. This is, however, unlikely to be sufficient for the CMA to plug the funding gap. The CMA could instead – or in addition – increase the UK jurisdictional thresholds, or increase the *de minimis* exception from £3m to closer to £10m.[18]

In the short term, regulatory uncertainty during and immediately after Brexit may be reduced by transitional merger control arrangements. There are three instances where issues are likely to arise:

- where a merger was notified to the Commission before Brexit and, at the point of exit, the Commission is still reviewing the transaction;
- where a merger has not been formally notified to the Commission at the point of Brexit, but the merging parties are already in advanced pre-notification discussions with the Commission; and
- where a merger has been reviewed by the Commission before Brexit, but the merging parties wish to challenge its decision and the enforcement of remedies following Brexit.

Any transitional arrangements would, at the very least, need to consider: (i) the appropriate cut-off point for the CMA to take over jurisdiction, instead of the Commission; (ii) whether for those mergers that are currently under review by the Commission, or under appeal to the European courts, the companies involved should continue to have the same rights of defence post-Brexit; and (iii) perhaps an agreement between the CMA and the Commission to allow for co-operation between the two authorities.

The year ahead

UK M&A activity was strong and finished well in 2016 despite economic and political concerns. The 2017 pipeline is positive, helped by plenty of available capital from private equity generally, and overseas investors seeking a bargain at current exchange rates.

Yet strong headwinds remain. The UK will notify the EU formally of its intention to leave the EU,[19] and national elections in other EU member states may together lead to the creation of a new political and therefore business environment. The early months of the Trump administration in the US will be one to watch closely, especially since most global M&A activity in 2016 was dominated by the US ($1.5trn, 5,585 deals, 47.8% global M&A value). President Trump's plans to reduce the US corporate tax rate and allow for the repatriation of offshore funds may boost capital markets. On the other hand, China's temporary restrictions on outbound M&A may depress inward UK M&A inward activity.

Brexit may lead to changes in the administration of merger control rules, in particular, the one-stop shop principle, the burden of extra notifications, and the risk of UK filing fees increasing.

Boards may understandably be cautious in 2017, seeking more deals at lower value, and fewer deals at higher value. Drivers for M&A activity involving trade buyers and private equity include: (i) limited organic growth prospects for certain businesses; and (ii) the ongoing lack of clarity around commodity prices, in particular for the natural resources sector. These drivers create opportunities, particularly as larger companies continue to divest non-core businesses.

Last year technology was a hot spot, and certainly remains one to watch this year. Energy and Infrastructure should also continue to be active, given the solid revenue streams provided by projects in those sectors.

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15. These will include mergers, acquisitions and the creation of full function joint ventures.
16. Council Regulation (EC) No 139/2004, which entered into force on 20 January 2004.
17. The CMA will be under a duty to refer the merger for a detailed Phase II investigation by one of its Inquiry Groups under sections 22 and 33 of the Enterprise Act 2002. Where the merger raises a defined 'public interest consideration', the UK system allows the Secretary of State to intervene.
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19. Under Article 50 of the Treaty on the European Union.

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Overview

After the record-breaking prior year, 2016 saw a drop of announced M&A transactions involving U.S. targets from $2.1trn to $1.7trn. This represents a decline of 16%, the same percentage by which global M&A activity declined. Factors to which this decline has been attributed include the UK's planned withdrawal from the European Union, uncertainty around the U.S. presidential election, aggressive antitrust enforcement, softness in energy and commodity prices, unrest in the Middle East, and a slowdown of the Chinese economy. And while all of these factors were at play, 2016 constituted in many ways a reversion to the mean after the frenzied deal activity seen in 2015. Viewed in historic perspective, 2016 was still a very strong year, in fact the second-strongest on record, with deal volume more than 11% higher than that of the pre-financial crisis high of 2007.

While the value of deal volume was down, the number of announced U.S. deals increased by 7% from 10,287 to 11,027. This reflects a relative decrease in megadeals, a trend that was reversed in October 2016 with a spate of mega deals, including: AT&T Inc.'s bid for Time Warner Inc., described below; CenturyLink Inc.'s acquisition of Level 3 Communications Inc.; the combination of the oil and gas divisions of General Electric Co. and Baker Hughes Inc.; Qualcomm, Inc.'s offer to buy NXP Semiconductors NV; TeamHealth Holdings Inc.'s acquisition by funds affiliated with Blackstone; and British American Tobacco plc's offer to purchase all shares not already owned by it in Reynolds American, Inc. As a result, with deals worth $329.1bn, October 2016 almost broke the July 2015 record for monthly M&A activity in the U.S. It did break that record on a worldwide level, registering over half a trillion dollars in announced deals. This is all the more impressive, as the weeks leading up to a U.S. presidential election are typically marked by muted deal flow.

Despite the relative decline in M&A activity, deal multiples remained lofty at 14.5x EBITDA, although down sequentially from 16.3x in 2015. And U.S. takeover premiums were the highest ever, at 35.9% over the four-week stock price (vs. 35.4% in 2015).

In light of the record deal activity experienced in 2015, it was not a surprise that abandoned deals were at a record high in 2016, with over $500bn worth of withdrawn deals in the first two quarters alone. The culprits here were antitrust failures, financing failures and changes in tax rules governing "inversions" (*i.e.,* the redomiciliation of a company to a more tax-favourable jurisdiction). The most prominent victim of the new inversion rules was a deal highlighted in last year's chapter, the combination of Pfizer Inc. and Allergan plc, which at $160bn would have been the third largest deal in history, but ended up being terminated in April of 2016.

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Significant deals and highlights

Strategic transactions

In this section we'd like to highlight the two largest transactions of the year, Bayer AG / Monsanto Company and AT&T Inc. / Time Warner Inc., not only because of their respective size but also because they offer an interesting study in contrast: While the Monsanto announcement came about only after a protracted game of cat and mouse, the Time Warner announcement took a mere eight weeks from start to signing. Other significant transactions are addressed in the Industry Focus section of this article.

- *Bayer AG / Monsanto Company*

As Monsanto explained in its proxy statement, the Bayer / Monsanto transaction was driven by industry consolidation pressures and the challenging macro environment for global agriculture. Bayer initially approached Monsanto on May 10, 2016, proposing an all-cash acquisition of Monsanto for $122 per share, a premium of 35% over the unaffected share price. The offer was made on the heels of Monsanto's unsuccessful offer to buy the Swiss agricultural company Syngenta AG and discussions between Monsanto and an undisclosed third party about combining their agricultural businesses. It also followed various meetings between Monsanto and Bayer relating to Bayer's CEO transition, as the parties had a longstanding business relationship prior to their merger talks.

On May 23, 2016, Monsanto rejected Bayer's offer as being inadequate and providing insufficient transaction certainty regarding regulatory and financing risks. In the following weeks, Monsanto continued to negotiate a potential transaction with the undisclosed third party and two other merger candidates, all the while continuing to engage with Bayer. On July 8, 2016, Bayer upped its offer to $125 and added a reverse termination fee of $1.5bn. On August 5, 2016, following its due diligence of Monsanto, Bayer increased its offer to $126.50 per share and, later that day, to $127.50 per share. It also offered to commit to divestitures of assets representing up to 12% of Monsanto's net sales in order to obtain antitrust approvals. On September 6, 2016, Bayer increased the reverse termination fee to $1.7bn. The next day, Bayer made its "best and final offer" of $128 per share, a premium of 44% over the unaffected share price, and a reverse termination fee of $2bn. Following further negotiations, a separate divestiture limit for certain specified asset categories was eliminated, the reverse termination fee was decreased to $1.85bn, and Monsanto agreed to reimburse Bayer for up to $150 million of its expenses, should Monsanto's shareholders fail to approve the merger. The parties agreed to these terms and announced the transaction on September 14, 2016, more than four months after entering into talks. At an enterprise value of $64bn, this was the year's second-largest transaction.

As of February 2017, the parties expect the transaction to pass regulatory hurdles by the end of the year, despite delays with both U.S. and European antitrust authorities. Bayer has commenced raising capital to finance the purchase price, having completed a $4bn mandatory convertible bond issuance and planning to raise an aggregate $19bn in equity.

The Bayer / Monsanto deal shows how target boards and their advisers can increase shareholder value through a well-run process, sustaining momentum over several months' of negotiations, and maximising both the offer price and transaction certainty.

- *AT&T Inc. / Time Warner Inc.*

Time Warner is no stranger to M&A activity, having spun off Time Warner Cable and AOL in 2009 and Time Inc. in 2014. In the summer of 2014, it fended off an unsolicited proposal from Twenty-First Century Fox to acquire it in a mixed share/cash deal.

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The CEO of AT&T initially broached the subject of a potential combination over lunch with Time Warner's CEO on August 25, 2016. At this time, AT&T's CEO indicated that AT&T could offer a price of about $100 per share, a premium of 26% over the stock price at the time. Following mutual due diligence, on September 28, 2016, AT&T proposed to acquire Time Warner for $103 per share, with 45% payable in cash and the remainder in AT&T stock. On October 7, 2016, Time Warner countered with a price of $110 per share. Four days later, the parties agreed on a price of $107.50 per share, consisting 50% of cash and 50% of stock. The price represented a premium of 36% over the unaffected stock price. Following negotiation of the merger agreement, the parties signed and announced the transaction on October 22, 2016, less than two months after AT&T's initial approach. With an enterprise value of $105bn, this was the year's largest deal.

At half the time it took Monsanto to negotiate a 4.5% increase of Bayer's offer, Time Warner was able to negotiate an increase of 7.5% over the initially indicated price. While this may be due to a number of factors, including the attractiveness of the initial bid, a key difference between the two transactions was that Monsanto negotiated after its failed bid for Syngenta and in the context of consolidation pressures prevailing in its industry. Time Warner, on the other hand, had been successful in fighting off Twenty-First Century Fox's unsolicited offer. More importantly, through its various spin-offs, it had positioned itself as an acquisition target with highly coveted media content. This allowed it to negotiate from a position of strength, requiring significantly less time for a successful outcome.

That said, it may be premature to call the AT&T / Time Warner transaction successful, as it faces intense regulatory scrutiny. Then presidential candidate Donald J. Trump announced back in October 2016 that the transaction would not be approved in his administration, "because it's too much concentration of power in the hands of too few." In January 2017, the U.S. president elect met with AT&T's CEO, although the transaction was reportedly not discussed. And in February 2017, senators from the Judiciary Committee's antitrust panel expressed grave concerns about the combination and called on the Department of Justice to scrutinise it. Should the merger agreement be terminated for failure to achieve antitrust approval, AT&T would be required to pay a reverse termination fee of $500m to Time Warner.

Private equity

Private equity sponsors continued to exhibit discipline in the face of record equity valuations. One measure of their restraint is the aggregate dollar volume of private equity backed buyouts, which at $158.1bn, was up 7.5% year-over-year but stayed below 2014's record $163.6bn. Another measure is the amount of available dry powder, which at the end of 2016 stood at a record $820bn globally, as compared to $755bn at the end of 2015.

The largest portion of investments were in computer software businesses, with buyout volume amounting to 23.6% of all private equity buyouts. Even so, the software sector was not represented in the year's largest deals, which were: Apollo Global Management's $12.3bn acquisition of ADT Securities Services Inc.; a private equity consortium's $7.5bn acquisition of MultiPlan; and Blackstone's $5.6bn acquisition of Team Health Holdings Inc.

The dollar volume of private equity exits was essentially flat at $234.0bn versus $231.9bn in 2015. Notable exits include: the above mentioned MultiPlan transaction (which was a trade sale from one private equity consortium to another); KKR's sale of Energy Future Holdings Corporation, valued at $18.4bn; and Blackstone's sale of a 25% stake in publicly traded Hilton Worldwide Holdings valued at $6.5bn to Chinese conglomerate HNA Tourism Group. The latter deal showcased the continued strong interest of Chinese buyers

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in U.S. targets – a trend that may well persist despite efforts by Chinese authorities, initiated towards the end of the year, to curb capital outflows.

Unsolicited transactions

Unsolicited activity declined by 37% from $473bn to $297bn. As in prior years, unsolicited offers proved to be a mixed bag in terms of success rate.

The biggest successful transaction (pending completion) was British American Tobacco plc's $46.5bn acquisition of the remaining 57.8% it did not already own in Reynolds American Inc. After opening in October 2016 with an offer of $24.13 in cash and 0.5502 British American Tobacco shares per Reynolds American Share, the parties agreed in January 2017 on a per share price of $29.44 in cash and in 0.526 British American Tobacco shares. The success in this case was in no small part predicated on British American's 42.2% stake at the outset of the process, effectively foreclosing a white knight defence.

Major failed bids include Honeywell International Inc.'s $90.3bn offer to acquire United Technologies Corporation, and Mondelez's $22.8bn offer to acquire The Hershey Company. Both offers were withdrawn relatively quickly, with Honeywell rescinding after only four days, and Mondelez throwing in the towel after two months. Neither bidder attempted to improve its offer.

The above examples demonstrate the transaction risk inherent in an unsolicited approach. The success of United Technologies and Hershey as stand-alone businesses also goes to show that the successful execution of a company's business plan and strategy is often the best defence against an unsolicited approach. This is all the more true in an environment in which activist pressure has prompted most companies to abandon traditional takeover defences.

Key developments

Case law developments

- *Disclosure-based settlements*

2016 saw the continuation of an important shift in the judicial treatment of disclosure-based settlements. Disclosure-based settlements are settlements of shareholder class actions, in which the acquisition target agrees to additional disclosures about the transaction, typically in exchange for a broad release of claims. In order to be binding on the putative class (*i.e.,* the other shareholders), these settlements require court approval, following the court's determination that the proposed settlement is reasonable and intrinsically fair to the class members. In the past, there was a perception that settlements were approved with little scrutiny of the merits of the new disclosures, notwithstanding the payment of significant plaintiff attorney fees (often in the neighborhood of $500,000 or more). In this regard, it is interesting to note that, prior to 2015, parties engaging in an acquisition faced a nine-in-ten chance that their deal would be challenged. On average, between 60 and 75% of these cases were settled, with 75 to 85% of settlements being purely disclosure-based.

Beginning in the second half of 2015, the Delaware Court of Chancery spearheaded an effort to end this practice, which in January of 2016 culminated in the case *In re Trulia, Inc. Stockholder Litigation*. In this landmark decision, Chancellor Bouchard noted that not only do disclosure-based settlements rarely yield genuine benefits for stockholders, but the customarily broad releases (the proposed release in Trulia comprised known and unknown claims under U.S. and foreign common law or other law or rule) create the risk of losing truly meritorious claims. Chancellor Bouchard quoted the example of the 2015

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Rural/Metro case, in which the Court of Chancery considered it "a very close call" to reject a disclosure-based settlement that would have released claims ultimately yielding over $100m to stockholders.

Chancellor Bouchard went on to announce that, henceforth, practitioners should expect the Court to be increasingly vigilant in applying its independent judgment to its case-by-case assessment of the reasonableness of the "give" and "get" of disclosure-based settlements. The Court would continue to disfavour supplemental disclosures unless they (i) addressed a plainly material misrepresentation or omission, and (ii) the subject matter of the proposed release was narrowly circumscribed to encompass nothing more than disclosure claims and fiduciary duty claims concerning the sale process. In the Court's view, the proposed Trulia disclosures did not meet this burden.

Not surprisingly, the Trulia decision has had an immediate impact on deal litigation. In the first half of 2016 (the most recent period for which statistical data is available), the percentage of U.S. M&A deals valued at over $100m that were challenged by shareholders declined to 64% (vs. 84% in 2015 and 90% or higher in each preceding year since 2010). Over the same period, the percentage of cases resolved via settlements dropped to 27% (vs. 36% in 2015 and well above 60% in each year since 2009). Disclosure-based injunction requests have declined in tandem.

On the downside, we have seen a significant uptick in applications for mootness fees, *i.e.,* fees awarded to plaintiff attorneys in connection with the dismissal of a claim, following the voluntary disclosure of supplemental information by the defendant company. Mootness fees are smaller in amount than settlement fees and recent Delaware Chancery Court decisions took liberty to approve smaller fees than applied for, or to deny them entirely. For example, in *In re Xoom Corp. Stockholder Litigation*, the Court awarded a fee of $50,000 vs. the requested $275,000. And in *In re Keurig Green Mountain Inc. Stockholder Litigation*, the Court denied the request for a $300,000 mootness fee because the supplemental disclosure provided purely confirmatory information that the proxy had already been correct.

Another effect of *Trulia* has been an increase in claims filed in forums other than Delaware, *e.g.,* in the state of the defendant company's headquarters. At times these suits conflict with the defendant companies' exclusive forum bylaws, plaintiffs betting (often successfully) on the companies' openness to waiving them in exchange for a quick, disclosure-based settlement. Time will tell whether this trend will persist, as at least some other state courts, as well as the U.S. Court of Appeals for the Seventh Circuit, have started adopting the *Trulia* standard. Recently, however, the Appellate Division of the New York Supreme Court, First Judicial Department, applied what appears to be a less onerous standard, inquiring whether the proposed nonmonetary relief was in the best interest of all class members, and whether the settlement was in the best interest of the corporation.

An interesting aspect of *Trulia* will be its interplay with the 2015 decision *Corwin v. KKR Financial Holdings LLC*. *Corwin,* which we highlighted in last year's chapter, held that an uncoerced, fully informed vote of disinterested stockholders in favour of a challenged transaction provides an independent basis to invoke the business judgment rule, insulating the transaction from all attacks other than on the grounds of waste. This decision was reaffirmed in a string of 2016 decisions, most notably *Singh v. Attenborough,* which explained that where the business judgment rule applied, "dismissal is typically the result". And in *In re Volcano Corp.,* the Delaware Court of Chancery extended this principle to apply to tender offers. As a result of the *Corwin* doctrine, plaintiffs' best shot at challenging a merger or tender offer will often be to claim that shareholders were not fully informed.

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Given the above noted drop in disclosure-based settlements and injunctions, going forward, plaintiffs will less frequently be able to rely on a discovery record established in connection with an injunction or settlement. This in turn may make it more difficult to call into question the application of the business judgment rule.

- *Appraisal rights*

In several decisions issued by the Delaware Court of Chancery in 2016, the Court departed from its prior practice of using the merger price offered by the acquirer as the best evidence of the fair value of dissenting shareholders' shares. Although the Court reiterated that the deal price is important evidence of fair value, the Court held that its analysis of fair value is context-specific. The Court relied on a discounted cash flow analysis in the Dell and ISN Software Corporation appraisal proceedings, and on a combination of discounted cash flow, comparable company analysis and merger price in the DFC Global Corporation appraisal. This approach proved costly for acquirers, resulting in a fair value determination in the Dell case that was 28% higher than the offered merger consideration. Both the Dell and the DFC Global Corporation appraisal proceedings have been appealed to the Delaware Supreme Court.

Late in the year, however, the Chancery Court, in *Merion Capital v. Lender Processing Services*, decided to rely on the merger price as indication of fair value in a sale process with meaningful competition among bidders, availability of adequate and reliable information to the bidders, and lack of collusion or unjustified favouritism towards particular bidders. In weighing the merger price against the discounted cash flow value, the court decided to give the merger price 100% weight, as the sale process generated reliable evidence of fair value while the discounted cash flow analysis depended heavily on assumptions.

These decisions indicate that Delaware's appraisal jurisprudence is evolving, and will remain so as the Delaware Supreme Court addresses these important questions in 2017.

- *Director independence*

Finally, we'd like to briefly highlight a decision of the Delaware Supreme Court on director independence. In *Sandys v. Pincus,* the Court determined that certain directors of Zynga, Inc. were not independent because of their personal and professional connections to the company's founder and controlling shareholder (including as a result of joint ownership of an aircraft), and others were not independent because their venture capital firm owned substantial equity interests in Zynga, in a business co-founded by the wife of the company's founder, and in a business in which an independent director of Zynga served as director. In a split decision, the majority of the Delaware Supreme Court determined that this mutually beneficial business relationship might have a material effect on the parties' ability to act adversely towards each other.

Legislative developments

Noteworthy on the legislative front are two amendments to the Delaware General Corporate Law (DGCL) affecting appraisal proceedings. Under Section 262 of the DGCL, shareholders may petition the Court of Chancery to determine the fair value of shares acquired in a merger, and to direct the payment to the petitioning shareholders (not to others) of such fair value, plus interest from the effective date of the merger. Effective as of August 2016, pursuant to Section 262(g) of the DGCL, Courts are required to dismiss appraisal proceedings, unless: (i) the total number of shares entitled to appraisal exceeds 1% of the outstanding shares of the class or series eligible for appraisal; or (ii) the value of the consideration provided in the merger for such total number of shares exceeds $1m. This *de minimis* exception applies

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only to corporations whose shares are listed on a national securities exchange, and it does not apply to short form mergers between a 90% shareholder and its subsidiary.

Another noteworthy amendment to the appraisal provisions addresses the practice of appraisal arbitrage. Under Section 262(h) of the DGCL, shareholders seeking appraisal are entitled to interest from the effective date of the merger through the date of payment at 5% over the Federal Reserve discount rate, to be compounded quarterly. This steep interest rate has been a significant contributor to the rapid increase in the popularity of appraisal proceedings (somewhat outdated data suggests a tenfold increase of appraisal claims between 2004 and 2013 to an aggregate value of $1.5bn), as it guarantees shareholders a sizable return even without an increase in the merger consideration. Section 262(h) of the DGCL has now been amended to allow companies to prepay an amount towards the appraisal payment, in which case interest only accrues on any difference between the fair value determined by the Court and the amount thus prepaid.

Shareholder activism and corporate governance

Activist campaigns dropped from 378 in 2015 to 322 in 2016, a decrease of 15%. This decline is at least in part attributable to companies' greater awareness of activist threats and demands, and their willingness to engage in an open dialogue with investors, resulting in fewer opportunities for activists. Another factor may have been the lacklustre results activists have achieved in recent years. Returns generated by activists in 2015 were reported at a paltry 1.2%, triggering net asset outflows in the first half of 2016, a phenomenon unseen since 2009. As a result, activists focused more on investor relations and raising capital than on launching new campaigns. For 2016, activist investment returns were reported to be back up at 10.5%.

Another notable trend was away from campaigns against large-cap targets towards campaigns against small and mid-cap targets. The percentage of Schedule 13Ds filed with respect to companies below the $1bn market cap increased from 53% of all 13D filings in 2015 to 69% in 2016. Note that on an absolute basis, the number of sub-$1bn campaigns was relatively steady at 37 in 2016 compared to 35 in 2015.

The number of settlements with activists was flat in 2016 (60 versus 59 in 2015). 30% of settlements were reached in less than one month after initiation of the campaign, versus 15% in 2015. This trend prompted State Street Global Advisors to issue a letter in October 2016 questioning the speed of settlements and demanding that settlements contain terms that align with the interests of long-term shareholders. Previously institutional investors BlackRock and Vanguard had written open letters cautioning against pursuit of short-term agendas that negatively impact long-term growth.

On the governance front, proxy access bylaws continued to be a hot topic. These bylaws afford shareholders maintaining a minimum ownership (typically 3%) over a minimum period (typically three years) access to the company's proxy statement for purposes of nominating directors. The number of companies having implemented such bylaw jumped from approximately 125 by the end of 2015 to close at 350 by the end of 2016, and now includes approximately half of the S&P 500 companies. In November 2016, GAMCO Asset Management, Inc. became the first shareholder to make a nomination under a proxy access bylaw. The target, National Fuel Gas Co., rejected the nomination, as GAMCO's control intent made it ineligible to use the bylaw. GAMCO promptly withdrew its nomination.

Also on the governance front, market participants and academics continued to discuss board composition (including required director skill sets and diversity), director tenure (*i.e.,* the desirable length of director tenure, as well as maximum tenures for members of

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key committees and the lead independent director) and executive compensation and its alignment with long-term goals.

Industry sector focus

As in 2015, M&A activity was seen across the board. Also as in 2015, energy & power and technology were among the busiest sectors, media & entertainment coming in a third. Healthcare continued to be strong but dropped out of the top three sectors, with activity in 2015 having largely been driven by consolidation pressures resulting from the Affordable Health Care Act and by inversions, which, as noted above, became more challenging due to applicable tax regulations effected in the past year.

Energy & power

With a deal volume of $327bn (compared to $268bn in 2015), equalling a 19.6% market share, energy & power was the strongest sector in terms of M&A activity. Deals were mostly driven by depressed equity valuations resulting from a slump in energy prices. Representative transactions include Sunoco Logistics Partners L.P.'s acquisition of Energy Transfer Partners, L.P., with an enterprise value of $51.5bn the year's third-largest U.S. transaction overall, and Enbridge Inc.'s acquisition of Spectra Energy Corp., with an enterprise value of $43.1bn the fourth-largest transaction of the year. The Spectra acquisition was the biggest of four Canadian inbound deals valued at greater than $10bn, placing Canada as the number-one among foreign acquirers, with Germany taking the second spot (largely as a result of the Bayer / Monsanto transaction), and UK the third.

Technology

With a volume of $297bn (compared to $387bn in 2015), representing a 17.8% market share, technology was the second-most active sector. Notable was Microsoft Corporation's $24.5bn acquisition of LinkedIn Corporation at a whopping 67% premium over the unaffected share price, the highest premium seen among mega deals in recent years. Also noteworthy is Yahoo Inc.'s $4.48bn sale of its operating business to Verizon Communications Inc. Following completion of the transaction, Yahoo will continue to be traded on the NASDAQ and will register as an investment company under the Investment Company Act of 1940 due to the nature of its remaining assets, including stakes in Alibaba Group Holding Limited and Yahoo Japan Corporation.

Media & entertainment

With a volume of $170bn (compared to $178bn in 2015) and a 10.2% market share, media and entertainment rounds out the three most active sectors. This placing was in no small part due to the AT&T / Time Warner transaction described above. Indeed, among the top 25 deals, there is no other transaction in this space, although there were several large transactions in the related telecommunications sector, including Level 3 Communications Inc.'s acquisition by CenturyLink Inc. for $34.4bn, and Brocade Communications Systems Inc.'s acquisition by Broadcom Limited for $5.9bn.

The year ahead

2017 looks to be another busy year for M&A practitioners. As an indicator, at the beginning of the year, the volume of pending (*i.e.,* announced but not closed) transactions with a public U.S. target stood at $640bn. More importantly, U.S. based businesses are exposed to the same pressures that have driven deal activity in years past, including a dearth of opportunities for organic growth in what is generally a low-growth environment, and the

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need to acquire new technologies to stay ahead of the competition. In the meantime, equity markets are continuing to advance to record highs, increasing the buying power of strategic buyers using their stock as acquisition currency. Plans of the new U.S. administration to lower corporate taxes and to facilitate the repatriation of offshore earnings could provide additional liquidity to U.S.-based businesses, which should further fuel M&A activity.

That said, the geopolitical risks noted in last year's chapter have not abated, the change in the U.S. administration has introduced additional elements of uncertainty, and lofty equity valuations come with the risk of market reversals. Any such reversal could be expected to be seized upon by private equity investors, with abundant cash at their disposal.

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