An ALM Publication

GLOBAL Mergers & Acquisitions GUIDE 2015

GUIDING THE WAY

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

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

Contents

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

Welcome

THE GLOBAL M&A MARKET STRENGTHENED CONSIDERABLY in 2014, driven by increased boardroom confidence to invest through M&A. We have seen the return of strategic deals and transformational M&A, some of which have been in the pipeline for years, as well as increased appetite for unsolicited moves.

US investment is flooding back into Europe with American investors seeking opportunities to purchase European brands, patents and technologies, and to access European supply chains. We are also seeing strong M&A activity across the Asia Pacific region, as well as Latin America.

The deal pipeline is strong across all major regions and in certain key sectors. This bodes well for M&A activity levels into 2015.

Our guide provides expert analysis and updates from some of the leading law firms in jurisdictions across the globe. We hope you find it informative and useful.

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EVERSHEDS

The M&A Market and Approach to Dealmaking in Europe

Amidst healthy M&A activity, dealmakers need to be mindful that a deal is not necessarily the same in every country across Europe

As far as M&A is concerned, often, Europe, and in particular the EU, is seen as one region by North American commentators. People talk about doing "deals in Europe". In addition the statistics which are produced often support this concept of a "European deal". However in reality, and while this is slowly changing, the processes and style and the documentation can vary dramatically depending on the particular country in which an "M&A transaction in Europe" is taking place. While cross border deals tend to be more Anglo-Saxon in style, if you are dealing with a transaction in a particular jurisdiction, let's say Poland or Sweden, there can be big variations to what you might consider as the norm. The deal documentation in a domestic French deal will look very different to an English domestic deal.

Also, often people talk about EU law. And while of course there are Directives coming down from the European Commission in Brussels to be implemented at a national level in particular relating to social policy, to a large degree in relation to the corporate law, there is no EU law. Even where a directive could apply to a transaction, for example in relation to the transfer of employees on a business sale otherwise known as the Acquired Rights Directive or "TUPE", each country will interpret that directive in a different way so local advice is required.

A US acquirer should therefore not treat Europe as a single market for the purposes of M&A and would instead need to focus on the particular countries involved, who the sellers are, and what the regulatory environment is in any particular country.

ECONOMIC HEALTH

At the time of writing this article, economic surveys indicate moderate growth on a global basis providing a supportive environment for M&A activity in Europe. The Global all Industry Purchasing Managers Index ("PMI") for the third quarter is just below the three year high of July 2014 reflecting solid contributions from the manufacturing and service sectors along with a continued acceleration of new orders for manufacturing.

It is fair to say the countries in Europe outside the Eurozone are seeing more M&A activity but the Manpower Survey of hiring intentions reveals that employers in 36 of 42 countries surveyed expected workforce additions in quarter 4 2014 - pointing to a wider optimism required for sustained growth in M&A. Notwithstanding this, the combination of the need for growth and minimal inflation caused the European Central Bank to cut interest rates to record lows in the Eurozone in early September in an attempt to support the Eurozone economy.

DEAL TOTALS/VALUATION

By the end of the third quarter, the mid-market transaction totals in Europe year on year increased by just under 30% with a similar incremental increase in dollar value from 2013. This would indicate a healthy pipeline. The medium EBITDA transaction multiple was 8 times for the first nine months of 2014, with transactions below £100 million having an EBITDA multiple of around 7 times and above £100 million at around 9 times.

In terms of cross border activity and in particular acquirers from North America, traditionally the UK has been the main country in which acquisitions take place followed by Germany, France, Spain, Italy, the Netherlands, Ireland, Belgium, Sweden and Switzerland. The UK and Germany represent approximately 60% of all North American inward investment by way of deal activity. North America remains by far the largest acquirer of European assets and the anticipated flow from Asia still remains small compared to North America notwithstanding signs that this could increase. There is still a view that Asian companies are not as comfortable in dealing in an auction process as North American strategics are and, in particular, are uncomfortable with financial sponsor deals.

FINANCIAL SPONSOR EXITS

While the UK is inevitably closer to the US market than a number of other European countries, both in terms of culture and language as well as risk appetite, there are however important differences to the way deals are structured. This is particularly the case in relation to financial sponsor deals.

As an example on exits, financial sponsors will not expect to give any reps or warranties. They will resist any working capital or net debt adjustment post deal and will more than likely insist upon a locked box mechanism. If a strategic buyer is seeking more contractual protection, a financial sponsor would normally direct them towards a warranty and indemnity insurer for coverage. This is an increasing trend in financial sponsor sales, in order to bridge the gap for the clean exit for the financial sponsor and the risk that imposes on a strategic buyer, for more extensive, less material due diligence. This is inevitably slowing up transactions and there is no question that transactions are taking longer as more due diligence is required to be done upfront.

Unfortunately this has led to timetables being regarded as "meaningless" as they just do not reflect the time that will need to be spent on due diligence in Europe. Anecdotally, there is regular commentary in the marketplace that financial sponsors would prefer to sell to another financial sponsor to move transactions on faster. However to date this has not been seen as a genuine disadvantage for strategics in processes but of course this potential trend needs to be monitored on a regular basis.

EQUITY MARKETS

In Europe the equity markets have shown somewhat of a revival in 2014. On significant assets there is now normally a triple track process of talking to strategic buyers, talking to financial sponsors and

"The UK and Germany represent approximately 60% of all North American inward investment by way of deal activity."

also looking at IPO opportunities. It is uncertain how long this will last. Already the uncertainties of the global economy and investors concerns with valuations being too high and financial sponsors unwillingness to holding stock long term after an IPO have pointed towards a number of IPO's being pulled with then a emphasis on a strategic sale.

OCEAN DIVIDE

There are a number of other key differences which a North American buyer should be aware of between the US style of documentation and the European style of documentation.

1. Firstly, European deals envisage the concept of general disclosures rather than specific exhibits. The issue of the general disclosure, for example, of a data room as opposed to specifically disclosing documents from a data room by way of exhibits is something which should be addressed at an LOI stage.
2. In Europe, typically, the maximum liability for sellers is closer to 100% of the consideration value.
3. In the UK in particular, domestic sellers may well resist the concept of indemnity basis of damage and instead insist on a buyer establishing a diminution in the value of the shares being acquired.

4. Importantly non-competes cannot be longer than three years other than in extreme exceptional circumstances. The European Courts do not like non-competes unless they are specific and are genuinely needed to protect the value of the business being acquired.
5. While deals are often conditional upon anti trust clearance, deals are less contingent on financing contingencies and MAC clauses are often tightly drawn up and are linked to a significant diminution in turnover or EBITDA often around the 25% level.
6. It is important to note that in a number of European jurisdictions the concept of good faith applies. While litigation is rare there has been cases relating to not acting in good faith in relation to a particular transaction.
7. Agreeing the governing law clause and whether arbitration or courts should be used in any dispute is something which should be addressed at the LOI stage. Domestic sellers in Europe will often insist upon a local governing law clause and addressing that upfront as part of any deal is important.

"...the cost of integration on cross-border deals in Europe should not be underestimated."

8. While the concept of fundamental warranties relating to title and capacity is more widely accepted, obtaining other fundamental warranties for example in relation to trade or bribery compliance is only a trend that has recently been introduced.
9. In Europe the concept of VDD is more common than in the States and you should expect to receive, in auction processes, VDD reports which you are expected to then to negotiate with the provider.
10. On a cross border transaction you should assume that you will have an umbrella agreement and a local transfer agreements in each individual territory; and
11. Finally you should also bear in mind, depending on the industry sector, that there could well be governmental consents required before any acquisition by an overseas entity can be approved, good examples being French Ministry of Defence or Commerce consents.

TIME MANAGEMENT & MATERIALITY AND OTHER PECULIARITIES

In the author's view, on any particular cross border deal in Europe, project management is key. One cannot assume that if you have got lawyers in the UK they will be able to deal efficiently with issues say in Italy, Germany or Spain. Eversheds realised this several years ago and have a dedicated cross border international team to handle these types of deals.

While every buyer will have their own levels of materiality on any cross border deal, it is important to focus on the corporate and regulatory aspects including compliance even at a non-material level. Employees have more rights in Europe than they do in the States and are protected by legislation in relation to their employment. If for tax reasons you are doing a mixture of a share and asset deal you will need to consult with employees either at a local basis ie each individual country or at a collective basis if the target has a European works council. Typically on a cross border deal there would be a tax analysis which dictates the structure of a transaction from a tax efficiency for both the sellers and buyers perspective. This can lead to individual deals under an umbrella arrangement.

Avoiding duplication of cost and having tight project management is essential. Nevertheless it is important to note local rules. For example in many countries in Europe there is the concept of notarial fees which requires local transfer agreements to be registered locally, in person, at closing. In addition to the extent that debt financing on a secured basis has been put in place the rules on recording security vary considerably from country to country.

Further it is often a requirement that whilst English language and English law may be the governing language and law of the contract, local requirements require documentation in the local language which again can increase the cost and process time involved.

Doing a cross border transaction in Europe requires more management time and more time that you might expect than doing a domestic deal in the US. Time is a critical element in putting together any cross border timetable. You should anticipate that any cross border European deal to take at least 50% longer and devote at least 75% more management time than a domestic deal.

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ANTI TRUST

The final area to watch in terms of cross border European deals is anti-trust analysis. You should not assume that there is only a need for one filing at a European level. In fact each member state has its own cartel authority and its own rules in relation to filings. There is not a consistent approach across Europe. Therefore it is necessary right at the beginning of any transaction to analyse where you might need to file in Europe and what the timescales are. Some European countries adopt a turnover threshold but some also adopt a market share test and some look at the aggregate of the parties turnover. In most countries filings are mandatory and you cannot complete a deal in the meantime.

In summary, scoping and processing and agreeing up front timetables and understanding the approach that has been taken by a seller particularly if it is a financial sponsor are critical.

POST DEAL

Integration will be a key factor, as it is in any transaction, but the cost of integration on cross-border deals in Europe should not be underestimated. The retention of people and the focus on cultural differences are important. The author would recommend a 100 to 180 day plan which focuses on people and processes as well as compliance.

In addition, there will, of course, be issues that have been raised during the deal which require immediate rectification. Getting buy-in from local management to those actions as early as possible so that they are working with the acquiring company is critical.

Often, it is reported that post deal the strategic rationale for an acquisition is not clearly set out to target senior management who then feel isolated, then pass their concerns on to people at a lower level in the organisation resulting in a disenchantment from the acquired workforce. While it is essential to carry out necessary compliance training so that a business understands the requirements of US compliance, getting buy-in from senior management to the process and allowing senior management locally a role, as well as actually conducting the compliance training in local languages, are often seen as being more effective than simply introducing a North American perspective.

It is essential that you get control of any corporate records, real estate records, financial records and HR records as soon as possible. Leaving these until the next accounting period, again, can lead to a lack of integration and inefficiency.

While customers and suppliers often understand the rationale for an acquisition, internal communications can be missed and there is strong evidence, particularly in Europe that personal contact is seen to be more effective than email correspondence.

It is also important that you do not lose the people that have control of local permits and understand local regulatory requirements. This is regularly an issue due to often a lack of understanding from both the acquirer and local management as to the regulations.

On larger acquisitions involving many countries, the approach to integration is even more critical. You should not underestimate the time and cost it will take to integrate the business to extract the synergies and to maximise the return. There have been too many war stories of acquiring companies finding out 12 months later of either a sales office they weren't aware of or a reporting line they weren't aware of. Understanding post deal existing reporting lines is essential, even more so on a larger cross border deal.

In summary, Europe is a very large marketplace with relatively stable macro economic and political structures but do not assume a deal in Europe is the same in every country. ■

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Robin Johnson developed *"Eversheds M&A Blueprint: Inception to Integration."* Copies are available from www.eversheds.com.

التميمي و مشاركوه
AL TAMIMI & CO.

Business Conditions in the Arabian Gulf

Economic growth and favorable demographics are driving M&A writes Al Tamimi & Company's Gary Watts, Grahame Nelson and Alex Saleh.

The economies in the Arabian Gulf continue to grow rapidly, despite instability and unrest afflicting their neighbouring countries in the Middle East. The Arabian Gulf countries are the members of the Gulf Cooperation Council (GCC) namely Saudi Arabia, the United Arab Emirates, Kuwait, Qatar, Bahrain and Oman. These GCC countries are collectively important for any business with global aspirations and ambitions.

According to the International Monetary Fund (IMF), in the five-year period following the financial crisis of 2008, the real gross domestic product of the GCC countries grew by 24%, a stark contrast to negative growth experienced over the same period in the U.K. and in the Eurozone countries.

GROWTH DRIVERS IN THE ARABIAN GULF

This impressive growth in the Gulf was made possible by high oil and gas reserves and prices over most of the period since 2008, coupled with a willingness on the part of governments in the region to increase spending and to move aggressively to diversify their economies away from energy production. High rates of government expenditure continue in most GCC countries, as governments invest these significant oil and gas reserves to boost social services and infrastructure. At the time of writing the outlook for oil prices was uncertain, but the major producers have built significant reserves from big surpluses over recent years, so in the short-term public spending should not be affected.

Aside from these advantages, all GCC countries have rapidly increasing populations. The IMF also reported that between 2008 and 2013 the population of the GCC countries grew by a staggering 18.9%, emphasising the youthful demographic.

Importantly, most of the Gulf countries are zero tax or low tax jurisdictions. Labour markets

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are flexible, and local businesses import and deploy expatriate workers across a wide spectrum of skilled and unskilled occupations (literally from labourers to rocket scientists). Under the GCC legal systems, residency visas are linked to employment contacts and are generally weighted in favour of employers.

Despite the political unrest across the wider Middle East, all the GCC countries seem politically stable at present, with only Bahrain having a recent history of civil disorder and sectarian political issues.

CRITICAL ISSUES FOR FOREIGN INVESTORS IN THE GCC

All GCC countries impose restrictions on the level of foreign ownership and control in local businesses. These restrictive rules often pose a challenge for foreign investors when setting up companies or businesses in the GCC; or when investing in established GCC companies.

The foreign investment rules are intended to protect national entrepreneurs and to limit foreigners to minority ownership positions. Foreign investors usually have two options:

- Pursue the path of joint venture—the investor identifies a local company which will contribute to the business, share any financial risk and facilitate business development and operations on the ground; or
- Conclude arrangements with a local businessman (or company) who will become a partner in name only; even where such a local partner owns 51% of the company, the foreign investor will put in place side agreements which allow the foreign partner to retain almost all the profit, carry all the risk and exercise full control over the business.

Both types of arrangements are extremely common throughout the region.

All GCC countries have rapidly increasing populations. The IMF also reported that between 2008 and 2013 the population of the GCC countries grew by a staggering 18.9%, emphasizing the youthful demographic.

—GARY WATTS, PARTNER AND REGIONAL HEAD OF CORPORATE COMMERCIAL, AL TAMIMI & COMPANY

The restrictions on foreign ownership go hand in hand with a prescriptive business licensing regime that prevails in all the GCC countries. Any business must obtain a "gateway" licence to carry on business from the government authorities. This is a substantive approval process and applicants must demonstrate that they have employed staff with appropriate skills and experience and track record to operate the business. Highly regulated types of business (e.g. healthcare and education) also require further regulatory approvals and licences to be obtained, in addition to basic "gateway" licences.

CONDUCTING DUE DILIGENCE

Foreign investors find it difficult to identify targets for acquisition or partnership in the Middle East, let alone conduct detailed due diligence on their targets. In Western countries it is normal to elicit considerable background information about target companies from corporate registers, real estate

SAUDI ARABIA

DEALS IN SAUDI ARABIA: *Mixed Messages*

Saudi Arabia is the biggest economy and market in the GCC. So it offers the greatest rewards but also presents significant challenges in making investments. Politically, Saudi Arabia is stable at present and business activity is strong, although a major crackdown on expatriate workers without proper visas has led to labor shortages in some sectors, particularly in the building industry.

The gateway to foreign investments is the Saudi Arabian General Investment Authority ("SAGIA"), a regulatory body that must approve any foreign investment application from outside the GCC countries.

SAGIA was established in 2000. It administers a foreign investment regime dependent on the issue of foreign investment licences by SAGIA.

For those foreign businesses wanting to carry on a business activity in Saudi Arabia, they can only do so if they have a legal presence in Saudi Arabia and they have a foreign investment licence which authorises that activity to be conducted.

Foreign investors may acquire ownership of business in all sectors of the economy subject to two broad qualifications:

Foreign investment is not allowed in oil exploration, drilling and production (although there is no prohibition on foreign investment in refining and petrochemical development).

The Foreign Investment Law identifies a number of business activities reserved for Saudi owners. This is referred to as the "Negative List".

SAUDI ARABIA: FOREIGN INVESTORS MAY BE ALLOWED TO OWN UP TO 100% OF THE CAPITAL OF THE ENTERPRISE. HOWEVER, THERE ARE SOME BUSINESS ACTIVITIES WHERE AT LEAST SOME LEVEL OF SAUDI OWNERSHIP WOULD BE REQUIRED.

After a liberal beginning to the SAGIA administration about three years ago there was a change in leadership at SAGIA which led to a tightening of foreign investment rules. SAGIA is now selective about the applications it approves. Nevertheless, for many business activities it is feasible to achieve foreign ownership up to 75%. Foreign investors may be allowed to own up to 100% of the capital of the enterprise. However, there are some business activities where at least some level of Saudi ownership would be required.

But it is easier to secure approval if your investment is large; or is viewed as bringing new technology or significant job creation to Saudi Arabia.

Foreign players can often gain access to the Saudi market without carrying on a business in Saudi Arabia. In many cases, the restrictions on foreign ownership encourage companies to enter into distribution, commercial agency and franchise arrangements with parties allowed to carry on those businesses in Saudi Arabia. The foreign company will not need a foreign investment licence to enter into these arrangements and won't need to establish a legal presence in Saudi Arabia.

registers, court registers, credit checks and other public sources. However, in the GCC countries, not much information is recorded on public registers, there is no accessible credit reporting system (except in Bahrain) and most of the information maintained is not available is not available to the public or to any third party.

This lack of publicly available records makes it difficult to source or corroborate reliable information from public sources to verify basic facts about the target. It is usually necessary to rely wholly on information and documents furnished by the prospective seller. ■

THE UNITED ARAB EMIRATES

DEALS IN THE UAE:
Business is Brisk

Business in the UAE is extremely positive. Dubai, in particular, has reinforced its position as the leading financial centre in the region as a result of its superior lifestyle and infrastructure, coupled with its unequalled air transport connections with the region and the rest of the world. Dubai is a major beneficiary of the difficulties elsewhere in the Middle East. It is now the major tourist destination and focus for property investment in the region.

Abu Dhabi is likewise constructing the first offshoot of the iconic Louvre Museum and a new Guggenheim Museum, has built theme parks and significantly upgraded its hospitality and transport infrastructure (including the beginning of a trans-Arabian railway network). There is also a major port and industrial zone being developed in Abu Dhabi near the main freeway between Abu Dhabi and Dubai.

The UAE has pioneered the development of economic free zones, which are designated areas within urban or industrial precincts where foreign investors are permitted to set up 100% owned companies and businesses. UAE free zones, particularly those in Dubai and Ras Al Khaimah, have been very successful and a staggering array of businesses operates from the free zones, ranging from manufacturers to banks and consulting firms. However, there are strict limitations on the types of business activities which can be conducted from free zones. Also, to set up in a free zone, it is necessary to buy or lease premises in the free zone areas.

One sector that is currently seeing exceptional growth in the UAE, particularly in Abu Dhabi, is the healthcare industry. It is forecast that over the next few years, due to factors such as the rapidly expanding population, greater public awareness of medical conditions and treatment available, higher incidence of lifestyle diseases and deeper insurance penetration, this sector will continue to grow exponentially (becoming a $12 billion industry by 2015 according to the Dubai Chamber of Commerce & Industry).

The UAE seeks to promote itself through the development of healthcare tourism, attracting patients to its premium facilities from around the region. The Government and the government-subsidized insurance schemes also recognize the opportunity to save costs by treating the national population at home, rather than paying for expensive treatment abroad as has been common previously. This forecast growth has fuelled a significant increase in both public and private sector investment in healthcare facilities with high-profile names, such as Cleveland Clinic, John Hopkins and Mayo Clinic now operating in the UAE.

The UAE's non-oil sectors expect continued growth in 2015, driven by strong real estate development activity, tourism, leisure and retailing buoyancy and a continuation of major infrastructure projects. ■

UAE:

IT IS FORECAST THAT OVER THE NEXT FEW YEARS, DUE TO FACTORS SUCH AS THE RAPIDLY EXPANDING POPULATION, GREATER PUBLIC AWARENESS OF MEDICAL CONDITIONS AND TREATMENT AVAILABLE, HIGHER INCIDENCE OF LIFESTYLE DISEASES AND DEEPER INSURANCE PENETRATION, THE HEALTHCARE SECTOR WILL CONTINUE TO GROW EXPONENTIALLY.

KUWAIT

DEALS IN KUWAIT:
Building Infrastructure Is Key

Of all the GCC countries, Kuwait is closest geographically to the serious ongoing violence in the region, as it has a long land border with Iraq. However, the GCC's only parliamentary democracy remains relatively stable and prosperous. It retains significant oil reserves.

The government of Kuwait has vast foreign assets, but much of the local infrastructure is overdue for overhaul and enhancement. However, it continues to take time for the political processes to work through how Kuwaiti's plentiful sovereign resources will be spent. This long-delayed "makeover" of Kuwait and its infrastructure will act as a major stimulus as it emerges over time.

In response to its growing need for robust local infrastructure projects, the Kuwait government passed the country's first PPP (Public Private Partnership) and IWPP (Independent Water Power Plant) laws in 2008 and 2010 respectively. On the heels of the passing these laws, Kuwait embarked on a mission to procure numerous midsize and large infrastructure projects under a PPP regime. The PPP projects anticipated by the issuance of these laws cross a business areas that include (but are not limited to) electricity and power, waste water management, transportation, communications, hospitality, healthcare and land development within the State of Kuwait.

The aim of the PPP Law is to create wider ownership in larger projects (i.e. to shift the development cost burden away from the government and toward private investors), while giving the investor management control of the joint stock company and the project. Since the PPP Law was passed in 2008, over $25 billion worth of projects have been announced and significantly more are expected to be announced over the next few years as Kuwait sets out to expand and diversify its economy.

KUWAIT:
THIS LONG-DELAYED "MAKEOVER" OF KUWAIT AND ITS INFRASTRUCTURE WILL ACT AS A MAJOR STIMULUS AS IT EMERGES OVER TIME.

In January 2014, Kuwait reached financial close on the Az Zour North Independent Water & Power Project, Kuwait's ground-breaking PPP/IWPP project. Considered as Kuwait's flagship infrastructure project under the PPP and IWPP laws, the $1.8 billion project will result in the construction of combined cycle power plant and associated water desalination plant.

To improve upon gaps in the PPP regime and lessons learned following the success of the Az Zour North project, Kuwait recently passed a new PPP law, which is more flexible and conducive to attracting foreign private investment. As such, Kuwait believes large infrastructure projects to gain momentum, including projects such as the Umm Al Hayman Wastewater Treatment Plant, Az Zour North Phase 2 IWPP, Al Abdaliyah Integrated Solar Combined Cycle Plant and Al Khiran IWPP, amongst many others in the pipeline. ■

BAHRAIN

DEALS IN BAHRAIN:
All Investors Welcome

Bahrain has long established roots in international trade and in 1932 it was the first GCC country to discover significant oil reserves. Over the past 40 years Bahrain has put in the place foundations for a modern economy. As Bahrain no longer has significant oil reserves like some of its GCC neighbours, it has moved away from dependence on oil, diversifying into other sectors. During the 1980s and 90s, it was seen as the banking hub of the GCC.

Bahrain has close ties with the US and is the first and only GCC state to have a bilateral Free Trade Agreement with the U.S., which came into force in 2006. As a result, there are few restrictions for U.S. individuals and companies wanting to do

QATAR

DEALS IN QATAR:
Countdown to the World Cup

Qatar is the wealthiest country in the GCC per capita and enjoys vast gas reserves. There have been major new developments in Doha and important cultural attractions established (such as the magnificent Islamic Art Museum). However the real stimulus to activity in Qatar is expected to be the major infrastructure which must be built to permit the staging of the 2022 World Cup.

The country's economic progress has slowed following a change in leadership in 2013 (the old Emir stepped down in favour of his son) as the government and the publicly owned businesses continue to digest the implications of the change. However, the World Cup infrastructure has an implacable deadline for completion, so significantly increased activity is expected in the near future.

DUBAI:
THE WORLD CUP INFRASTRUCTURE HAS AN IMPLACABLE DEADLINE FOR COMPLETION, SO SIGNIFICANTLY INCREASED ACTIVITY IS EXPECTED IN THE NEAR FUTURE.

The Qatar railway project is also underway with contracts now filtering downstream. The Msheireb "Heart of Doha" project revamping the old central business district is making significant progress; and development of the new Doha satellite city of Lusail is expected to move up a gear during the next 12 months.

Whilst infrastructure works are proceeding, the policy of attracting industrial activity to the country has not achieved significant success. Difficulties with registration of businesses with over 49% foreign-ownership and slow paced industrial licensing are proving to be significant hurdles and the under-developed state of Qatar's industrial zones are hampering efforts to attract the larger players in the manufacturing industry.

Significant mergers and joint ventures in Qatar are still largely driven by governmental initiatives. The Qatar Exchange is now wholly-owned by the sovereign wealth fund entity Qatar Holding. There are still proposed mergers and strategic consolidations being considered by government entities and Qatar Petroleum and its subsidiary organisations are involved in joint ventures with a number of global companies. Despite encouragement from various sources, new listings on the Qatar Exchange are few and far between and the capital markets lag behind largely more buoyant regional financial markets such as the UAE and Saudi Arabia. ■

business in Bahrain. Bahrain is also home to the U.S. Navy's Fifth Fleet.

There are many advantages to doing business in Bahrain. It has a relatively liberal lifestyle compared to some other countries in the GCC, e.g. Saudi Arabia and Kuwait. It is strategically positioned between Saudi Arabia (to which it is connected to by a causeway), Qatar and Kuwait. It has a well developed legal system with relatively advanced companies law, financial services laws and even a trust law. It has well developed sectors in financial services, manufacturing, professional services, logistics and ICT. It has a relatively liberal foreign investment ownership regime with no restrictions on foreign investors in certain sectors and no restrictions on U.S. investors at all. Bahrain also has an educated and diversified work force comprising both expatriates and Bahrainis. Like all other GCC states, Bahrain is tax free in most sectors of industry.

Bahrain's Economic Development Board is responsible for attracting inward investment into Bahrain and is charged with leading implementation of the Government's 2030 Economic Vision.

Bahrain was affected adversely by the Arab Spring and in 2011 an attempted uprising took place as a result of a latent sectarian divide between the Shia majority and the Sunni monarchy. The uprising expressed in some civil disorder and a degree of political violence. The situation has however stabilized in recent months. Bahrain is acutely aware of the loss of business and investor interest which has been a side effect of the recent disorder and as a result it has become increasingly investor and business friendly, whilst also trying to address its political issues. ■

BAHRAIN:
THERE ARE MANY ADVANTAGES TO DOING BUSINESS IN BAHRAIN. IT HAS A RELATIVELY LIBERAL LIFESTYLE COMPARED TO SOME OTHER COUNTRIES IN THE GCC. BAHRAIN ALSO HAS AN EDUCATED AND DIVERSIFIED WORK FORCE COMPRISING BOTH EXPATRIATES AND BAHRAINIS.

OMAN

DEALS IN OMAN:
An Oasis of Stability

The Sultanate of Oman has a long record of political stability under the dynasty of Sultan Qaboos and continues to be on good terms with all its neighbors. Major industrial development is occurring at Sohar, whilst near the capital Muscat there is outstanding hospitality infrastructure on the coast, catering to travelers who prefer five star resorts.

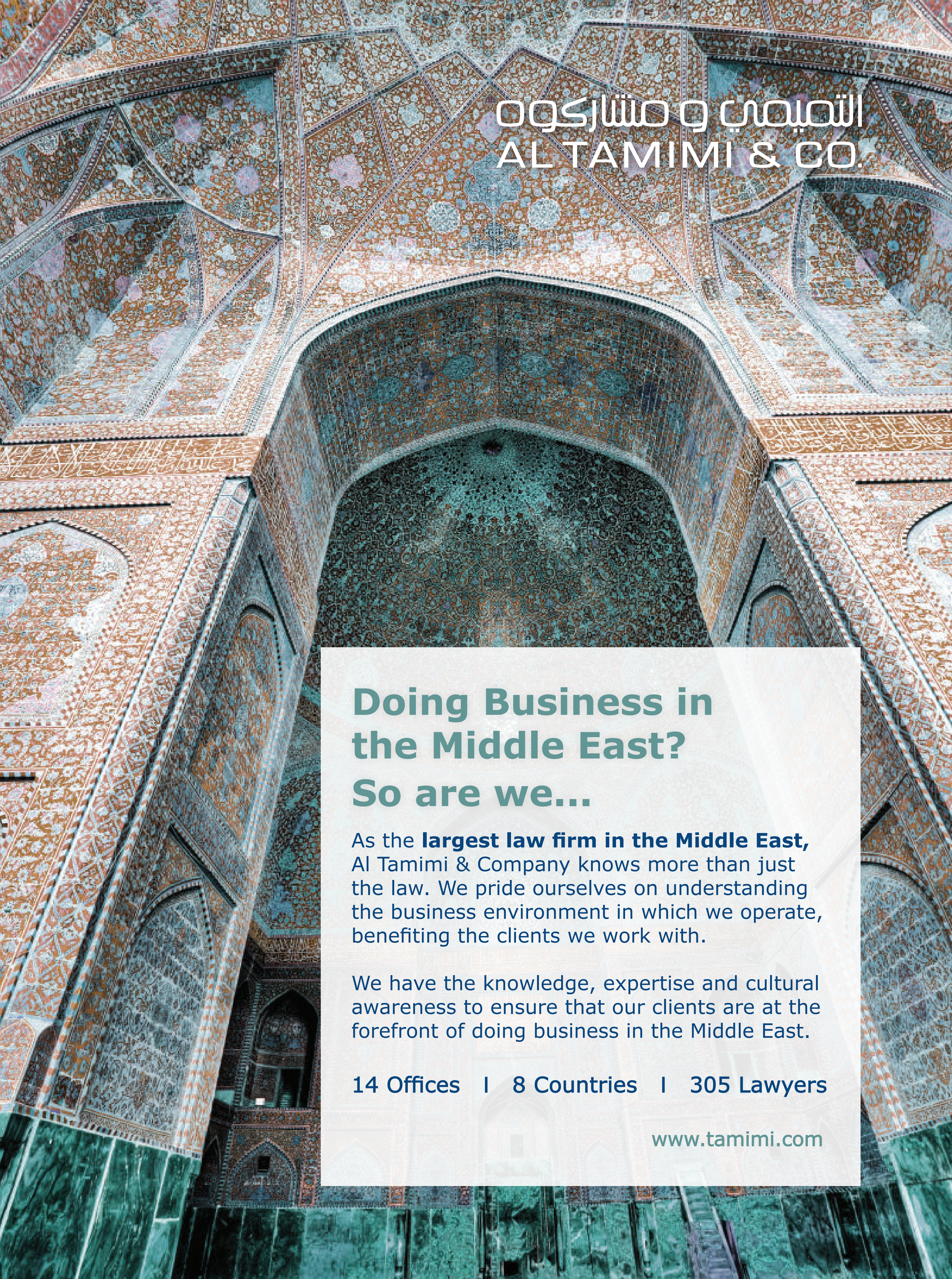
The legal infrastructure is likewise good and the government has made a comprehensive assessment of the investment sector to define the obstacles and challenges faced by the existing legal framework. Oman offers attractive investment concessions to U.S. nationals and U.S. companies under treaty arrangements designed to create a more market friendly environment for U.S. investors.

Oman was ranked above Saudi Arabia, Bahrain and the U.S. in the 2014 Global Peace Index put together by the Institute of Economics and Peace, ranking 59th out of a total of 162 countries. The Index of Economic Freedom 2014, an indicator of ease of doing business, ranked Oman 48th out of 178 countries. Moody's and Standard and Poor's both view Oman's investment outlook as stable and have reaffirmed Oman's A1 and A/A1 sovereign credit rating, respectively.

OMAN:
MOODY'S AND STANDARD AND POOR'S BOTH VIEW OMAN'S INVESTMENT OUTLOOK AS STABLE AND HAVE REAFFIRMED OMAN'S A1 AND A/A1 SOVEREIGN CREDIT RATING RESPECTIVELY.

Oil exports remain the major source of foreign earnings and significant revenue earners for the Sultanate; the impact of depressed oil prices towards the end of 2014 on the economic health of the Sultanate is yet to be seen. It is likely that marginal infrastructure projects will re-evaluate or postponed whilst the oil price continues to fluctuate.

The Sultanate's finite oil resources have propelled the Government of Oman to embark on a strategy of economic diversification to lead the Sultanate away from an economy driven by oil to one more reliant on tourism, real estate and trade through better utilisation of its geographic positioning as the gateway to Asia. World Bank projections indicate growth in GDP of 5% during 2015, making the Sultanate an attractive market for investment. ■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M&A in Australia

Four key developments are setting the stage for an uptick in M&A activity in Australia.

Several factors have combined in 2014 to create a positive environment for mergers and acquisitions (M&A) in Australia.

First, private equity sponsors, hedge funds and sovereign wealth funds are more actively pursuing Australian Securities Exchange-listed companies in order to deploy pan-Asian and global funds into mature investments in the region. This is in line with an increasing trend for activist shareholders to take advantage of shareholder-friendly features of the Australian regulatory environment.

Second, corporate boards are more comfortable with their own view on value, which has led to a greater propensity by directors to market and promote sale auction processes. While not quite at the level of the "don't ask don't waive" (DADW) provisions in the U.S., there are similarities.

Third, bidders for public companies are able to take advantage of relatively loose disclosure rules for derivative positions to gain momentum in unsolicited bids.

Finally, China's interest in Australian M&A activity has continued to rise, representing its highest growth since 2009.

SHAREHOLDER ACTIVISM

While economic activism has been a significant driver of activity in the global M&A market over the past few years, Australia has seen very little organized, professional activism compared with the United States. Nevertheless, the market has seen some high-profile campaigns in recent years and activism could soon become a more prominent feature of the Australian market. Strong shareholder rights enshrined in Australian legislation and case law provide shareholders with greater leverage against Australian listed companies than in some other jurisdictions. We expect that Australian companies will be targeted more frequently once experienced value-driven activist investors obtain greater familiarity with the shareholder-friendly features of the Australian regulatory environment.

Unlike many jurisdictions in the U.S., Australian law allows shareholders with a 5% stake to requisition a meeting to consider a resolution, including a resolution to remove directors. Only a simple majority (50% +1) of votes cast is needed for such a resolution to be passed. Australian boards are also much more vulnerable than boards in jurisdictions that permit "staggered boards." Some jurisdictions, such as Delaware, ensure that only one-third of the directors are vulnerable to a contested election at any annual general meeting and, accordingly, that an activist needs no less than two annual general meetings to take control of the board. This is not the case in Australia.

Shareholders of Australian companies also have the ability to nominate directors directly on the company's ballot. At the requisitioning shareholder's request, the company is required to distribute a statement provided by the requisitioning shareholder to other shareholders in relation to the proposed appointments. The proxy forms mailed to shareholders must list all the resolutions proposed, including the resolutions to appoint the shareholder-nominated directors. By contrast, shareholders of companies in the U.S., while having certain rights to submit proposals for inclusion on the company ballot, are generally not permitted to use the proposal mechanism for the purposes of nominating directors.

Directors of Australian companies also have a duty to give balanced disclosure to shareholders. The board must comply with continuous disclosure requirements and disclose to the market any material intentions or plans. Communications must be neutral in tone. By contrast, activists have no duty to disclose their plans and are free to use emotive language, so long as they do not make defamatory or misleading statements.

Some jurisdictions require full disclosure of derivative positions if 5% is reached when aggregated with any physical securities holdings, although that is not the current position in Australia. Activists frequently hold derivative positions in listed entities and do not file substantial holder notices based on derivative holdings or movements unless a control transaction is in progress or they are taking preparatory steps for one.

The "two strikes" rule requires a listed company to put adoption of an executive remuneration report to a nonbinding shareholder vote at each annual general meeting. If the company's remuneration report receives a "no" vote of 25% or more of votes cast on the non-binding approval resolution, a "strike" will be recorded against the board. A strike at two consecutive annual general meetings triggers a requirement for the company to submit a "spill" resolution to shareholders.

The spill resolution, if approved by a simple majority of shareholders, forces the company to hold another meeting within 90 days, at which all of the company's directors (other than managing directors) who were serving at the time of the second "strike" must stand for re-election. The rule is intended to provide an additional level of accountability for directors and to give greater voice to shareholders. However, given that only 25% of votes cast are needed to record a strike, the rule potentially affords activists holding minority stakes significant leverage over boards of Australian companies. Activists who encourage even a small coalition of minority investors now pose a meaningful threat to incumbent directors. By contrast, "say on pay" votes in the U.S., while potentially embarrassing to directors, are advisory only.

While shareholder rights plans, or "poison pills," have long been used by corporations in Delaware to defend takeovers and hostile activists, an Australian company's ability to implement a tactical poison pill in the face of an unsolicited approach or activist accumulation is constrained by likely Takeover Panel opposition and an ASX requirement that shareholder approval be obtained. This inability to stop activists means that Australian boards have potentially less ability to control process and additional accumulation by activists.

Some jurisdictions permit boards to spend corporate funds to defend against a contested election, but directors in Australia are restricted from using corporate resources to campaign against the election of incumbents, even if it is in the best interests of the corporation. Unless directors are willing to make use of their personal wealth, they cannot compete on an equal footing against the actions of wealthy hedge fund activists.

"Derivatives continue to be a very effective tool for gaining momentum in competitive bidding situations."

COMPETITIVE SALE PROCESSES

Australia has seen a fairly recent emergence of competitive sale processes in connection with the acquisition of controlling (or significant) stakes in listed companies. The most recent example involved Wotif running a competitive sale process for all of its shares, which ended with Expedia successfully acquiring Wotif following that process. Preferred bidders in these circumstances run the risk that other participants do not put forward their best offer under the company led sale process, and seek instead to disrupt the preferred transaction once the bidder's offer price is announced.

The typical standstill arrangement does not completely address this risk of being overbid as an approach by an under-bidder to a target board in those circumstances may mean the directors feel compelled (due to fiduciary duties) to waive the standstill provision to allow a superior offer to be presented to shareholders. While targets are willing provide representations and warranties to preferred bidders as to the scope and tenure of all under-bidder standstill restrictions, they have not been as willing to provide enforceable undertakings to enforce these standstill restrictions. There is some guidance from the Takeovers Panel in the International All Sports decision, which indicates support for the use of appropriately structured standstills which "Failure to enforce the agreements could disrupt the process of negotiating and consummating business transactions." However, it is generally considered that a preferred bidder will need to demonstrate to the Panel why a standstill should be enforced against another bidder if that standstill prevents a higher bid being offered to shareholders.

"Recent changes by the Chinese government to simplify approval processes for Chinese outward investment are having a positive effect on Australian M&A."

By contrast, the recently adopted DADW provisions in the U.S. appear to have become a significant tool for target boards running public auction processes. These provisions prohibit potential purchasers from submitting a bid without the target company's invitation ("don't ask"), and prevent the bidder from publicly or privately requesting that the target company waive the standstill provision ("don't waive"). Whilst DADW provisions are yet to permeate the Australian market, their use is being closely examined. Despite the Panel's limited endorsement of standstills, it is unclear whether they would support the use of DADW provisions. The policy question for the Panel is whether shareholders would be better off with a preferred bidder acquiring a blocking stake (such as happened in the acquisition of Wotif) or enforcing DADW provisions effectively to lock out other participants from bidding. In our view, provided the target company can demonstrate that the process was designed to elicit highest shareholder value, we believe the Panel would support and maintain standstills in competitive sales processes. However, the onus would be on the preferred bidder and the target company in each case to show that the process gave each participant the opportunity to present the highest bid.

DERIVATIVES POSITIONS AS PRE-BID STAKES

Bidders (and potential bidders) continue to use a variety of methods to acquire interests in potential targets prior to launch of the bid. However, in recent years, bidders have increasingly turned to cash and physically settled equity derivatives to obtain a foothold in Australian listed targets. Recent examples include Crown's efforts to pressure its competitor for Echo Entertainment and Dexus' takeover bid for the Commonwealth Property Office Fund.

Derivatives offer two primary benefits. First, a bidder gets a hold on a pre-bid stake in the target for minimal cash outlay. Given the current market conditions, this may be a major benefit since the cost of acquiring a physical holding is significantly higher. Second, traditional pre-bid arrangements require the bidder to find target shareholders who are willing to dispose of their shares pre-bid (or at least indicate that they will accept a takeover offer from the bidder) and this has both insider trading and misleading and deceptive conduct issues to navigate. With a derivative, the counterparty is able to borrow shares from institutional shareholders and deliver them to the bidder (with an obligation to return equivalent shares to the institutional shareholder at a later date) and thereby build a stake without those concerns and without moving the market price.

The position in relation to disclosure of derivatives in Australia depends on whether they are physically settled or cash settled. A physically settled derivative (in excess of 5% of the target's shares) must be disclosed, whereas a cash settled equity derivative is generally not required to be disclosed unless in the context of a "control transaction." While holder notices are required to include a copy of any document setting out the terms of any "relevant agreement" that contributed to the situation, what is generally disclosed in practice has been relatively inconsistent. While in the case of physically settled derivatives, the look-through holding of the counterparty should be disclosed (whereas the actual aggregated long position for cash settled derivatives should be disclosed), this is often not the case.

The lack of timely and accurate disclosure of derivative positions has caused participants to seek orders from both the Panel and Federal Court to obtain proper disclosure of derivative positions (including collar/capped forward documentation where collars or capped forwards are used for the benefit of the counterparties to cash-settled and physical holdings, to enable them to fund their short position and, therefore, enter into the derivative). This has in turn led some to argue for reform on the use and disclosure of derivative positions. In the meantime, they continue to be a very effective tool for gaining momentum in competitive bidding situations.

THE AUSTRALIA CHINA FREE TRADE AGREEMENT

Recent changes by the Chinese government to simplify approval processes for Chinese outward investment are having a positive effect on Australian M&A activity. The changes follow the decision by the Central Committee of the Communist Party of China on Certain Major Issues Pertaining to Comprehensively Deepening Reform, which urged reform of government review of investment projects.

The key reform was to distinguish between "Special Projects" and "General Projects." Only "Special Projects," investments of US$1billion or more, or that involve sensitive countries and regions or sensitive industries, require verification by the National Development and Reform Commission (NDRC), whereas other "General Projects" are subject to record filing requirements. Prior to the reform, Chinese investors contemplating outward investment typically needed approvals from the NDRC, Ministry of Commerce (MOFCOM), State Administration of Foreign Exchange (SAFE) and, for state-owned enterprises (SOEs), approval from the State-owned Assets Supervision and Administration Commission (SASAC). The NDRC process alone involves a preliminary NDRC "road pass" before undertaking "substantive work" on an investment and final approval from NDRC for the transaction prior to signing or announcing the transaction. Due to the complexity of these procedures, China outbound investment deals were often burdensome and time-consuming, even for powerful and well-connected SOEs.

DAVID FRIEDLANDER
PARTNER

LEE HORAN
PARTNER

The impact of the reform was felt almost immediately in Australia with the joint bid by Chinese steel giant Baosteel and Aurizon Holdings for control of the $1.4 billion Australian iron ore and coal target, Aquila Resources. That Baosteel's contribution to the joint bid was less than US$1billion meant NDRC approval was not formally required. Such market liberalization has the capacity to make Chinese investors more competitive in the global capital and M&A markets and able to react more opportunistically to offshore investment proposals. The reduced need for bidder conditionality as well as various seller deal protections which had become commonplace, such as reverse break fees in Australia and the rest of the world, is driving transaction costs down.

The extent to which Australia can further increase its share of Chinese outward investment from 15% currently may depend upon the political climate in Australia and in particular the outcome of November's bilateral Free Trade Agreement. ■

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Austrian Public M&A in 2014

During 2014, the private M&A market remained below expectations both as to transaction value and number of transactions. Transactions have been mainly driven by consolidation or workouts in the banking and industrial sectors.

From January through November 2014, the Austrian public M&A market saw nine public offers, with the public offer by Carso Telecom, Netherlands/America Movil, Mexico, for Telekom Austria and the offer by Airports Group Europe for Flughafen being significant as to transaction value. Compared to three public offers in 2013, this is a substantial increase in public M&A activity both as to number of public takeover offers (PTOs), including full and partial offers and mandatory tender offers (MTOs), and in volume.

1. TELEKOM AUSTRIA.

Carso Telecom/America Movil (AMX), which held about 26.8 percent in Telekom Austria, entered into an April 2014 shareholder agreement with OIAG, which held about 28.2 percent in Telekom Austria. This allowed Carso Telecom/AMX to take control of Telekom Austria. Due to the control change Carso Telecom/AMX launched a PTO on Telekom Austria with an offer term from 15 May 2014 to 10 July 2014, subject to fulfillment of various regulatory CPs. Based on the offer price of EUR7.15 per share, the total offer volume was above EUR1.4 billion. Following conversion into a mandatory offer, Carso Telecom/AMX increased its participation in Telekom Austria to 50.9 percent.

2. FLUGHAFEN WIEN.

On 7 November 2014 Airports Group Europe SaRL launched a partial offer for up to 6, 279m shares in Flughafen Wien with a minimum acceptance condition of 20 percent and a maximum of 29.9 percent in the target. On 1 December, the bidder announced the increase of the offer to EUR82/share and dropped the minimum acceptance condition. Based on the offer price of EUR82 per share, the total offer volume is above EUR500 million. The partial offer runs until 18 December 2014.

3. CA IMMO.

O1 Group Limited acquired 16.5 percent in target CA Immo in an off-market transaction and subsequently launched a public offer to acquire shares of up to 26 percent in Target. Based on an offer price of EUR18.50 per share the total offer volume is above EUR180 million. The partial offer will run until 6 February 2015.

4. S IMMO AG.

The partial offer from 21 May 2014 to June 2014 was directed at a repurchase by the Vienna Stock Exchange (VSE) listed real estate company S Immo AG of parts of its profit participation certificates. With an offer price of EUR79.11 per certificate, the total offer volume was about EUR90 million. On completion of the offer, the limited offer was oversubscribed and therefore curtailed as to acceptances.

5. HIRSCH SERVO.

Herz Beteiligungs GmbH launched a mandatory offer for the VSE listed small cap company Hirsch Servo AG, with an initial offer term of 14 May 2014 to 28 May 2014. With an offer price of EUR7.94 per share, the total offer volume was about EUR1.5 million. At the end of the initial offer period the bidder had increased its participation in Hirsch Servo from 61.92 percent to 67.1 percent.

6. GEP I B-GMBH IN LIQUIDATION.

Under a 2013 ruling by the Austrian Takeover Commission (ATC), GEP Beteiligung Management was required to launch a mandatory offer. This offer was launched from 11 July 2014 to 25 July 2014 with a total transaction value of below EUR0.5 million. On completion of the initial offer term, the participation quota of the bidder in the target increased to 88.03 percent.

7. BWT.

The controlling shareholder Aqua Invest GmbH launched a partial offer from 15 September 2014 to 29 September 2014. The total transaction volume was EUR62 million. On completion of the initial offer term, Aqua Invest had increased its participation by 9 percent to 79.8 percent.

8. UBM.

The controlling shareholder PIAG of UBM, a real estate developer, already holding 49.71 percent in the target, launched a voluntary public offer for all shares of UBM reserving the right to convert the offer into a mandatory offer. The public offer was from 26 September 2014 to 17 October 2014 and had a total offer volume of EUR21.2 million. On 13 October the offer was converted into a mandatory offer. Upon completion of the initial offer term, the bidder had increased its shareholding in the target to 85.37 percent.

9. SCHLUMBERGER.

Sastre SA, Switzerland, launched a mandatory offer for the outstanding shares and preference shares of the spirits company Schlumberger AG. The offer period was from 30 September 2014 through 25 November 2014. On commencement of the offer, the bidder had 71.46 percent of the share capital, the total offer volume was below EUR10 million. Upon completion of the initial offer term the bidder had increased its participation in the target by around 5 percent to 76.52 percent.

MTO ORDERED ON HIRSCH SERVO
(RULING BY THE ATC OF 27 JANUARY 2014)

In a ruling dated 27 January 2014, and upheld upon appeal by the Austrian Supreme Court by its decision of 13 March 2014, the Austrian Takeover Commission ordered Lifemotion SA, Switzerland to launch a mandatory offer to all shareholders of Hirsch Servo AG. The decision was based on the following facts: in December 2013, Lifemotion had acquired a controlling shareholding in the distressed listed target inter alia by acquiring 51 percent of the voting capital from the previously controlling shareholder against EUR3.92/share plus various other considerations, granting a shareholder loan to the target and acquiring creditor bank loans against the target of EUR24 million for EUR1, with a partial waiver of debt and a subsequent subordination of the loan. Moreover, the supervisory board of the target was reorganized to include representatives of the new controlling shareholder.

The Austrian Takeover Commission held that the – distressed- target did in fact fulfill the two core criteria for an exemption from a mandatory offer as to the acquisition of shares for purposes of financial restructuring of the target, namely the objective restructuring need (financial distress of target close to insolvency) and the intention of the investor to restructure the target. However, the Austrian Takeover Commission denied the exemption from a mandatory offer holding that the investor had violated the principle of equal treatment of shareholders: the investor had granted the former controlling shareholder an exit against payment of a not unsubstantial consideration, whereas the remaining free float would bear the risk of the financial restructuring without having at least the possibility of an exit from the target under a PTO. There was no possibility to protect the free float in their financial interests by commitments by the investor. The Austrian Takeover thus held that the investor Lifemotion was under an obligation to launch a mandatory offer. The Austrian Supreme Court upheld the decision of the Takeover Commission against the appeal of investor.

In 2013/14 the ATC issued a number of other rulings. The following rulings are significant.

TELEKOM AUSTRIA AG

(RULING BY THE ATC OF 16 APRIL 2014)

In connection with the PTO by Carso Telecom launched in May 2014, Carso Telecom/AMX announced that it intended to participate in an up to one billion capital increase of the target Telecom Austria, to take place on completion of the PTO. In such a capital increase Carso Telecom/AMX would possibly take up shares of shareholders that did not exercise its mandatory subscription rights. Carso Telecom/AMX therefore obtained a ruling by the ATC as to the inapplicability of the nine months price warranty under the Austrian Takeover Act (TA) relating to the shares, if any, then acquired in the capital increase. The ATC held that Carso Telecom/AMX and parties acting in concert with it would not be required to pay the difference between the offer price per share paid under the PTO and a possibly higher price per share in the capital increase provided that both:

The cash capital increase did not exclude the subscription right of shareholders.

The principles of equal treatment of shareholders was observed in the implementation of the capital increase.

The ruling is a precedent for capital increases following a PTO. The ATC also held that no price warranty applied to shares acquired by the bidder of the PTO prior to the capital increase, irrespective of whether these shares are acquired in the exercise of subscription rights or taken up in the capital increase as a consequence of other shareholders failing to exercise the subscription right.

BUWOG

(RULING BY THE TAKEOVER COMMISSION DATED 14 NOVEMBER 2013)

The VSE listed real estate company Immofinanz AG intended to spin off of its subsidiary BUWOG and to list the shares of BUWOG. On a ruling request by Immofinanz, the ATC held that both:

The spin off, which were to be implemented in a linear manner (that is, respecting the participation rights of free float shareholders in Immofinanz) and to reduce the shareholding of Immofinanz in its subsidiary BUWOG to 43.9 percent from 100 percent would not trigger a mandatory offer for either the shareholders or the holders of bonds with conversion rights, if proportionate conversion rights were created as to the spun-off BUWOG shares.

The acquisition of shares in BUWOG by Immofinanz to re-transact financings with JP Morgan Securities plc and others in March 2015 and January 2016 will not trigger mandatory offer obligations of Immofinanz AG to BUWOG shareholders.

UBM

(RULING BY THE TAKEOVER COMMISSION OF 13 AUGUST 2014)

The listed Porr construction group internally reorganized its real estate business. This reorganization, among other things, involved a demerger of the UBM participation to NewCo and a merger of NewCo and UBM, a real estate developer. The ATC held that these corporate reorganizations did not trigger mandatory offers as the controlling shareholder syndicate remained unchanged on completion of the reorganization. ■

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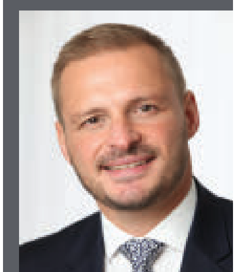
Q&A

REPORTER MARIA JACKSON PUTS THE QUESTIONS TO VAN BAEL & BELLIS

M&A TRENDS IN BELGIUM

Leading independent law firm Van Bael & Bellis outlines the key developments driving M&A deals in Belgium



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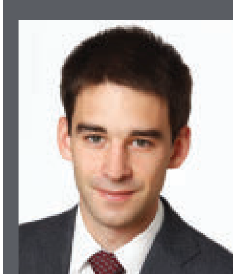

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Brussels-based Van Bael & Bellis is one of Belgium's most prominent law firms. The firm is amongst the best-ranked independents for corporate M&A, and is, in addition, widely recognized as a top-tier expert in EU competition law, EU trade and customs law and EU regulatory law. This makes it perfectly placed to comment on the headline trends affecting transactional work in Belgium.

Michel Bonne, corporate M&A head at Van Bael & Bellis, along with senior associate Tom Swinnen and associate Mattias Verbeeck, discuss the main opportunities opening up for investors.

WHAT ARE THE KEY FEATURES OF BELGIUM'S INVESTMENT ENVIRONMENT THAT MAKES IT AN ATTRACTIVE JURISDICTION FOR INTERNATIONAL INVESTORS?

VB&B: Some of the core tenets of Belgium's success as an investment environment for international investors are its location and accessibility. It is located in the very center of Europe, on the crossroads of economic powerhouses such as France, Germany and the United Kingdom. It also boasts one of the highest densities of highways and railways in the entire world.

From a political perspective, as the host of the capital of the European Union and a sheer infinite number of other international institutions, Belgium has found itself located in the heart of Europe for over five decades. In the slipstream of these international organizations, dozens of multinationals have chosen Belgium as their global or regional headquarters. This has resulted in a large and very active international community, with all ensuing facilities (such as international schools and shops).

For its size, it has a surprisingly high number of airports and seaports, providing companies with quick access to the four corners of the globe. In particular, the Port of Antwerp figures among the busiest ports worldwide and is home to one of the largest concentrations of chemical companies in the world, only second to the Port of Houston.

Foreign investors are also particularly keen on entering the Belgian market itself as the country is well known for its high average income per household and its open economy. It is not only the favorite market of many enterprises globally, due to the avant-gardist mind-set of the Belgians, multinationals oftentimes use it as a laboratory for new products or business strategies. Finally, Belgium is globally renowned for the abundance of available, highly-educated staff, and the country tops the global productivity rankings year after year.

WHAT HAVE BEEN THE KEY BUSINESS SECTORS DRIVING M&A DEALS IN BELGIUM DURING 2014?

VB&B: Because of the relatively modest size of the Belgian M&A market, it is hard to discern real key sectors in terms of deal flow. Rather than one particular business sector stealing the spotlight, the Belgian market has witnessed several bigger deals spread across all segments of the Belgian market over the last year. For example, the recent deals in which Van Bael & Bellis' corporate and M&A team acted as counsel for either the seller or the buyer took place in a variety of economic sectors, ranging from the automotive sector through to the entertainment business and renewable energy.

Nevertheless, in line with the global M&A trend, there has clearly been a noticeable heightened M&A activity in the Belgian healthcare sector, with two major deals in OTC and generic pharmaceuticals, each worth over EUR 1 billion in the month of October alone.

PRIVATE EQUITY ACTIVITY SPED UP AT THE BEGINNING OF THE YEAR, TO WHAT EXTENT HAS THIS CONTINUED INTO THE LATTER PART OF 2014?

VB&B: Recent surveys show that the Belgian M&A market has not experienced a surge in acquisitions as was the case in, for example, the British market. One explanation that has been used to explain this difference, is the more risk-averse attitude of Belgian companies. This, of course, opens up possibilities for private equity firms who can fill the gap that has been left by industrial investors. Consequently, it is no surprise that private equity activity has remained at an increased level throughout the second half of 2014 with insiders speculating on a steady climb in activity in the sector in 2015.

ARE THERE ANY OTHER SIGNIFICANT TRENDS DRIVING THE M&A ENVIRONMENT IN BELGIUM?

A particular trait of the Belgian private equity landscape is that it is, to a certain extent, dominated by government-backed or owned funds. The federal government, nearly all regions and even some provinces wholly or partially own one or more investment vehicles, most of which have become "regulars" in the Belgian M&A environment.

Another leverage in the market relates to the fact that many small and medium-sized companies are privately held by the so-called "baby-boom generation". This highly successful generation is about to retire, causing generational and follow-up issues which fuel the M&A environment significantly.

IN OCTOBER, THE BELGIAN GOVERNMENT ANNOUNCED NEW TAX MEASURES; WHAT ARE THE KEY FEATURES OF THOSE PROPOSALS?

VB&B: The new government coalition, which came to power in the fall of 2014, has pledged to implement a more business friendly tax regime. In general, the tax administration was instructed to apply the presumption of innocence on a more consistent basis and only use those investigation methods that are the least disruptive for the businesses under scrutiny.

"As the host of the capital of the European Union and a sheer infinite number of other international institutions, Belgium has found itself located in the heart of Europe for over five decades."

In addition, it was announced that certain penalties imposed by the tax administrations were to be reduced and the use of them further restricted. The possibility to avoid the recently imposed 25 percent liquidation tax, by contributing the company's distributable reserves into its share capital and to which only a 10 percent withholding tax applies, has also been extended for an unlimited period of time.

Finally, following the sale of a large OTC pharmaceutical company, political debate was spurred over the possible introduction of a capital gains tax for private individuals. It goes without saying that the introduction of such tax could make it significantly less appealing for private sellers to sell their company, which, in turn, could have a negative effect on M&A activity in Belgium.

WHAT IS THE INVESTMENT OUTLOOK FOR THE BELGIAN CORPORATE MARKET GOING INTO 2015?

VB&B: One of the possible game changers in the Belgian M&A environment may be the governmental agreement of the newly elected coalition. Among other proposals, the government has committed itself to reevaluating the stakes it holds in various private and public companies with a view to a possible privatization. Historically, the Belgian state has been, directly or indirectly, an important shareholder in a variety of companies, including the national postal company, the country's largest telecom provider and one of the four Belgian major banks. Consequently, a string of divestments initiated by the government could give an important boost to M&A activity in Belgium. This effect would even be amplified if regional and local governments, historically important participants in the utilities sectors, would follow suit and increase their divestments efforts as well.

Although the economic outlook has significantly improved since the height of the financial crisis, quite a few companies are still experiencing financial distress. Since the introduction of the Law on the Continuity of Enterprises in 2009 (the Belgian equivalent of Chapter 11), such financial distress has proven to offer an interesting opportunity for potential investors. This law provides for the possibility to implement an 85 percent haircut on all outstanding unsecured debt and at the same time implements a procedure which can trigger the sale of the distressed company or its assets to an interested third party without the consent of either the board or the shareholders. The increasingly well-known cherry-picking opportunities that are inherent to this procedure may prove to spur increased interest in distressed M&A by both domestic and international strategic investors.

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Finally, there has been much speculation about a consolidation in the telecoms sector. Belgium still has a rather high number of cable providers for its limited size and it has been argued that a merger between two or more of them would make sense from an economies of scale point of view. In addition, many foreign industrial investors have expressed their interests in entering the Belgian telecom sector, through an acquisition.

IN AN ERA OF INCREASED REGULATORY SCRUTINY, HOW DOES VAN BAEL & BELLIS' LEADING COMPETITION AND REGULATORY LAW PRACTICES AUGMENT ITS CORPORATE AND M&A OFFERING?

VB&B: The fact that the firm has in-depth knowledge of, and decades of experience in, competition and regulatory law allows us to identify potential legal and business threats to a deal at a very early stage. The unique set of in-house competences of Van Bael & Bellis subsequently enables us to elaborate, in close contact with the client, a number of creative solutions to counter these issues in a manner that serves the interests of the client in the best possible way, ranging from including specific protective clauses or sophisticated mechanisms in the transactional documents to an entire remodeling of the deal.

Moreover, the fact that our corporate M&A team has a world-class merger filing team in-house guarantees more efficient information exchanges, better responsiveness towards the competent authorities and the client, and overall quicker and more effective results.

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Michel Bonne is a partner at Van Bael & Bellis, where he heads the corporate M&A practice. Michel has advised a wide range of listed and privately held corporate, private equity and financial clients on Belgian and cross-border M&A transactions. His experience includes (cross-border) restructuring work (distressed or not), private M&A, capital markets (IPOs, secondary offerings and take-over bids), private equity and venture capital placements, real estate transactions, privatizations, mergers, joint ventures and reorganizations, acquisition finance structures, corporate governance, corporate litigation (shareholders' disputes, board issues) and corporate law advisory in general. He also works across a broad range of sectors, including the (renewable) energy, media, financial, telecom, IT, retail, real estate, life sciences, aviation and biotech sectors.

"Recent surveys show that the Belgian M&A market has not experienced a surge in acquisitions as was the case in, for example, the British market. This, of course, opens up possibilities for private equity firms who can fill the gap that has been left by industrial investors."

Michel is recognized for his expertise in corporate M&A in all leading directories, including Chambers & Partners, IFLR1000 and Legal 500. Clients describe him as "very quick, very precise and very effective". He speaks Dutch, English, French and Spanish.

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Tom Swinnen is a senior associate at Van Bael & Bellis, where his practice focuses on all aspects of Belgian business law, with a strong emphasis on corporate M&A. His experience includes advising on restructuring work, public and private M&A, private equity and venture capital placements, real estate transactions, joint ventures, acquisition finance structures, insolvency and corporate law issues in general. In addition to his advisory work, he is a teaching assistant at the Financial Law Institute of the University of Ghent and lectures on corporate law at Syntra Management School.

Tom is recognized for his expertise in corporate M&A by Chambers & Partners, IFLR1000 and Legal 500. Clients laud him for his "service-minded and client-oriented" style. He speaks Dutch, English and French.

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Mattias Verbeeck is an associate at Van Bael & Bellis, where his practice focuses on corporate and finance law. His experience includes assisting a state-owned investment fund in relation to its successful bid on the wind division of a renewable energy producer in the framework of the latter's judicial reorganisation; a China-based private equity firm in relation to its acquisition of a 30 percent stake in a transmissions and powertrains manufacturer; and a U.S. private equity fund in relation to the Belgian aspects of the financing of the USD 20 billion management buyout of an international hardware manufacturer. Mattias speaks Dutch and English, with a good command of French.

Q&A

REPORTER MARIA JACKSON PUTS THE QUESTIONS TO MATTOS FILHO

BRAZIL'S EVOLVING PRIVATE EQUITY SCENE

Mattos Filho, Veiga Filho, Marrey Jr. e Quiroga Advogados discusses the evolution of M&A deals through private equity

RODRIGO FIGUEIREDO NASCIMENTO, PARTNER MATTOS FILHO

PEDRO WHITAKER DE SOUZA DIAS, PARTNER MATTOS FILHO

São Paulo-headquartered Mattos Filho, Veiga Filho, Marrey Jr. e Quiroga Advogados is one of Brazil's most prestigious law firms. The firm houses a top-tier corporate practice that is regularly instructed by major multinational corporations, financial institutions, investors and government bodies and it is particularly well known for its extensive experience in serving Fortune Global 500 companies.

As Brazil continues to attract the lion share of private equity capital invested in the Latin American region, Rodrigo Figueiredo Nascimento and Pedro Whitaker de Souza Dias - both partners at Mattos Filho - discuss the key developments in the evolution of the country's private equity landscape.

WHAT ARE THE HEADLINE BUSINESS TRENDS DRIVING M&A ACTIVITY IN BRAZIL?

MATTOS FILHO: M&A activity in Brazil has been thriving for several years. There are multiple underlying reasons for that, but the main factors are probably related to:

(i) The intrinsic characteristics of the Brazilian internal market. With a population of over 200 million inhabitants, M&A activity is able to leverage from an active internal economy that, although affected by macroeconomic dynamics, generates acquisitions, reorganizations and joint ventures at a consistent and strong level.

(ii) A capital markets boom that enabled publicly held companies to be strongly capitalized during 2004-2006. Several IPOs occurred during that period, most of them attracting strong international investments that created side effects in the Brazilian economy, particularly in M&A.

(iii) As a result of all the investments that poured into Brazilian companies during the capital markets boom, liquidity increased; with more liquidity, a fertile ground was created for private equity funds to establish permanently in the country.

The most active industries in recent years in Brazil have been healthcare, insurance, agriculture, real estate, intellectual property and retail. A special note must be dedicated to the retail industry as a whole. As a result of economic stabilization after the Plano Real (a set of measures taken to stabilize the Brazilian economy in 1994), the population was able to tap into credit markets strongly. Without entering into the merits of that policy, it generally fostered retail activity. As retailers positioned themselves to tackle a new client base with more access to credit, M&A activity (including purchase and sales, reorganizations and joint ventures) naturally followed.

TO WHAT EXTENT HAS INVESTOR APPETITE FOR DEALS INCREASED OVER RECENT MONTHS?

MATTOS FILHO: 2014 was a unique year, in the sense that it was affected by extraordinary events, such as the 2014 World Cup and general elections, including the presidential elections. Considering the positive and negative effects of those events in the Brazilian economy, deal activity seems to have continued in 2014 if compared to 2013. 2015 is expected to be a sensitive period, considering that the Brazilian re-elected government is expected to face important macroeconomic challenges that may have a direct impact on M&A activity.

At the time the article is being written, the uncertainty over the performance of the re-elected government is creating strong foreign exchange fluctuation; with the depreciation of the Brazilian real, private equity funds that are funded in dollars are, once again, well positioned to potentially take advantage of investments in Brazilian assets. Another attractive factor for new private equity investments is the lack of long term credit lines in the Brazilian market. Companies find in private equity funds an important alternative for new capital for long term investments and expansion.

BRAZIL REPRESENTED 68 PERCENT OF TOTAL PRIVATE EQUITY CAPITAL INVESTED IN LATAM IN 2013; WHY ARE PE FUNDS LOOKING SO CLOSELY AT BRAZIL?

MATTOS FILHO: As articulated in prior inquiries of this paper, private equity funds find in Brazil fertile ground for investments with interesting rates of return. A significant proportion of internationally recognized private equity funds have established in Brazil with local teams and structures, such as Actis, Advent, Apax, Blackstone, Carlyle, General Atlantic and KKR, among others. Also, local private equity funds are extremely active including Gávea, GP, Pátria and BTG, among others.

The main type of private equity deals in Brazil are structured as plain vanilla buy-outs. LBOs are not common, since the cost of debt is high in Brazil (the Brazilian prime rate is currently at 11.25 percent). Last October, the first IPO of the year went public, with strong support from a private equity firm, General Atlantic, which entered into an anchoring agreement with the issuer and the selling shareholders.

TO WHAT EXTENT ARE PE HOUSES LOOKING TO FUNDRAISE IN THE REGION?

MATTOS FILHO: The general perception is that fundraising in the region, specifically in connection with Brazil, is still active.

Although macroeconomic factors and recent events (such as the general elections) may have had a short-term impact in decision making, it seems that medium-to-long term investment decisions are based on the general perception that Brazil is a solid democracy, with a strong internal market and sizable economy.

Private equity funds find in Brazil fertile ground for investments with interesting rates of return. A significant proportion of internationally recognized private equity funds have established in Brazil with local teams and structures, such as Actis, Advent, Apax, Blackstone, Carlyle, General Atlantic and KKR, among others.

As an example, Advent, a United States private equity fund (that has had a local presence for more than 15 years), just raised a fund of over $2 billion for the region.

It is expected that foreign investors will continue to use structures through jurisdictions that are not considered tax heavens under Brazilian legislation and use "fundos de investimentos em participações" (FIPs) as their preferred alternative while investing in private equity in Brazil.

It is also expected that Brazilian pension funds become more active in the investment process (as co-investors, for instance), to the extent that they seem to be increasingly open to some historic demands, such as governance aspects, particularly the requirement to participate in general partner's investment committees.

HOW HAS LEGISLATION CHANGED IN BRAZIL TO FACILITY NEW PRIVATE EQUITY STRUCTURES?

MATTOS FILHO: The private equity industry in Brazil has developed in an aggressive way over recent years. Macroeconomic factors and the general characteristics of the country have an important impact in such developments (see above). However, specific legal improvements helped the industry to reach the current level of influence in the Brazilian mergers and acquisitions market.

One specific milestone is the formation of "fundo de investimentos em participações", or FIPs. Regulated by Rule 391, dated July 16, 2003, as amended, FIPs are closed-end investment funds that are allowed to invest in shares, debentures, subscription bonds, convertible securities issued by Brazilian corporations, among others, provided that such investment assures to the FIP significant influence in the management and decision-making of the investee companies.

FIPs were created to meet the demands of the Brazilian capital markets, as well as the interest of both Brazilian and foreign investors investing in small and medium-sized companies based in Brazil, whose equity interests are not listed and traded in the stock exchange or organized over-the-counter markets. This is the only type of investment fund in Brazil that is allowed to invest in equity interests issued by non-listed, privately-held companies.

One significant aspect of the FIP structure is that gains realized by a FIP are not taxable until a distribution is made to investors. Such deferral of taxes is often a key consideration.

Also, as Brazilian and international authorities have intensified enforcement of anticorruption, antitrust, environmental, social and other compliance rules, private equity investors have responded by heightening due diligence standards, strengthening covenants regarding controls and procedures, and exercising greater oversight.

Due diligence of compliance matters has been significantly expanded. Interviews with senior officers and third parties have become more common and, for certain sectors, routine.

Representations and warranties and covenants dealing with anticorruption, antibribery and other compliance matters have become increasingly common in deals involving private equity investors. A new Brazilian anticorruption law entered into force in January 2014 and is also having an impact on transactions involving Brazilian companies.

Oversight is generally exercised through the board of directors, and it is now standard practice to adopt codes of ethics enunciating rules and prohibitions relating to bribes, third party agents, gifts, conflicts of interest, and other compliance issues and creating channels for anonymous complaints. Although not yet a trend, some private equity investors have initiated programs tailored specifically to create a culture of corporate social responsibility and environmental awareness in portfolio companies.

WHAT ARE THE KEY FEATURES OF A FIP THAT MAKES IT A PREFERRED PRIVATE EQUITY VEHICLE?

MATTOS FILHO: In addition to the aforementioned attractions of a FIP structure, the main features of a FIP could be summarized as follows.

FIPs must be registered with the CVM (Comissão de Valores Mobiliários), the Brazilian securities and exchange commission. They are subject to the oversight of the CVM and have periodic reporting requirements. Registration is typically automatically granted upon the filing of certain documents with the CVM.

Issuances of quotas of FIPs are generally considered public offerings of securities. Accordingly, the requirements for registration of such offerings mirror the general registration requirements for public offerings of other types of securities. The offering registration requirement is waived as to offerings of FIPs that receive investments from 20 or fewer investors. Registration of the FIP itself, however, is always required.

Sponsors are engaged as managers of the FIPs and are entitled to receive management and performance fees. Management fees generally correspond to a percentage of the commitments of the investors (during the investment period) or the net equity of the FIP (during the holding and divestment periods). Performance fees are typically due and paid only after total distributions to investors exceed the amount invested adjusted by inflation, plus a hurdle rate. Rules relating to the catch-up of performance fees vary.

FIPs are organized as joint ownerships of assets, and each quota corresponds to a notional fraction of assets owned by the FIP. FIPs are not formed as legal entities and do not confer limited liability. Under Brazilian law, if the net asset value of the FIP is negative, investors are directly responsible for the FIP's obligations as a matter of law and will be required to make additional capital contributions to the FIP to meet such obligations. Note that administrators and portfolio managers of FIPs may only be liable for liabilities of the FIP if they have not acted in compliance with the investment policy or applicable laws.

As also mentioned in question 5 above, investors may prefer a FIP because gains realized by a FIP are not taxable until distributed to investors.

According to the CVM regulation, it is mandatory for a FIP to have significant influence in the management and decision-making of the investee companies. However, CVM has recently issued rules releasing FIPs from the requirement that they hold certain governance rights in investee companies, so long as such investees represent no more than 35 percent of total fund assets.

CVM rules also have been amended recently to remove the prohibition on FIPs guaranteeing obligations and assuming joint and several obligations, subject to approval by at least two-thirds of the FIP's investors. This ability to provide guarantees eliminates a significant constraint on deal-making.

WHAT ARE THE MOST COMMON EXIT STRATEGIES UTILIZED BY PE HOUSES IN BRAZIL?

MATTOS FILHO: As a result of a developed capital market in Brazil, private equity firms have two main routes for implementing their exits strategies: private sales and/or capital market transactions.

In contrast to other emerging countries with inactive public equity markets, Brazil has experienced strong capital market activity since 2006, and private equity firms are one of the most important players in this trend. A significant number of the companies that have gone public had a private equity investor as an investor. Having the public sale as an exit strategy was one of the headline reasons for several international private equity firms to start investing in Brazil and establishing their local offices in the country. Despite the few number of initial public offerings in Brazil over the last two years, private equity firms still consider the capital markets exit as one desirable and realistic opportunity.

In relation to private sales, private equity funds generally aim at a sale to strategic and/or financial buyers. Fund-to-fund transactions are becoming increasingly common in Brazil, considering that large funds identify portfolio companies of smaller funds as an attractive target. In order to implement the private and/or public sales, private equity funds generally have all typical exit rights regulated in their Shareholders Agreements, such as tag along, drag along, put option, demand rights, among others.

Although currently not so typical as in key markets (such as the U.S.), it is becoming increasingly common to see dual-track exits locally.

TO WHAT EXTENT IS IT IMPORTANT FOR INVESTORS TO INSTRUCT A LEADING BRAZILIAN LAW FIRM, SUCH AS MATTOS FILHO, WHEN LOOKING TO NAVIGATE THEIR WAY THROUGH BRAZIL'S PRIVATE EQUITY LANDSCAPE?

MATTOS FILHO: Mattos Filho has around 350 attorneys and enjoys a reputation for providing high-quality legal services, to both Brazilian and foreign clients, in support of a full range of business activities across every major industry and business sector. Our presence at the top of all the major league tables and rankings attest to our national and international reputation. In recent years, our firm has won a series of awards from leading industry publications, including "Best Latin American Law Firm" and "Brazil Law Firm of the Year" from Chambers and Partners.

Specifically in relation to private equity transactions, it is fair to say that our industry-leading private equity practice advises funds and other large investors in connection with all sorts of private equity investments. We believe that our experience in private equity deals and our knowledge of the local market allows us to provide clients with sophisticated advice in a broad array of legal services, such as corporate, tax, labor, antitrust, regulatory, environmental, litigation, intellectual property, among others.

Such expertise is of the essence in the context of private equity transactions, when oftentimes local counsel is required to "translate" and adapt to local rules concepts that are common to the industry abroad.

In contrast to other emerging countries with inactive public equity markets, Brazil has experienced strong capital market activity since 2006, and private equity firms are one of the most important players in this trend.

In recent years, we have acted for various international private equity funds with a presence in Brazil, such as Actis, Advent, Apax, Carlyle, Darby and General Atlantic, among others, as well as for various domestic private equity funds such as BTG, Gávea, GP and Pátria, among others. Among Mattos Filho's recent experience we have acted in: Singapore's sovereign wealth fund GIC's acquisition of Abril Educação (education); the sale of Intermédica Group (healthcare) to the private equity fund Bain Capital; the acquisition by Actis of XP Investimentos (brokerage services), Universidade Cruzeiro do Sul and Editora CNA (education); the acquisition by Gávea of Camil (food), Hermes Pardini (healthcare) and Colombo (retail); the acquisition by Carlyle of a controlling stake in Tok Stok (retail).

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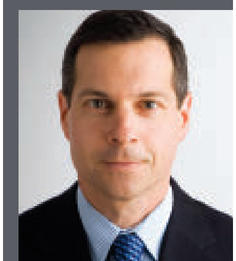
Q&A

FASKEN MARTINEAU PARTNERS ON CANADA'S M&A MARKET

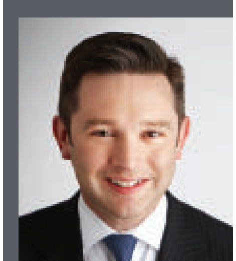
PROMISING OUTLOOK FOR M&A IN CANADA

Fasken Martineau Partners discuss trends and opportunities for investing in Canada.



RICHARD STEINBERG

BLAIR HORN



AARON ATKINSON

NIKO VEILLEUX

As with many countries around the world, the post-2008 economic environment has proved challenging for Canada, which has suffered from a softening of exports and commodity prices and the recent decline in value of the Canadian dollar. The Canadian economy is expected to see growth in 2015, where key contributors over the next few years are anticipated to be consumer non-durable goods (such as food and clothing) and exports. Business investment is expected to be strong in 2015.

American Lawyer spoke to global M&A experts and Fasken Martineau Partners Aaron Atkinson, Blair Horn, Richard Steinberg and Niko Veilleux about the state of M&A in Canada—where it stands, and where it's headed.

WHAT IS THE OUTLOOK FOR M&A IN CANADA?

FASKEN MARTINEAU: We're expecting a busy 2015 in Canada for M&A, as buyers take advantage of a strong equity market, cheap financing and healthy cash balances. Cross-border deals have been a prevailing theme in recent times, with significant increases in both inbound and outbound deal value. We're also seeing a lot of private M&A activity.

By sector, commodities remain the leaders in value and volume, with the energy sector playing a significant role. One sector to note in particular is liquefied natural gas (LNG). There are approximately 17 different LNG projects underway in Western Canada, and we expect some consolidation among those proposing these projects.

Canada is uniquely positioned to benefit from the increasing global demand for food due to its vast tracts of arable land, abundant water, infrastructure and long experience in agriculture. Therefore, significant M&A and investment activity can be expected in the agriculture sector over the coming years.

IN WHICH OTHER SECTORS ARE YOU SEEING INCREASED M&A ACTIVITY?

FASKEN MARTINEAU: Apart from commodities, we are seeing increased activity in food, including the large Burger King/Tim Horton's and Loblaw/Shoppers Drug Mart transactions. Other notable sectors include transportation, real estate and telecom. There has been a lot of discussion in Canada about what's going to happen in the telecom sector in 2015 regarding Mobilicity and Quebecor and whether Canada will produce a fourth national wireless carrier.

In October the sale of 175 papers by Quebecor to Post Media was announced. The deal is expected to close in the first quarter, which will significantly alter the country's print media industry.

WHAT ABOUT THE CANADIAN MINING SECTOR?

FASKEN MARTINEAU: It is a conservative time for mining companies, some of which are rationalizing certain assets, either by finding strategic partners to develop large projects or entering into risk sharing arrangements. We've also witnessed some companies selling assets which fall outside of their core portfolios, such as IAMGOLD's sale of its niobium mine to a consortium led by foreign investors.

Lower commodity prices are also expected to trigger M&A activity as certain mining companies will have difficulty obtaining financing and may look for strategic partners. In particular, there has been quite a dry spell in fundraising by junior miners and a growing likelihood that they may become targets for some of the larger players looking to consolidate.

WHICH COUNTRIES PROVIDE MOST OF THE M&A FLOW IN AND OUT OF CANADA, AND WHY?

FASKEN MARTINEAU: Canada and the U.S. have one of the largest and most comprehensive investment relationships in the world, so it is to be expected that a significant amount of cross-border M&A activity is with the U.S. We're witnessing increased U.S./Canada cross-border activity, and given relative valuations and exchange rates, we expect to see it continue. We're perhaps seeing less activity from China and other Asian countries than in the past. The Canadian government announced regulations regarding further acquisitions in Alberta's oil sands, which has dampened activity there.

We are also seeing an increase in European-based private equity firms looking to Canada for investments. We expect European interest to be significant in the coming years.

Many large Canadian pension funds are internationally focused in their investments, and we've seen them complete a number of infrastructure and other investments in Asia-Pacific, Europe and the U.S. These firms also often partner with other large pension or institutional funds.

WHAT MAKES CANADA AN ATTRACTIVE DESTINATION FOR FOREIGN INVESTORS?

FASKEN MARTINEAU: Foreign investors are attracted to Canada's strong economic fundamentals, its proximity to the U.S. market, its highly skilled work force and abundant resources. Canada also has very competitive corporate tax rates and a fairly stable and sophisticated tax policy. With few exceptions, Canada offers full national treatment to foreign investors within the context of a developed open market economy operating with democratic principles and institutions. Foreign investment policy in Canada has been guided by the Investment Canada Act (ICA) since 1985. The ICA liberalized policy on foreign investment by recognizing that investment is central to economic growth and key to technological advancement. Canada has only turned down investment offers three times since the ICA came into force 25 years ago.

We are also seeing an increase in European-based private equity firms looking to Canada for investments. We expect European interest to be significant in the coming years.

WHAT ARE THE IMPLICATIONS OF PROPOSED CHANGES TO THE TAKEOVER BID REGIME IN CANADA?

FASKEN MARTINEAU: The main change is that the new rules provide a mandatory minimum at which bids have to remain open, from 35 days to 120 days subject to an ability to waive and requiring the majority of shareholders to tender to any bid. These two key changes will no doubt draw out the bid process and afford shareholders a measure of comfort that their shares won't be taken up by a lesser majority.

This legislative scheme is intended to incorporate into the law shareholder-friendly elements of typical poison pills that we have today. This would allow more time for shareholders to decide without feeling potentially coerced knowing that they will be pressured to tender, because shares won't get taken up unless a majority is along for the ride. The proposed changes do not, however, move Canada to a Delaware model. For example, if we simplify the decision in Airgas to a great degree, the directors are more or less put in the driver's seat in the U.S., because they're the ones who evaluate the threat to the organization, and if they perceive that even a low stock price doesn't take into consideration the company's long-term future, Airgas would likely tell you that the company has a relatively free hand to operate. In Canada, the proposed rules are expected to give a target board greater leverage, as the board will have 120 days to find a white knight or convince shareholders the bid isn't right for them, but at the end of that period it's the shareholders' decision to make. This is a very Canadian solution, giving the board more time while maintaining the shareholder choice model we have in Canada.

WHAT WERE THE PROPOSED CHANGES TO THE EARLY WARNING REPORTING SYSTEM IN CANADA?

FASKEN MARTINEAU: The key change is that the Canadian Securities Administrators proposed reducing the early warning reporting threshold (which triggers disclosure by a shareholder of its shareholding in a company) from 10% to 5% to match the U.S. This would give the market advance notice that an investor is accumulating a block of shares.

What may have gotten lost in that shorthand analysis was the reporting timeline. In the U.S., investors have to report at 5% but have 10 days to file their report, and can keep buying during that period. So a situation where Pershing Square was accumulating a block in Canadian Pacific Railway and crossed the 5% line in the U.S., but bought a substantial number of shares within that 10-day window is possible. By the time they went public they had approximately 12%, and were able to use our alternative system in Canada so they didn't get tripped up by the 10% rule. In Canada, when you hit 10% you must stop buying and report immediately, which is a big difference.

The thinking that simply reducing the early warning reporting threshold to 5% would help to align Canada with the U.S. is actually not quite the case. Canadian investors wouldn't be able to do, for example, what Pershing Square did, because they would have had to stop buying at 5% and tell the public. Once a respective activist shareholder publicly discloses its investment, the stock price typically jumps, becoming uneconomic for the activist to keep accumulating.

The investor community argued that the current 10% threshold allows activists to accumulate a significant block at prices that allow investors to generate an appropriate return as they finance the activism. Everyone gains because there's enough upside for activists to get skin in the game and try to change a company's corporate culture. As a result, all shareholders reap the benefits. If Canada were to reduce this threshold, we might see less activism due to substantially decreased economic incentives.

HOW SIGNIFICANT A FORCE IS SHAREHOLDER ACTIVISM IN THE CANADIAN MARKET?

FASKEN MARTINEAU: This year we saw fewer cases of high-profile shareholder activism, although we witnessed a few more hostile bids than usual, and there seems to be an inverse relationship between the two.

A possible reason for fewer well-publicized proxy fights is the success of various activist shareholders the last couple of years in Canada, perhaps prompting boards to engage in settlement discussions at an earlier stage. The reduced number of publicly launched proxy fights may just be that boards are increasingly being advised to settle matters outside the public limelight.

WHERE DO YOU SEE THE CANADIAN M&A MARKET HEADED?

FASKEN MARTINEAU: If we consider historical trends, five years is probably a good window for resources to be front and center again. Our economy being what it is, we suspect resources will come back to be the driver of Canadian M&A.

Financial players from around the world are looking for opportunities in Canada, and this will continue to increase over the next five years.

Financial players from around the world are looking for opportunities in Canada, and this will continue to increase over the next five years.

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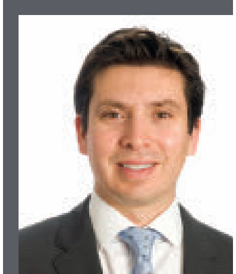
Q&A

REPORTER MARIA JACKSON PUTS THE QUESTIONS TO BAZ

MATÍAS ZEGERS
PARTNER



MARCO SALGADO
SENIOR ASSOCIATE

M&A INVOLVING FAMILY-OWNED BUSINESSES

Bahamondez, Alvarez & Zegers provides a guide for multinationals looking to acquire family-owned businesses in Chile.

Foreign investors are flocking to Chile in record numbers. According to research from corporate intelligence agency Mergermarket, during the first half of 2014 inbound M&A hit $7.8 billion, which saw the country reach its highest inbound deal value since 2011 with six months of the year still to go.

As new players continue to enter the local market, law firms are witnessing several important themes emerge in terms of M&A structuring. In Particular, Chile's business landscape is dominated by family-owned businesses, which can cause unique challenges for international companies looking to create a footprint in the country. As Chile's investment profile continues to skyrocket, Santiago-headquartered law firm Bahamondez, Alvarez & Zegers explains how to overcome the potential pitfalls presented by these types of deals.

HOW HAS CHILE ESTABLISHED ITSELF AS ONE OF LATIN AMERICA'S MOST STABLE ECONOMIES?

BAZ: Chile has built its reputation on three key foundations: the robustness and consistency of its macroeconomic policies; dialogue and cooperation between its public and private sector; and low corruption levels – notably, it is ahead of countries like France and Austria and just behind the U.S. after being ahead for some years, according to Transparency International. In this regard, an independent, autonomous, technical and very well-recognized Central Bank has been the key element behind such macroeconomic policies. All this has allowed Chile to safely walk through multiple international crises, relatively maintaining its growth ratios for almost three decades.

From a legal standpoint, a historically steady legal framework and a trustworthy judicial system has contributed to the accountability of the market's players. However, as in many other jurisdictions, we are seeing an increasing use of local and international arbitration to resolve conflict in sophisticated transactions.

Based on a Continental Law System, multiple bodies of law have to be articulated to accurately represent to foreign investors the rules that will govern their ventures in Chile.

As in any other country, there are many issues that could be improved on, but the main guidelines have remained stable for the last 30 plus years; this stability gives foreign investors the capacity to plan and execute deals without major disruptions due to the specific economic or political environment of the country.

HOW OPEN IS CHILE TO FOREIGN INVESTMENT?

BAZ: It is said that Chile has the largest network of Free Trade Agreements in the world (more than 20 trade agreements with 60 countries and regional organizations in accordance with public registries). Further, Chile is one of the world's ten freest countries, according to the Index of Economic Freedom 2013, published by the Heritage Foundation and the Wall Street Journal.

According to the World Investment Report 2013, released by the United Nation Conference on Trade and Development (UNCTAD), Chile was the world's 11th largest recipient of foreign direct investment in 2012.

Last, Chile also has a very extensive network of Double Taxation Treaties, most of which follow the OECD model. Currently there are 25 Treaties in force, with three signed but pending Congress approval (including a treaty with the U.S.) and more under negotiation.

Despite all of the foregoing, it is not unusual to hear international investors and companies landing in Chile criticize the bureaucracy they face when setting up a company and initiating activities in the country. However, the government

"Chile has built its reputation on three key foundations: the robustness and consistency of its macroeconomic policies; dialogue and cooperation between its public and private sector; and low corruption levels."

and policy makers have taken some of these complaints on board and have responded by implementing a package of measures to break down some of the barriers caused by red tape. The most important of these measures include the so-called 'Tu Empresa en un Día' (your company in one day) and the internationally-renowned 'Start-up Chile' program, which supports Chilean and foreign entrepreneurs in innovative fields.

WHAT ARE THE KEY INDUSTRY SECTORS CURRENTLY DRIVING M&A IN CHILE?

BAZ: Recent deals have demonstrated that Chile is loyal to its open market reputation. Multimillion dollar M&A deals in the pension funds, pharmaceutical, soft drinks, and transport markets have attracted lots of attention during the last three to four years, as there has been an international player present in almost all of these deals, such as Principal Financial Group (U.S.) in the acquisition of AFP Cuprum (pension funds administrator), TAM airlines (Brazil) in the merger with Lan Airlines, Metlife (U.S.) in the acquisition of AFP Provida (also a pension funds administrator) and Abbott (U.S.) in the acquisition of CFR (pharma company).

More recently, we have been witnessing an increasing flow of European investors targeting the highly regulated infrastructure and energy markets and related areas of service.

Mining is also a key industry in Chile, but as the main projects have already been developed by multinational companies, any M&A activity in this sector occurs abroad. Further, mining activity has been affected by the decreasing demand for such commodities from China. This has caused a decline in the activity of servicers providers in the mining industry, which in turn, opens business opportunities for prospective players willing to enter into this market. Finally, we are seeing an increasing activity in smaller projects, which take advantage of different ownership or financing structures (i.e. junior companies).

TO WHAT EXTENT DO FAMILY-OWNED BUSINESSES REMAIN A KEY DRIVER OF CHILE'S ECONOMY?

BAZ: In fact, private companies and publicly traded corporations owned and driven by family - or groups related by family ties- constitute the landscape of property ownership in Chile, where in average controlling shareholders own 53 percent of the stock of listed companies and more in private companies.

Chilean law governing companies, corporations and the most commonly used forms of legal entities, implicitly grant broad power to the partner and/or shareholder holding the majority of the equity. In fact, in private and public corporations (sociedades anónimas), the shareholders meeting is the supreme body of the entity, being the board of directors subordinated to the shareholders. The most important decisions in the life cycle of a company, such as amendments to the bylaws, mergers, divestitures, sale of relevant assets, are directly made by the shareholders, despite the existence of a certain degree of involvement of the board of directors in these matters. Nevertheless, the board members have fiduciary duties within the company, whether or not they are also controlling shareholders or elected them, being forbidden by the directors to favor particular interests within the company. The directors cannot adopt any decision which is not aimed at the so-called 'company interest' (interés social), which has been consistently understood as the legal right of all shareholders to participate in the revenues of the company in accordance with its participation in the equity.

Despite the foregoing, there are strong incentives for a close cooperation between majority shareholders and directors. Shareholders not only appoint directors but also determine their remuneration, can replace them anytime and also limit their powers. As a consequence, defensive measures such as staggered boards, poison pills and/or white knights, and hostile takeovers are almost absent from the Chilean takeover landscape. Thus, being able to close a takeover in prior negotiations with the controlling shareholders is a must.

As a final note, this scenario places challenges on the corporate governance of family-owned companies, in particular, in regards to the relation between majority and minority shareholders and the agency costs arising out of such an ownership structure, something that foreign investors might want to bear into account when analyzing the feasibility of acquiring a minority stake in such companies.

WHAT CHALLENGES DO MULTINATIONALS FACE WHEN LOOKING TO ACQUIRE A FAMILY-OWNED BUSINESS IN CHILE?

BAZ: Depending on the size and type of family-owned business, multinationals face multiple but similar challenges. In both cases, takeovers are initiated by direct discussions with the majority shareholder rather than with the board.

Regarding public corporations controlled by families, when a multinational is looking to acquire such a corporation, the acquisition has to be made via the stock market through a public offering with some exceptions. In most cases, the controller or family controlling the company will have to participate in the said public offering for the same consideration per share that minority shareholders will be receiving. Thus, before launching a public offering, the multinational will have to contact and secure the participation of the owner of the family-controlled company to reach a successful deal. Our experience in these sort of deals have demonstrated that multinationals and these sort of corporations, despite the latter being controlled by families, are able to speak the 'same language' and conduct their discussions with high levels of sophistication. The development of the Chilean stock market rules and the 'upgrade' that this mean in terms of sophistication for any company, certainly plays a role in this.

In regards to family-owned private corporations, the first challenge a multinational faces when looking to acquire such a corporation, is identifying a correct counterparty for initiating discussions. In fact, it is common that this type of company is managed by one or more family member, but the family equity is not individually held by him or her. Further, the family might be well

"Recent deals have demonstrated that Chile is loyal to its open market reputation. Multimillion dollar M&A deals in the pension funds, pharmaceutical, soft drinks, and transport markets have attracted lots of attention."

prepared for managing the day-to-day business of the company (which in many cases was initiated two generations ago) but may lack the sophistication and cold-bloodedness needed to successfully conclude a deal of this nature. The participation of financial advisors and external counsels (which, in the first place, would have to win the family's trust) accompanying sellers through the deal is a must.

During the development of the negotiations, multinationals might want to assess the importance of personal leadership of family members in the internal and external (i.e. client and providers) deals of the company. Buyers might also want to give a close look at the need to maintain sellers in key managerial positions after closing to facilitate transition.

Likewise, as buyers approach sellers and conduct negotiations, multinationals should be aware that a 'one size fits all' approach is not necessarily applicable to the local landscape. Many multinational companies have their own set of rules, procedures and documents that they try to apply to any deal without due consideration to the specifics of the case and/or the country, jeopardizing the deal with requirements of a different nature that have nothing to do with the case, or at least adding complexity that oftentimes only increases frustration among the parties. Many times a soft landing is required to secure the success of the deal so being able to build up a relationship based on trust and knowledge of the business is key to a good outcome.

Finally, upon closing, the organization of the acquired company might be stressed by the need to rapidly adapt to the international standards applied by the multinational. In addition, sellers, now in many cases managers, might find it difficult to stop conducting themselves as owners and accepting the existence of a new (foreign) boss within the organization.

HOW HAVE CHILE'S NEW CORPORATE GOVERNANCE RULES HELPED TO INSERT TRANSPARENCY INTO THE COUNTRY'S BUSINESS ENVIRONMENT?

BAZ: New corporate governance rules have increased the accountability of the most relevant stakeholders in Chile's business environment. More important, however, is the increasing supervisory scrutiny from the Superintendencia de Valores y Seguros (Superintendency of Stocks and Insurance) and the pension funds administrators.

As a consequence, any deal is subject to a greater deal of inspection and not always what can be done is what is achieved. Such actions have lead into an increasing judicialization of matters. Corporate scandals are not unknown to Chile. In recent years, cases such as Fasa, la Polar, Enersis, and more recently Cascadas, have shaken the corporate landscape - being controlling shareholders questioned for breaching their fiduciary duties towards minority shareholders in matters such as related party transactions and appropriation of corporate opportunities, among others.

Despite the foregoing, unveiling, prosecuting, judging and sanctioning corporate scandals is a demonstration of maturity and development of the Chilean stock market, which might lead it to even higher standards of transparency favoring the business environment.

We are also seeing an increasing level of self-regulation, mostly driven by institutional investors (local and foreign), and a market more willing to see corporate governance rules as an excellent tool to increase value to its companies.

WHAT ADVANTAGES DOES INSTRUCTING BAHAMONDEZ, ALVAREZ & ZEGERS PROVIDE TO MULTINATIONALS LOOKING TO ACQUIRE A CHILEAN FAMILY-OWNED BUSINESS?

BAZ: The acquisition of family-owned businesses places multiple challenges before multinationals as foreign investors, and not only from a legal standpoint. The assistance of a local corporate full-service firm is a must in these sorts of deals. Clients need to instruct a firm that can speak the 'client's language' and successfully transmit and adapt such language to a local counterparty. If the latter is not achieved, the future of the deal could be jeopardized.

Local firms have a good level of sophistication, with most lawyers having trained in U.S. and U.K. law firms. Therefore, understanding the standard documents and language is not an issue - having the buyers understand local regulations and culture is more of a challenge and key not only for the success of the deal, but also to the success of the future operation.

Last, in terms of local capabilities, going to the right team rather to a brand is very relevant. Well-known brands do not always possess the hands-on approach or the flexibility and agility to provide the levels of service needed to assist multinational enterprises in Chile.

"Private companies and publicly traded corporations owned and driven by family constitute the landscape of property ownership in Chile, where in average controlling shareholders own 53 percent of the stock of listed companies and more in private companies."

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Cross-Border M&A in China

More transactions, bigger deals, reports Lee Edwards, Managing Partner in Shearman & Sterling's Beijing office and head of its China M&A practice.

Inbound and outbound China M&A activity have both experienced steady growth over the past three decades. That growth is likely to continue as China continues to pare down restrictions on foreign investment at the same time as it seeks to promote the global reach of Chinese enterprises and pushes reforms aimed at increasing the competitiveness of state-owned enterprises ("SOEs"). Chinese participants in the global M&A market have become more sophisticated in recent years, contributing to the increasing size and complexity of transactions involving Chinese buyers or sellers.

Total China M&A deal value reached US$260.2 billion in 2013, up 40.4% from US$185.3 billion in 2008. The aggregate volume of inbound and outbound China M&A transaction slightly reduced from 4,805 in 2008 to 4,448 in 2013. This trend has continued in 2014, with the aggregate China M&A deal value reaching US$183.1 billion in the first six months of 2014, up 18.7% from the same period in 2013. The value of foreign inbound investment activity has climbed to record highs in recent years, rising from US$ 108.3 billion in 2008 to US$123.9 billion in 2013, reflecting increased efforts by multinational companies to capitalize on the rapid growth in Chinese consumer buying power, as well as substantial investment and acquisition activity by foreign investors already present in China looking to enhance the competitiveness of their China operations. The value of outbound investment activity has also increased steadily in recent years, rising from US$52.1 billion in 2008 to US$107.8 billion in 2013, reflecting the increased need for Chinese industry leaders to find new markets for their products as well as China's insatiable thirst for the natural resources, skills, intellectual property and technology lacking in China. Europe and North America remain the top destination markets for China outbound M&A. SOEs have continued to focus on resources, energy and power, as well as heavy industry, while outbound acquisition activity by private enterprises has been focused more on the telecommunications, technology and real estate sectors.

STREAMLINING INBOUND INVESTMENT APPROVALS

2014 saw a number of significant developments in China's foreign direct investment regulatory regime. The State Council, the National Development and Reform Commission ("NDRC"), the Ministry of Commerce ("MOFCOM"), the State Administration for Industry and Commerce ("SAIC") and the State Administration of Foreign Exchange ("SAFE")) all individually or jointly issued new regulations intended to streamline the approval process for acquisitions and other investments in China by foreign and foreign-invested companies.

On October 31, 2014, only eleven months after the State Council issued the 2013 version of the Index of Investment Projects Subject to the Governmental Approval (the "Governmental Approval Index"), the State Council issued a revised Governmental Approval Index, effective on the same date, which further shortens the list of investment projects subject to governmental approval:

15 categories of investment projects which were previously subject to substantive review and approval by the NDRC ("hezhun") are now only required to be "reported" to the NDRC and subject to an expedited and ostensibly procedural approval process ("bei'an") and 23 categories of investment projects which were previously subject to central level government approval are now only subject to local level approval; and

For most inbound foreign investment projects, the "investment-size" thresholds triggering central level governmental approval were lifted from US$300 million (for projects in the "encouraged" foreign investment category) and US$ 50 million (for projects in the "restricted" category), to US$ 1 billion and US$ 100 million, respectively.

At almost the same time, the NDRC published a draft amendment to the 2011 version of the Catalogue of Industries for Guiding Foreign Investment (the "Foreign Investment Catalogue"), soliciting public comments. Pursuant to the draft amendment, the number of industry sectors within the "restricted" category would be reduced from 79 to 35; and the number of industry sectors which are subject to foreign ownership restrictions would be reduced from 44 to 32. The revised version of the Foreign Investment Catalogue is expected to be promulgated and become effective early next year.

2014 has also seen the reform by MOFCOM and the SAIC of the corporate registered capital system and the corporate annual inspection system. The two-year time limit for foreign investors to contribute all of the registered capital of a foreign invested entity (an "FIE") has been eliminated, leaving foreign investors and their Chinese partners free to decide their own capital contribution schedule. The annual inspection requirement has also been repealed; foreign invested companies now only need to submit their annual report online through the SAIC information system.

STIMULATING OUTBOUND INVESTMENT

The 2014 Governmental Approval Index also further relaxed the regulatory approval requirements with respect to outbound investment by Chinese entities. Previously, substantive review and approval by the NDRC, MOFCOM or one of their local branches was required for outbound investments exceeding certain size of investment thresholds. Under the 2014 Governmental Approval Index, such "investment-size" thresholds have been abandoned. Substantive NDRC and MOFCOM approval (involving a detailed review and assessment of the merits of the proposed transaction) will only be required where the outbound investment project is in a "sensitive country or region" or in a "sensitive industry." Projects not in a sensitive country (region) or in a sensitive industry are only subject to the "bei'an" requirement. Projects involving investment by an SOE under the direct control of central government (a "Central SOE") and projects involving investment by entities other than Central SOEs with an investment amount exceeding US$300 million should be filed with NDRC and MOFCOM for record-keeping and expedited, procedural approval purposes. Other projects should be filed with the relevant local branches of NDRC and MOFCOM.

Regulatory changes have greatly simplified the regulatory process for Chinese entities seeking to make outbound acquisitions or other overseas investments and reduced uncertainty.

These regulatory changes have greatly simplified the regulatory process for Chinese entities seeking to make outbound acquisitions or other overseas investments and reduced the uncertainty with respect to the ability of a prospective Chinese purchaser of a foreign business or assets to obtain the requisite Chinese government clearance. These changes, if fully implemented, should enhance Chinese buyers' likelihood of success in competitive sales processes.

CROSS-BORDER RMB CASH POOLS: A NEW WAY TO INVEST IN CHINA?

Traditionally, foreign investors have only been able to move cash into China by contributing capital, or extending a loan, to an FIE, in the former case, subject to the approval of MOFCOM or the relevant local branch of MOFCOM and in the latter case, subject to strict foreign exchange controls. Funds contributed to registered capital must remain in the FIE unless the FIE obtains MOFCOM approval for a capital reduction or the FIE is dissolved.

2014 has seen the issuance of two regulations designed to facilitate the development of the RMB cross-border business in the China (Shanghai) Pilot Free Trade Zone ("Shanghai FTZ"). Entities established in the Shanghai FTZ (each, an "FTZ Entity") are allowed under these regulations to engage in RMB cross-border business, including cross-border mutual RMB cash pooling. These new regulations are intended to provide an efficient means for multinational companies to channel funds across the border of China and to make corporate treasury more convenient and transparent.

Notwithstanding the rigorous examination of VIE companies by regulators in recent years, reports of the impending demise of the VIE structure appear to have been premature.

An FTZ Entity that satisfies certain qualification requirements would be allowed to establish a "cross-border RMB cash pool". Entities, either inside of China or outside of China, that have a direct or an indirect shareholding relationship with such FTZ Entity may be included in the cash pool (each, a "Cash Pool Member"). Each Cash Pool Member may inject RMB into, or withdraw RMB out of, such cash pool without any governmental approval. If the Chinese subsidiary establishes a cross-border cash pool, the foreign investor may simply inject RMB funds into, and the Chinese subsidiary may withdraw RMB funds from, the cash pool without PRC governmental approval and without being constrained by the statutory debt-registered capital ratio. When the Chinese subsidiary has extra funds, instead of remitting such funds as dividend or repayment of loan, it may inject the cash back into the cash pool which the foreign investor may withdraw from time to time. Some banks in the Shanghai FTZ, such as HSBC and Shanghai Pudong Development Bank, have started to offer such cash pooling services to their clients.

Trial Procedure for Notification of "Simple Concentrations": Getting to the Finish Line Faster

The PRC Anti-Monopoly Law (the "AML"), promulgated in August 2008, requires investors to file an anti-monopoly notification with the Anti-Monopoly Bureau of MOFCOM if their proposed transaction meets certain thresholds. As of September 30, 2014, MOFCOM had reviewed the anti-monopoly notifications of 904 projects among which 878 projects were unconditionally approved, 24 projects were approved with conditions and 2 projects were blocked.

MOFCOM has been widely criticized for the time-consuming nature of its anti-monopoly review process. Under the AML, the statutory timeline for MOFCOM to review an anti-monopoly notification is 120 (+60) calendar days, including: 30 calendar days for the first-stage review and additional 90 calendar days (which may be extended for another 60 calendar days if necessary) for the second-stage review if MOFCOM identifies any anti-competition concerns during the first-stage review and decides to conduct a second-stage review. As a matter of practice, however, the MOFCOM review frequently takes five to six months or longer from the first time the notification is filed. According to MOFCOM's 2013 Annual Anti-trust Report, MOFCOM has cleared 161 anti-trust notifications in the first ten months of 2013. Only 21 out of the 161 cases (13%) were cleared during its first-stage investigation, 130 cases were cleared after a second-stage review, and the other 10 cases ran into the extra 60-day investigation. In recent years, the pre-review period (i.e., the period from the date the parties make the initial filing to the date MOFCOM confirms the filing being complete) has become longer: in 2011, the average pre-review period generally lasted 2 to 3 weeks, whereas in 2013 it was approximately 2 months. In some cases, MOFCOM may ask for additional information to prolong the pre-review period or initiate a second-stage review in order to allow it to process the backlog of antitrust filings that it has received.

As part of its effort to expedite anti-monopoly reviews, MOFCOM introduced "simplified procedures" in 2014 for anti-monopoly filings in relation to qualified "simple concentration cases". The relevant rules and regulations define the key criteria for determination of whether an M&A or investment project constitutes a "simple concentration" and enumerate the notification requirements applicable to simple concentration cases. On 22 May 2014, MOFCOM published the first simple concentration case-"Rolls-Royce Holding/ Rolls-Royce Power Systems" on its website for public comment. As of November 20, 2014, 54 simple concentration cases have been publicly announced and many of them were cleared within two months following the expiration of the 10-day public announcement period.

However, it is worth noting that newly introduced opposition procedures create the risk that MOFCOM could withdraw its certification of a transaction as a "simple concentration" and require a re-filing if it determines that an opposition petition filed by a third party has merit. Parties considering filing for a simple concentration review should consider the likelihood of third-party opposition and the resulting risk of a review process potentially even longer than the standard review timeline.

LEE EDWARDS
MANAGING PARTNER

VIES: STILL VIABLE?

The variable interest entity ("VIE") structure, which is also commonly referred to as the "Sina structure" as it was first used by Sina in 2000, is a contractual arrangement that has been widely used by Chinese companies operating in industries in which foreign investment is restricted or prohibited to attract foreign venture capital or private equity financing or to effect offshore listings. Some Chinese companies not facing such foreign investment restrictions also adopted such structure in their offshore listing in order to circumvent certain regulatory approval requirements. The VIE structure had been adopted by more than one hundred Chinese companies for their offshore listings.

However, in recent years, the VIE structure has attracted substantial scrutiny from domestic and overseas regulators, including the State Council, MOFCOM and the United States Securities and Exchange Commission (the "SEC"). The legality of the VIE structure has also been the subject of litigation in Chinese courts. A number of transactions involving companies using a VIE structure failed to make it through the PRC antitrust review process, leading to speculation that Chinese regulatory authorities were considering a crackdown on VIE companies. MOFCOM indicated that it was conducting a review of VIE policies. Both the SEC and The Hong Kong Stock Exchange issued a number of rules setting out more stringent listing and disclosure rules applicable to companies with a VIE structure.

The long-term viability of the VIE model has always been uncertain due to the fact that its fundamental purpose is to allow foreign investors to invest in businesses engaged in activities for which foreign investment is restricted or prohibited. However, notwithstanding the more rigorous examination of VIE companies by regulators in recent years, reports of the impending demise of the VIE structure appear to have been premature.

Recent overseas listings by companies with a VIE structure provide further evidence of the structure's continued viability. In particular, two leading PRC e-commerce giants that utilize a VIE structure, Alibaba Group and Jingdong Group, completed their initial public offerings in 2014. However, while it seems likely that VIEs will remain an important feature of the foreign investment landscape in China for the foreseeable future, it is also likely that regulatory scrutiny of such entities will continue to increase, with Chinese authorities looking for new ways to increase the transparency of these structures and to enhance the government's ability to monitor and enforce compliance by VIE entities with Chinese laws and regulations. ■

PRAGUE
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M&A in the Czech Republic: Optimism Continues to Grow

What is the current M&A landscape in the Czech Republic? Will optimism continue to grow? What challenges does the M&A market face?

Thanks to foreign investments, EU funding, developed EU links between EU countries and political stability, CEE region is often ranked among the most promising regions in Europe. Czech Republic, which lies in the heart of the CEE region, is one of the most successful CEE countries in terms of attracting foreign direct investment. In 2014, foreign direct investment reached almost USD 8 billion. Most of investments flew from German, US, Japanese, Austrian, Swiss and UK investors into automotive, machinery, real estate, pharmaceutical and food industries.

In 2013, the Czech Republic was ranked third in number of completed transactions behind Poland and Turkey. In 2014, market confidence continued to grow. Despite the fact that there was no multibillion Euro deal as seen on the Czech market in 2013, 2014 has seen activity on the M&A market as well as in private equity houses. Most of the deals currently happening on the market are in the value of below €100 million. The majority of transactions are so-called secondary sales, which signify forward-looking strategic decision making by market leaders. The size of the Czech M&A market can be estimated to be USD 8.32 billion, which represents a year-on-year increase of 39% or USD 2.34 billion.

Czech investors are investing mainly at home, with domestic transactions amounting to 56%. Nonetheless, Czech investors are also year on year more active on foreign markets. Main acquisitions in the past year took place in Slovakia and Germany, however higher rates were also reported in Bulgaria, where the number of acquisitions closed by Czech investors rose from 1 to 4.

The nature of the Czech market is changing, with established investment groups like PPF, EPH, KKCG or Penta taking the lead and being responsible for a significant share of the largest transactions. This is apparent by looking at the list of the most significant transactions of the past two years, where the finance groups dominated the M&A activity, mainly in the utility sector.

One of the top transactions of the year 2013, which completed in 2014, was the acquisition of controlling stake in Telefónica Czech Republic by finance group PPF, assisted by BBH. PPF acquired a majority stake of Telefónica for a total consideration of €2.47 billion. This came after PPF sold its 25% stake in insurance company joint venture Generali PPF Holding to Assicurazioni Generali of Italy for €1.3 billion, a deal which was also assisted by BBH. Another significant transaction was the acquisition of Slovak Gas by Czech finance group EPH for €2.6 billion or the departure of E.ON from a Czech gas distribution company Pražská Plynárenská, where E.ON's stake was acquired by the City of Prague for €302 million. Another significant deal was the sale of RWE's 100% share in NET4GAS, s.r.o., a Czech gas transmission system operator, to a consortium of Allianz and Borealis Infrastructure.

The main driver of the M&A activity in the Czech Republic over the past few years was the exit of Western utility and energy companies. Looking forward, succession issue will become another powerful driving force. Many founders of companies which were established in the early post-Communist years are looking for new owners due to absence of a successor. Many of these companies are high quality companies with skilled labour force.

LEGAL FRAMEWORK FOR M&A

Mergers and acquisitions are in the Czech Republic regulated by Act No. 125/2008, on the Transformations of Business Companies and Cooperatives, which came into force on 1 July 2008 and which implemented EU Directive 2005/56/EC on cross-border merger of limited liability companies. The Act governs both national and international transactions. Pursuant to this Act, it is possible to transform companies in the Czech Republic by merger or acquisition, demerger, transfer of business assets to shareholders or conversion of their legal form. These transformations, which are generally tax neutral, require compliance with complex legal and tax procedures.

No recent modifications to Czech tax regulations affecting mergers or acquisitions have been issued. Generally, Czech tax residents are taxed on their worldwide income whilst non-Czech tax residents are taxed on their income from Czech sources. Certain exemptions are granted under the EU legislation and double taxation is eliminated by double taxation treaties. The government has introduced a number of investment incentives, such tax allowances, which may be granted under Investment Incentive Act No. 72/2000 Coll. Companies considering investing in the Czech Republic by establishing a new business or expanding their current business are encouraged to take advantage of the current investment incentives.

"Companies considering investing in the Czech Republic by establishing a new business or expanding their current business are encouraged to take advantage of the current investment incentives."

The merger control regime is stipulated in Act No. 143/2001 Coll., on Protection of Economic Competition. The Office for the Protection of Competition is the central authority of state administration in the field of public procurement and competition. It controls any arrangements distorting economic competition such as price-fixing or other cartel arrangements. The business conduct of companies with a dominant market position is subject to special regulations. It is mandatory to file a transaction which represents a concentration of businesses and exceeds a minimum threshold based on world-wide and net turnover. It is possible to make a simplified merger filing in case the transaction's impact on the relevant markets would be minimal. There is no specific time limit for making a filing, however clearance should be obtained prior to implementation. If the Office perceives the transaction as a potential threat to effective competition, it may prevent the transaction from going through.

As of 1 January 2014, the Czech Republic has implemented a new Civil Code and Business Corporations Act (Act No. 89/2012 Coll.), which lead to a complete transformation of Czech private law. The new Civil Code is based on the Austrian, French, German, Italian, Quebec and Swiss civil codes. The new Civil Code introduced better flexibility in contractual arrangements and represents

"It is expected that demand for work relating to criminal corporate investigations will continue to increase as many businesses realise that taking steps such as training employees or putting in place specific procedures can mitigate their potential future losses and exposure."

a step closer to freedom of contract by limiting reasons for invalidating contracts. Nonetheless, contractual freedom is not completely unrestricted; the code for example introduced a number of concepts protecting weaker parties. The new code also places much more emphasis on pre-contractual arrangements. In respect of liability of statutory bodies, the new code favours corporations by restricting powers of statutory officers. The code introduced a so-called "business judgment rule" which means that a statutory officer will not be liable for negative effects of his decisions on a company only if he can show that he acted with diligent care. Even though it is yet to be seen how the new Civil Code will impact business activities in the Czech Republic in the future, it is predicted that the increased legal flexibility will have a positive impact on the M&A activity in the Czech Republic.

Further, from 1 January 2012 the Czech Republic introduced Act No. 418/2011 Coll. On Criminal Liability of Legal Entities which enables criminal prosecution of legal entities. Corporations or other legal entities are prosecuted when it is apparent that an individual committed a crime for the benefit of the legal entity. Moreover, the Act enables piercing of the corporate veil in order to punish individuals who try to escape liability by acting in the name of a legal entity. Legal entities normally face financial penalties, although they can also face punishments such as closure of the business or prohibition of accepting donations.

It should be noted that the impact of the Act on Criminal Liability of Legal Entities reaches beyond the borders of the Czech Republic. If a Czech legal entity engages abroad in a criminal activity such as corruption, the activity falls within the scope of this Act as well as within the scope of the relevant foreign anti-corruption legislation such as the US's FCPA or UK's Bribery Act. Following the introduction of this new legislation, there has been a noticeable increase in demand for legal services in compliance and regulatory matters as well as investigations. It is expected that demand for work relating to criminal corporate investigations will only continue to increase. Many businesses realise that taking steps such as training employees or putting in place specific procedures can mitigate their potential future losses and exposure.

OPPORTUNITIES AND CHALLENGES

Key M&A players remain cautiously optimistic about the Czech market. With a stable economy predicted to grow in 2015 1% quicker than in the rest of the EU and with a friendly climate towards foreign investors, there is a consensus that the Czech Republic will remain a favourable market for mergers and acquisitions. Even though the Ukraine crisis has introduced a new level of uncertainty to the CEE region, optimists believe that this should not have a long lasting impact on the Czech M&A market. It is expected that the energy, utility, industrial, pharmaceutical and consumer sectors will continue to be the most active sectors in the Czech Republic in 2015.

It is expected that there will be a consolidation of and changes in the media and telecom market through acquisitions of certain media houses. In the last two years, we have already seen a number of substantial transactions, such as the acquisition of MAFRA and Anděl Media Centrum, being entities forming a major online and print media house in the Czech Republic by Agrofert Holding. Another significant deal was the sale of the media house Ringier Axel Springer CZ to entrepreneurs Daniel Křetínský and Patrik Tkáč.

It is also believed that there is still a potential for financial sector consolidation, which could mean both, large banking transactions as well as smaller transactions in the consumer credit business and insurance. Even though Czech banks were not hit by the economic crises as hard as banks in some other European countries, the fact that the Czech economy did not grow in years 2012 and 2013 did have an impact on the banks' performance. Moreover, many Czech banks were affected by problems of their parent companies. This, as well as the fact that many project developments failed due to developers' financial difficulties, had an impact on Czech banks' willingness to lend money and finance developments.

The Czech National Bank reacted in 2012 and 2013 to the economic slow-down by fixing interest rates and weakening the Czech currency. Many have perceived this as a step preventing deflation and boosting Czech economy by encouraging exports, foreign investments and decreasing unemployment. Reports of the Czech National Bank show that the intervention boosted the economy by almost 3% in the year 2014.

WHAT IS NEXT?

In the ever-globalised world, individual players become more and more dependent on each other. This enables increased global supply of investment opportunities however it also carries a risk of being susceptible to shifts on markets which are thousands of kilometres away. The challenge for the Czech M&A market is to place itself as a stable secure market with good investment opportunities. With this in mind, the vast majority of companies on the M&A market believe in positive development of the Czech economy and more merger and acquisition opportunities. Although investors remain cautions, data reflecting M&A activity on the Czech market shows that 2014 was a year of an increased confidence in future growth.

In the past 2 years, we have seen a number of noteworthy transactions happening on the Czech market as well as transactions on foreign markets completed by Czech investors. Czech companies are growing and becoming key to the whole market. The growth of many Czech businesses required law firms operating in the region to grow with them. BBH, originally a Czech law firm, was one of such firms which responded to the regional changes by opening offices in both Bratislava and Moscow and by establishing a special legal advisory group comprised of English qualified lawyers focused on cross-border as well as domestic transactions governed by English law. ■

JUDR. ING. PETR PŘECECHTĚL
PARTNER

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Q&A

REPORTER MARIA JACKSON PUTS THE QUESTIONS TO LIEDEKERKE

AIMERY DE SCHOUTHEETE
SENIOR PARTNER

DAMIEN CONEM
PARTNER

THIBAUT HOLLANDERS
SENIOR ASSOCIATE

SEIZING OPPORTUNITIES AND MITIGATING RISK IN THE DRC

Lawyers from Belgian law firm Liedekerke Wolters Waelbroeck Kirkpatrick discuss best practices for investment into the Democratic Republic of Congo

As the first country to have concluded a double tax treaty with the Democratic Republic of Congo (DRC), Belgium provides a useful springboard for investors into the African nation, and the wider region.

Brussels-headquartered Liedekerke Wolters Waelbroeck Kirkpatrick is one of Belgium's foremost business law firms. Liedekerke has a comprehensive international outlook and regularly acts for clients from China, India, Russia and other CIS states, as well as Middle-Eastern and Latin American corporations. The firm has particularly extensive experience in Africa-related work and its Africa practice serves Belgian and international clients in countries such as the DRC, Rwanda, Burundi, the Ivory Coast, Tanzania and South Africa.

As the DRC continues to present attractive opportunities for foreign investors, partners from Liedekerke Wolters Waelbroeck Kirkpatrick discuss the key points that should be considered when contemplating doing business in the country.

WHAT ARE THE HEADLINE BUSINESS TRENDS CURRENTLY DRIVING FOREIGN INVESTMENT INTO THE DRC?

LIEDEKERKE: Although the DRC offers an unlimited number of opportunities for the 'right' investor, the focus of foreign investments seems to run along two lines: 'heavy and long term' investment on the one hand, which covers the extractive industry and infrastructure (for which there is an enormous need); and 'mid-term' investment on the other hand, which broadly covers the fast-moving consumer goods (FMCG) and services industries. Both sectors need to create brand awareness and convince their local clients that they are in the DRC to stay.

As global appetite for natural resources remains strong, in particular from Asia, diversification into central Africa does make sense for the leading global and regional players in terms of extraction costs and proximity to customers. However, for these projects to yield, infrastructure will need to improve to facilitate and speed up the movement of these goods. Hence the extractive and infrastructure industry combine to make a virtuous pair.

In parallel, a middle class is coming to the fore and is looking to 'invest' in products that will underline their success and provide them and their families with a better, more comfortable living standard. Here, the main FMCG titans see an opportunity. For this opportunity to turn into a success, it is our view that many specialized services providers will be required: accountants, bankers, consultants, healthcare workers, lawyers, real estate brokers and developers, university professionals etc. The persons providing these services will strengthen the middle class and reinforce the virtuous circle referred to above, since they will consume more FMCGs but also will require improved infrastructure.

HOW HAS THE DRC'S BUSINESS LANDSCAPE EVOLVED OVER RECENT YEARS?

LIEDEKERKE: Here again, we see a couple of positive evolutions that should reassure investors. The first significant development is the change in the mentality of the political establishment; there is an increased awareness and consensus that a sound business environment is required to achieve the development objectives that they wish to pursue. This change in attitude vis-à-vis the business community in general, goes together with a legislation that aims at ensuring growth is shared fairly among investors and the local population and that knowledge is spread. These aims sometimes take the form of an obligation to employ local people or utilize local competences to fulfill certain missions but, generally, the legal provisions allow for an exception when that competence is not (yet) sufficiently present. In other words, the regulations are no longer blind to the commercial reality but are increasingly designed to encourage business in a framework that allows its benefits to reach the less well served members of the community.

This 'change of mind' has been fairly well received by foreign investors if one is to use the DRC's growth rate and FDI figures as a measure; over the last five years, the DRC's average growth rate was in excess of seven percent.

Last but not least, the DRC has a wealth of graduate students who have gained their degrees abroad at outstanding academic institutions (mainly in Belgium and France but also in the U.S.) and who, more often than in the past, view their best career opportunities as lying in the DRC. These 'brains' are the local talent that investors will also need to turn their ventures into a resounding success.

HOW HAS THE DRC'S ACCESSION TO OHADA CEMENTED ITS CREDENTIALS AS AN ATTRACTIVE VENUE FOR FOREIGN INVESTMENT?

LIEDEKERKE: Accession in July 2012 to OHADA, the organization for the harmonization of business law in Africa, can only benefit investment by providing companies doing business in the DRC with a single, modern, flexible and reliable business law framework which already applies in the other 16 OHADA member states and supersedes previous or subsequent national legislation. OHADA commercial, corporate, securities, accounting and arbitration law entered into force in the DRC on 12 September 2012, and many efforts have been made – backed especially by the EU, the World Bank, the U.K.'s Department for International Development and other funders – to support national agencies in assisting the administrations and courts with the application of OHADA in the DRC from 2013 until 2017.

"Regulations are no longer blind to the commercial reality but are increasingly designed to encourage business in a framework that allows its benefits to reach the less well served members of the community."

WHAT ARE THE KEY CHALLENGES FOR FOREIGN INVESTORS INTO THE DRC?

LIEDEKERKE: We believe that the challenges in the DRC are not that different from what an investor would face in other developing countries. There is still a significant amount of red tape, although the government is trying to reduce bureaucracy and simplify the life of the business community. Some legal steps that take a matter of days in a sophisticated jurisdiction can take weeks. In addition, infrastructure is clearly in vital need of improvement, as we mentioned earlier.

However, a considerable hurdle for investors is the challenge to find the right advisers to assist them along the way. The services sector in the DRC is still in its infancy and knowledgeable and properly trained 'facilitators' of business processes (from accountants to strategy consultants) are thin on the ground. In certain sectors, legal monopolies remain in place that allow the members of the local association to demand a premium for their work. Similarly, the pool of commercial experts available is small. And, now the stringent UK Bribery Act and US Foreign Corrupt Practices Act are in force, it is essential for any company doing business in the country to rely on the right commercial and legal partner to mitigate the business and regulatory risk. This being said, within the same association, more and more members realize what they could gain in quality of service and productivity would they embrace the management methods that have now become the norm in the Western world. And these persons are the ones seeking to collaborate more closely with foreign experts in their fields to 'outsmart' their local competitors.

TO WHAT EXTENT CAN BELGIUM PROVIDE A USEFUL STEPPING STONE FOR INVESTMENT INTO THE DRC?

LIEDEKERKE: Having a shared historical and linguistic heritage with the DRC, equips Belgium-based companies and corporate advisers with the necessary tools to help familiarize foreign investors with the local environment. Additionally, Belgium has an extensive network of Bilateral Investment Treaties which provides Belgian companies – or Belgian subsidiaries of international groups that are especially set up for follow-on investments elsewhere in the world – with strong protection for their foreign investments.

Finally, Belgium has entered into a very attractive double taxation treaty with the DRC (so far, DRC has only entered into DTTs with Belgium, South Africa and Zimbabwe), which can be combined with flexible corporate legislation and various tax incentives (e.g. the favorable tax regime available to all holding companies).

IF A DEAL DOES TURN CONTENTIOUS, WHAT OPTIONS ARE AVAILABLE TO FOREIGN INVESTORS LOOKING TO RESOLVE A DISPUTE?

LIEDEKERKE: The basic recipe remains to make all contracts and deals subject to arbitration. The Congolese business community, as well as government representatives, are used to arbitration and understand the need to have disputes governed by well known and neutral arbitration proceedings rules. ICC arbitration is the most common currently but could leave some room to OHADA arbitration in the future. Arbitration under the aegis of CEPANI (the Belgian Center for Arbitration) or the Swiss Chambers of Arbitration are also welcome. In the long term, the fact that the OHADA Common Court of Justice (based in Ivory Coast) acts as supreme court throughout the 17 OHADA countries for all matters regulated by OHADA uniform acts will have a positive impact on national judicial systems.

HOW DOES LIEDEKERKE'S EXPERIENCE MARK IT AS A TOP CHOICE FOR INVESTORS LOOKING TO DO THEIR FIRST DEAL IN THE REGION?

LIEDEKERKE: We have been active in the DRC for over 25 years and in central Africa for over ten years. We have gone through various tense episodes with our clients and have developed a good sense of how to tackle the challenges that political change can bring about in the region. Our familiarity with the local institutions, as well as the deep links we have established with the local legal participants, grants us an edge over any newcomer to the region. We are passionate about central Africa and are strongly committed to this region. Most importantly, we are ready to share our knowledge and experience in the region with those among the investment community who are ready to take their business into Africa. We believe that these attributes are the key qualities investors are looking for when seeking assistance in a transaction.

"Having a shared historical and linguistic heritage with the DRC, equips Belgium-based companies and corporate advisers with the necessary tools to help familiarize foreign investors with the local environment."

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Damien is a partner in the corporate and finance practice group. He advises international and national clients in relation to multi-jurisdiction and cross-border transactions in the areas of M&A (including private equity and regulated undertakings), corporate (re)structuring (outside insolvency proceedings) and equity capital markets. Before rejoining Liedekerke, Damien practiced with two major international players after completing his traineeship with the firm.

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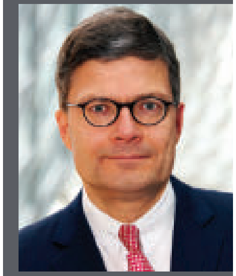
Q&A

REPORTER MARIA JACKSON PUTS THE QUESTIONS TO JONES DAY

TRENDS IN GERMAN PUBLIC M&A

Jones Day Frankfurt partner Johannes Perlitt discusses the key market issues for takeover offers in Germany



JOHANNES PERLITT
PARTNER
JONES DAY

Following a relatively quiet period for public M&A in Germany, there have been a number of significant transactions that have recently raised interest in this area.

One of the main trends is a revival of share-for-share transactions. Whereas the 2011 Deutsche Börse AG/New York Stock Exchange merger failed because the European Commission refused to provide merger control clearance, there is now a sizeable activity in the real estate sector in the form of three share-for-share transactions: Deutsche Wohnen AG/GSW Immobilien AG in 2013, ADLER Real Estate AG/ESTAVIS AG in 2014 (in both cases there were shareholder resolutions to create the consideration shares by way of a capital increase, a rare structure in Germany), and, just announced in December 2014, Deutsche Annington Immobilien SE's envisaged offer to the shareholders of GAGFAH S.A. (where a mix of shares and cash shall be offered).

Another remarkable trend is the important and influential role that shareholder activism and, in particular, hedge funds and opportunistic investors now play. The 2013 transactions that stand out in this regard (due to U.S. hedge fund Elliott's active role) are the takeover of Kabel Deutschland Holding AG by Vodafone and the acquisition of Celesio AG by U.S. buyer McKesson.

In Germany, the acquisition of publicly traded companies is principally governed by the German Takeover Act and the regulations promulgated thereunder. The Takeover Act provides the principal construct under which acquirors may offer to purchase the securities of a publicly traded company. It regulates the conduct of the acquiror prior to, during and after a tender offer. It also provides for the rights of shareholders in connection with tender offers, and the duties of the target company and its management during the offer period. Because in many circumstances the issues facing acquirors of German publicly traded companies prior to, during, and after the acquisition differ from those under other legal regimes, it is important that non-German acquirors be familiar with such issues and the developments that have recently facilitated public-to-private transactions.

Jones Day Germany has specific experience with the expectations and questions raised by international, and in particular U.S. clients, in the public M&A space.

WHAT ARE THE MOST IMPORTANT LEGAL RAMIFICATIONS THAT U.S. INVESTORS NEED TO UNDERSTAND WHEN DOING A TRANSACTION IN GERMANY?

JONES DAY: For many investors who are not familiar with the German rules it is not obvious that in Germany, where the entire transaction is less influenced by the target board(s) and more based on procedural rules, the target company cannot provide representations and warranties for the benefit of the bidder. Pre-launch conditions are not legally permissible, and offer conditions are permitted only where their fulfillment is not solely influenced by the bidder. Material adverse change provisions are possible, but do not protect the bidder during the period beginning on the date of announcement of the intention to make an offer through the beginning of acceptance period. Break fees should only be agreed as a lump sum cost compensation. Deal protection is typically obtained by securing larger shareholders (but strict disclosure provisions have to be observed). Particular attention has to be given to the so-called *Acting in Concert* of shareholders, which can trigger an obligation to make a mandatory offer once the relevant 30 percent threshold has been reached or exceeded (whereas a simple change in control through the acquisition of a block of shares alone does not trigger a mandatory offer with respect to a company with a pure U.S. listing).

"What requires some explanation to U.S. bidders is the fact that you need a shareholder resolution, with a majority of 75 percent of the votes cast, in order to be able to fully control a German stock corporation by entering into a domination agreement."

Another condition that may come as a surprise for a U.S. bidder is that German law limits the consideration you may offer to the target shareholders: it must be either cash (Euro only) or shares, but, as of the settlement of the offer, the shares must be listed at a regulated market in the European Economic Area (EEA), which covers the European Union plus Iceland, Liechtenstein and Norway. For a bidder whose shares are not listed in the EEA, there are three potential structures available:

- The target shareholders receive the statutory minimum consideration fully in cash, but the bidder offers, in addition, as an alternative consideration, shares that are listed solely outside the EEA.
- The statutory minimum consideration is fully covered by the bidder's shares with a dual listing on a regulated market in Europe (this structure is only perceived as attractive by investors if the premium offered by the bidder considers a potential flow back of the consideration shares to the home market).
- A combination where the statutory minimum consideration is only partly covered by shares with a listing on a regulated market in Europe and partly in cash.

Precedents for a mix of shares and cash are the UCB/Schwarz-Pharma transaction and the recently announced Deutsche Annington Immobilien SE/GAGFAH S.A. combination.

HOW CAN AN ACQUIRER OBTAIN FULL CONTROL OVER A GERMAN STOCK CORPORATION?

JONES DAY: What requires some explanation to U.S. bidders is the fact that you need a shareholder resolution, with a majority of 75 percent of the votes cast, in order to be able to fully control a German stock corporation by entering into a domination agreement which permits the majority shareholder to give instructions to the target management.

Under such a domination agreement, the remaining shareholders may choose to receive either an adequate annual guaranteed dividend or an adequate compensation for selling their shares, which is based on the higher of the equity value of the shares and the three-months-volume-weighted average market share price prior to announcement of the intention to enter into such an agreement. More importantly, the German stock corporation has a claim against the controlling shareholder for a compensation of its losses, if any.

If a claim is asserted to set aside the shareholder resolution of the general meeting and thus challenge the agreement becoming valid, a so-called release procedure is usually commenced to effect a court decision for the registration of the domination agreement with the commercial register irrespective of the pending litigation, but a claim alleging the inadequacy of the compensation will result in so-called appraisal proceedings (legal proceedings to verify the adequacy of the offered compensation).

Putting a 75 percent minimum acceptance threshold condition in a takeover offer to obtain the necessary majority to ensure the votes required for a domination agreement can provoke opportunistic investors to buy shares. This is done in order to (i) put pressure on the bidder to increase the offer price, but also (ii) in view of a potentially higher consideration obtained in connection with a subsequent structural measure such as a domination agreement or a squeeze-out, particularly in appraisal proceedings.

Recent steps taken to facilitate public-to-private transactions (in addition to the release procedure) include the 2011 introduction of an upstream merger squeeze-out at a shareholding of at least 90 percent (instead of 95 percent). And in 2013, the German Federal Supreme Court (BGH) decided that for a delisting stock corporation law requires no shareholder resolution and does not trigger an obligation to make a purchase offer to the minorities.

WHAT INFLUENCE HAS U.S. SECURITIES LAW ON OFFERS IN GERMANY?

JONES DAY: The German Takeover Act requires the tender offer to be addressed to all shareholders unless an exemption is granted. This is an issue in particular with respect to countries such as the U.S., where the securities law protects its citizens also in cases of offers where both the bidder and the target company are from outside the U.S., and is mainly relevant for exchange offers. In several previous German share-for-share transactions, if shares of a foreign private issuer were offered as a consideration, the German regulator (BaFin), upon application and in view of the burden caused by U.S. securities law, excluded U.S. shareholders (at least other than institutional shareholders). This is of most importance where the so-called Tier I relief of the U.S. Federal Securities Laws is not available because the percentage of target company shares held by U.S. shareholders exceeds 10 percent.

The BaFin insists on the bidder arranging for measures to comply with foreign laws. In share-for-share transactions, difficulties may arise where the period for the review of an S-4/F-4 document by the SEC cannot be easily brought in line with the strict timetable as set by German Takeover Law. Under German law it is compulsory to submit the German language offer document, including a prospectus-like description of the bidder and the bidder shares, within four (or with permission of the BaFin within eight) weeks after the announcement of the transaction at the latest. The BaFin has to approve the offer document within 10 to 15 working days after it is submitted. The reasoning for this tight timetable is to protect the shareholders of the target, as they generally wish the announced offer to proceed as quickly as possible. Immediately after the approval by the BaFin, the offer document has to be published at the same time to all shareholders (assuming the BaFin grants no permission to exclude shareholders).

WHAT ARE THE RIGHTS OF SHAREHOLDERS WHO BELIEVE THAT THE OFFER PRICE IS LOWER THAN STATUTORILY REQUIRED OR WHEN NO OFFER WAS MADE?

JONES DAY: As underlined by a decision of the German Federal Supreme Court rendered in July 2014, only shareholders that have accepted a public offer and tendered their shares are entitled to claim that a higher offer compensation (in line with statutory minimum price rules) should have been offered, whereas the shareholders that kept their shares have no such rights.

In this context, the markets observed

As underlined by a decision of the German Federal Supreme Court rendered in July 2014, only shareholders that have accepted a public offer and tendered their shares are entitled to claim that a higher offer compensation (in line with statutory minimum price rules) should have been offered, whereas the shareholders that kept their shares have no such rights.

with strong interest that in the 2013 McKesson/Celesio transaction the BaFin decided that prices paid at the parallel acquisition of convertible bonds issued by the target company were not relevant for the calculation of the minimum consideration payable for the target shares.

In 2013, the German Federal Supreme Court decided that shareholders have no right to sue in order to force a mandatory offer that was not implemented (however, the acquirer of the target company can face a fine and a loss of shareholder rights).

In any case there is a statutory obligation to increase the offer price in case of certain subsequent acquisitions (outside the stock exchange), but only to the benefit of those shareholders that have accepted the offer; in the event of a low rate of acceptance of the offer, this may open an attractive strategy for the bidder.

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Johannes Perlitt advises German and international clients in corporate and transactional matters. His practice is focused on public mergers and acquisitions. He was recognized by JUVE 2013/14 as one of 14 leading senior partners for corporate law in Germany and recommended for M&A.

He served as lead or co-lead partner advising clients on numerous transactions including: DAB Bank AG in connection with Unicredit Bank AG's sale of its stake to BNP Paribas Group and the parallel tender offer; the financing banks on the Douglas Holding AG takeover offer made by Advent; Volkswagen AG on the mandatory tender offer of Porsche SE; Evonik Industries AG on the acquisition of a 25.01 percent stake by CVC Capital Partners; and RAG AG on the Degussa takeover offer.

Johannes Perlitt is co-author of leading legal commentaries on stock corporation law and reorganizations.

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Joined Jones Day in 2014. Partner at a major international law firm (2000-2014).

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1947 Marshall Plan Administered From What Is Now Our Paris Office*
1957 German Stock Market Index Established
1990 German Reunification
1991 Frankfurt Office Opened – Stock Index at 1,578
2003 Munich Office Opened – Stock Index at 3,965
2012 Düsseldorf Office Opened – Stock Index at 7,612
2014 Stock Index at 10,029
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* Our Paris Office opened in 1970 and moved in 2010 into the historic Hôtel de Talleyrand, where the Marshall Plan was administered.

Bán, S. Szabó & Partners

The Main Trends of Mergers and Acquisitions in Hungary

Hungary: an attractive destination for international M&A

Historically, Hungary has been the main target of foreign investments in the Central-Eastern European region since the late 1970s. Hungary, being the first in the region, opened its doors for foreign capital and invited foreign companies with more flexible regulations than neighboring countries. The peak time for foreign companies establishing in Hungary was between 1989 and 2010 when, following the fall of the socialist system, over 90% of the previously state owned enterprises become privatized. Due to a lack of local capital, the privatization was driven and carried out mostly by foreign companies.

Ever since Hungary has been an attractive destination for international investment due to its central location in Central-Eastern Europe and highly developed infrastructure, good highway systems connecting to neighboring countries, highly educated professionals, cheap but skilled labor force, low social charges, low company income tax and a sophisticated legal system. A member of the European Union since 2004, Hungary is an inviting location for companies looking to establish their presence in the European Union.

RECENT TRENDS

During 2013[1] the number of merger and acquisition transactions grew by 11%, while the estimated volume of the M&A market increased to 250% compared with the previous year. This latter data is hard to estimate since the actual value of transactions is typically confidential and becomes published only in one quarter of the overall transactions. Most investors targeted the IT and technology sectors, the number of deals in these areas amounting to 20% of the entire M&A market. A significant number of the transactions were concluded in the media and telecommunications industries and in the financial services sector. The most important driver of the M&A market was the Hungarian State. The aggregate value of the transactions in which the Hungarian State was involved as purchaser or seller amounted to USD 1.3 billion. For example, MVM Magyar Villamosipari Művek Zrt. (a holding for electricity supply owned by the Hungarian State) purchased the entire gas industry business of E.ON (E.ON Földgáz Trade Zrt. and E.ON Földgáz Storage Kft.) for approximately EUR 870 million, as well as 49.83% ownership in Főgáz Zrt. (the municipal gas supply company) from RWE International B.V. for EUR 137 million (the majority owner of Főgáz Zrt. is the Municipality of Budapest).

During the first half of 2014[2], 48 M&A transactions were published, which represented a 14% increase compared to the first half of 2013. The estimated market size increased by 250% compared to the same period of 2013, while, based on the publicly available information, the estimated M&A market size was USD 0.85 billion. The market was dominated by domestic transactions. In 58% of the deals both the target and the purchaser were Hungarian companies. As a new characteristic of the market, the financial investors were in the majority throughout the first half of 2014, performing 60% of the M&A transactions. The overwhelming majority (86%) of the deals completed by financial investors were domestic transactions. The IT and technology sector was the most attractive during the first half of 2014, with 20 transactions completed. The largest deals in this sector were the acquisition of Hungarian IND Group by the UK based Misys Digital Channels and the C5 Capital's investment in Balabit. The second most popular sector was telecom and media, including, amongst others, the acquisition of Sanoma Media by Central Fund and VCP Capital Partners purchasing certain elements of Ringier and Axel Springer. In the field of Energy and mining MOL's acquisition of gas stations from ENI in the Check Republic, Slovakia and Romania, and MET Power AG's acquisition of the Dunamenti Erőmű (Dunamenti power plant) are worth mentioning.

Also in 2014, the market was dominated by the transactions carried out by the Hungarian State. It made directly, or through its state owned entities significant acquisitions, primarily in the IT, energy and banking sectors. Acting through Nemzeti Infokommunikációs Szolgáltató Kft. (the national info communication provider company) it purchased 100% of Antenna Hungária Zrt, the national broadcasting company from TDF, for USD 251.2 million. The National Bank of Hungary purchased 100% of GIRO Elszámolásforgalmi Zrt. (the national clearing house) from its member banks for USD 33.45 million. The Hungarian State purchased MKB Bank Zrt. from Bayerische Landesbank for USD 74 million.

DR. CHRYSTA BÁN
MANAGING PARTNER

LEGAL ENVIRONMENT

In general:

Two decades of privatization proved to be decisive in importing the legal methods and economic solutions of established and widely used western market economies. From 1989 Hungary introduced new legislation to establish the legal framework of a market economy. This process was greatly influenced by Hungary's accession to the European Union in 2004 which resulted in the implementation of European community law into the Hungarian legal system and the enactment or modification of several statues in order to make the legal system compliant with EU requirements. As a result of tremendous efforts on behalf of the lawmakers during the last 25 years, today Hungary offers a highly developed legal environment and court system that can satisfy the demands of foreign investors and the needs of a developed market economy. To name only a few of the most important legislative acts we need to mention the elaboration of a new tax system, including VAT legislation, an EU compliant antitrust law, including a flexible merger clearance regulation, the liberalization of the energy and telecommunications market, the law on economic

"Hungary offers a highly developed legal environment and court system that can satisfy the demands of foreign investors and the needs of a developed market economy."

[1] SOURCE OF SUMMARY: ERNST & YOUNG BAROMETER MARCH, 2014

[2] SOURCE OF SUMMARY: ERNST & YOUNG BAROMETER, HUNGARY H1 2014

entities introducing company formations similar to other market economy countries, the act on financial institutions, the act on securities and the act on insolvency and liquidation.

Latest developments in the legal framework:
The biggest legislative effort of the last 20 years, the new Civil Code entered into effect on March 15, 2014, accompanied by several parallel legal changes in related fields. The new Civil Code introduced a new company law (law on corporations and other economic company formations), a new law on contracts (general rules of obligations, general rules of contracts and regulations specific to different contract types, including special rules on sale and purchase contracts) and new laws on torts and liability issues. The new Civil Code includes regulations essential in the field of mergers and acquisitions.

As a result of a continuous improvement and most recent modification of the legal and technical conditions of the company registration system, the

"The biggest legislative effort of the last 20 years, the new Civil Code entered into effect on March 15, 2014, accompanied by several parallel legal changes in related fields."

current law provides for one of the quickest registration system in Europe. New company foundations and ownership changes, like merger and acquisition transactions, as well as any other company changes need to be registered in the company registry maintained by courts organized at a county level.

Recent modifications of the Labor Code added to the most important legislative results of this year, whereby the Code reduced, to some extent, the previously extremely high protection level of employees. The new regulations on termination of employment give more flexibility to the employers in structuring their needs of workforce and reducing the number of employees if and when necessary.

A significant modification of the antitrust legislation that came into force during 2014 affected the merger clearance regulations as well. Under the new regime the procedural framework of early closing of a transaction under merger clearance proceedings has also been regulated in detail.

For a long time, Hungarian law on conflicts has allowed the selection of foreign law by the parties in the sale and purchase agreement if there is a foreign element in the transaction, for example if the purchaser is a foreign entity. Similarly, the law on conflicts allows, in most cases, to select a foreign forum for the settlement of disputes, including foreign arbitration. Since January 1, 2012, due to a new regulation, only Hungarian regular courts have jurisdiction with respect of legal disputes related to any property situated in the territory of Hungary that belongs to Hungarian national ownership, as well as any right or claim related thereto. From 13 June 2012, issues related to real property located in Hungary (eg.: title issues, rental or use, usufruct or other rights in rem) between parties with a registered abode or other location exclusively in Hungary, if arbitrated, can only be arbitrated by Hungarian arbitration courts, if the governing law of the issues is Hungarian law.

FUTURE EXPECTATIONS

The Hungarian government launched two significant policies which are likely to influence the acquisition market in the near future. Several steps have already been taken in order to reduce the different utility prices (gas, electricity, water, etc). In order to enhance this movement, the Hungarian State may purchase some of the utility companies in the future in order to provide certain utilities on a low or no profit basis.

Furthermore, the government expressed its desire according to which more than 50% of the banking sector in Hungary should be held by Hungarian entities. This may result in purchasing further banking institutions by the Hungarian State either directly, or through its state owned companies. Following the purchase of MKB the Hungarian Trade Bank, there are rumors regarding the possibility of purchasing Budapest Bank Zrt. from GE Capital.

The biggest investment to be financed by the Hungarian State in the future shall be the expansion of the Paks nuclear power plant.

One can also read about the potential nationalization of the whole-trade market of tobacco and pharmaceuticals. ■

Dr. Chrysta Bán, Dr. János Rausch, Dr. Péter S. Szabó
senior partners

Bán, S. Szabó & Partners is a full service Hungarian law firm, primarily with international clients, whose practice includes mergers and acquisitions and other transactions, as well as a well-balanced corporate law practice. In addition to corporate law and mergers and acquisitions, the particular areas of our expertise include antitrust and competition, telecommunications, media and technology ("TMT"), energy and utilities, employment and labour, real estate, and banking and finance matters. Our team has participated in several major privatization and acquisition transactions in the fields of banking, real estate, TMT, oil and gas utilities and other industrial areas, including food processing, pharmaceuticals and agro-chemicals. We have provided general corporate advice in the areas of corporate, commercial, competition, labour, real estate, intellectual property, and procurement law matters in Hungary to international clients and the largest local companies operating in various fields of industries such as telecommunications, aviation, pharmaceuticals, food processing and car industry.

Bán, S. Szabó & Partners has seven partners and five qualified Hungarian associated lawyers. All of our lawyers are fluent in English. Several of our lawyers work in German, while some of our attorneys speak French as well.

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amarchand mangaldas

Through the Lens: Rewriting the Rules of M&A in India

Red zone to red carpet: Good times ahead…

Mergers and acquisitions (M&A) in India have recently risen to a record high and witnessed a promising double-digit growth as compared to the previous year, with cross-border deals accounting for more than 75% of the total value of deals in India. The first half of 2014 witnessed inbound M&A activity to the tune of US$ 17.1 billion; a towering 46% growth as compared to the first half of 2013. Further, the second quarter of 2014 is seeing a flurry of activities, especially in the pharmaceutical, real estate and telecom sectors.

Renewed interest in India is a combination of a number of factors. Firstly, the investment community (domestic and global) believes that the new government with a decisive mandate and a pro policy and investment bent of mind will result in India coming back strongly on the growth track. Secondly, the global economy also seems to have bottomed out and more corporates are confident of expansion and investment in different geographies of the world.

Concerted efforts amongst regulators towards overhauling dated regulations and the promise of a friendlier, more liberal regime have also ensured the resurgence of deals in the Indian M&A market. This chapter deals with the recent key changes in the regulatory regime, and the road that lies ahead for the M&A activities in India.

REGULATORY CHANGES

1. **Companies Act, 2013** (the 2013 Act): The 2013 Act has been a game-changer for M&A practitioners in India. Highly anticipated, the 2013 Act has brought sweeping changes to the extant company law regime in India. While, there have been cases of missed opportunities, the 2013 Act is definitely a step in the right direction. Some of the major changes introduced in the 2013 Act, which are likely to have a direct impact on the M&A deal-making, are set out below:

Fast-track and Cross-border Mergers: The concept of fast-track mergers has been introduced under the 2013 Act, whereby mergers between two or more small companies and between a holding company and its wholly owned subsidiary may be effected, without being referred to the National Company Law Tribunal (the NCLT, which is a specialized agency created under the 2013 Act for approving the mergers and acquisitions) for approval, subject to certain approvals obtained from the shareholders and creditors of the company and the Central Government. The 2013 Act has introduced the NCLT and the National Company Law Appellate Tribunal, which seek to replace the Company Law Board and Board for Industrial and Financial Reconstruction and also assume the role of the company court at the concerned High Court. As such, this is likely to catalyse the process of getting approvals and reduce onerous timelines for effecting mergers through conventional court process.

Further, foreign market access for Indian companies has been widened with outbound mergers of an Indian company with a foreign company now being permitted, in certain notified jurisdictions, subject to the prior approval of the Reserve Bank of India (RBI).

Minority Buy-out and Reverse Mergers: The 2013 Act provides for a minority buy-out as an exit option to the minority shareholder(s). An acquirer holding 90% or more of equity share capital of a company has an option to offer to buy the remaining equity shares of the company. Similarly, minority shareholders have an option to offer their shares to the majority shareholders. Further, as regards reverse mergers, the 2013 Act allows the shareholders of listed company to exit in case of a merger where transferor is a listed company and transferee is an unlisted company. However, it specifies that the transferee can continue to remain unlisted and shareholders deciding to opt-out of the transferee company shall be paid the value of their shares and other benefits on the basis of a pre-determined formula or after a valuation is made. The introduction of these provisions is a significant step that would provide more flexibility to the M&A players with their restructuring plans and effecting 100% acquisitions.

Concept of "Control": The 2013 Act defines 'control' as the right to appoint majority of the directors, or to control the management or policy decisions, exercisable directly or indirectly, including by virtue of their shareholding or management rights or shareholders agreements or voting agreements or in any other manner. This definition has been aligned with the definition of control under the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeover) Regulations, 2011, as well as under the Consolidated Foreign Direct Investment Policy issued by the Government of India (FDI Policy). In the same light, it must be noted that the definition of a promoter, *inter alia*, means a person who has 'control' over the affairs of the company, directly or indirectly, as shareholder, director or otherwise. As such, this could result in a shareholder who has secured some affirmative (or veto) voting rights or management rights be categorized as a promoter, which attracts extensive liabilities and obligations under the 2013 Act and other applicable laws.

Transfer Restrictions: Exit rights and restrictions

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on transferability of shares are typical in shareholder agreements. The 2013 Act now identifies the enforceability of transfer restrictions in private arrangements between shareholders, which was not the case earlier (due to various judicial pronouncements). However, the 2013 Act does not clearly support the view that public company can be bound by contracts restricting transfer of shares. Therefore, while enforceability of such provisions vis-à-vis the

"With the regulatory changes providing clarity, transparency and certainty, coupled with strong political will to take India's economic growth trajectory upward, India has almost (if not already) become a coveted M&A destination on the world's map."

company may be a remote question to consider and debate, the long standing debate on the enforceability of transfer restrictions amongst the shareholders has now been put to rest and this change has been well cheered by the M&A participants.

Insider Trading Restriction: The 2013 Act, for the first time introduces insider trading restrictions on shares of private or public unlisted company. Now, no director or key managerial personnel of a company shall engage in insider trading; which is, *inter alia*, described to include, subscribing or selling shares by such persons or providing any price sensitive information to any person. Given that almost every deal in the unlisted companies space, involves sharing of information by directors or key employees, this change is likely to impact deal structuring. Although this provision is well founded, it requires a carve-out for a private company, and a closely held public company because there are no retail/dispersed shareholders in such companies.

Some of the other provisions of the 2013 Act, which are likely to impact the deal-making are *entrenchment* (i.e., specified provisions of the articles of a company may be altered only upon the satisfaction of conditions or procedures that are more restrictive than those applicable in the case of a special resolution), *layering* (i.e., restriction on a company from making investments through more than two layers of investment companies), *enhanced regulation for private companies*, etc.

2. **Other Regulatory Changes:** Apart from the monumental changes with respect to M&A in the 2013 Act, there are other regulatory changes that change the turf of M&A, which are as follows:

Call and Put Option: There was always a cloud surrounding enforceability of option linked agreements till recently. Put and call options with assured returns in-built in the agreements were frowned upon by the regulators. However, the Securities and Exchange Board of India (SEBI) and the RBI have recently passed notifications clarifying that call/put options are enforceable as long as there is no assured return provided for such instruments. Again, it is a well intentioned step, although such notifications come with conditions attached to them.

Foreign Investments: Foreign investments are subject to limits and conditions prescribed under the FDI Policy. Since 1991, the economy has opened up and various sectors are eligible to receive foreign investments. Recently, there has been a strong push by the Central Government to allow and open more sectors to receive foreign capital. For instance, the following sectors have now been opened up – pharmaceutical (100% through automatic route in greenfield investment), defence (49% through the approval route), telecom (100% of which upto 49% is through automatic route), single brand product retail trading (100% of which upto 49% is through automatic route) and railway infrastructure (100% through automatic route), with many more in the waiting to open up. Allowing crucial sectors, such as the above, is likely to have a positive impact on the M&A activities in India.

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PARIDHI SHROFF
ASSOCIATE

Also, the RBI has relaxed the valuation norms under the FDI Policy for issue and transfer of shares, involving non resident parties. Now, the pricing has to be arrived at by internationally accepted pricing methodology for pricing of shares. Earlier, the applicable norm was the discounted cash flow method, and with the above change in the pricing norms, the RBI has brought the Indian valuation norms in line with international valuation guidelines.

THE WAY FORWARD

As stated above, the regulatory regime in India is undergoing metamorphosis, especially with respect to M&A. If the above changes did not amount to rewriting the rules of M&A in India to any reader, there are more changes which are on the cusp of introducing and consolidating a new era for M&A in India, such as SEBI insider trading regulations, the General Anti Avoidance Rules (on taxation policy providing clarity on M&A cross-border deals), single-window system for environment, industry and labour-related clearances, consolidation of the foreign exchange regulations and increase in sectoral caps of important sectors. In short, with the regulatory changes providing clarity, transparency and certainty, coupled with strong political will to take India's economic growth trajectory upward, India has almost (if not already) become a coveted M&A destination on the world's map. ■

A&L Goodbody

M&A Activity in Ireland: a Positive Outlook

The Irish M&A market continued to grow in 2014, built upon a steady recovery in recent years. The market is now showing renewed impetus with foreign investment through M&A and a number of stand out deals. Ireland suffered a painful economic contraction from 2008 onwards requiring external assistance from the "Troika" of the EU / the ECB and the IMF. Having entered its external assistance programme in 2010, the end of 2013 saw Ireland become the first eurozone country to exit such a program. This progress along the road to economic recovery set an encouraging tone for 2014, leading to a more buoyant M&A market and the long-awaited return to some domestic driven activity. This positive outlook was reflected in the first half of 2014 with an 18.5% increase on the number of deals from the first half of 2013 and €97.4 billion worth of deals announced, the highest figure ever recorded for a half year.

KEY FACTORS BEHIND THE RISE IN IRISH M&A IN 2014

Corporate Migrations

While 2014 has seen more of a variety of deals in terms of sector and type than in recent years, there is still no denying the impact which corporate migrations/inversions deals have had on the market in 2014. These are transactions that, if structured correctly, enable a US corporation to re-incorporate and change its tax domicile to Ireland without triggering the US anti-inversion rules. While moves were taken by the US Treasury Department in the latter half of the year to deter such deals, inversions remained a key driver behind M&A growth in 2014, with a number of deals in the pharmaceutical sector continuing the trend of recent years.

The stand out deal of the year, responsible for a large portion of the latest total deal value milestone reached by the Irish M&A market, was the US-based medical device maker Medtronic's €33.9 billion acquisition of healthcare company Covidien plc. The Medtronic/Covidien deal was the largest deal in Europe in 2014 by value when announced and was ranked third globally and fourth in the US. The transaction is expected to close in early 2015.

Since its inversion into Ireland in 2013 by way of a $8.5 billion acquisition of Warner Chilcott, Actavis has continued to be the most active buyer of drug companies in recent years. 2014 saw Actavis announce two notable deals – its €18 billion acquisition of Forest Labs and its proposed $66 billion acquisition of Allergan. Actavis emerged as the successful counter-bidder for Allergan after months of battling between Valeant and Allergan, during which Allergan pursued several lines of defence. Another deal highlighting the popularity of inversions in the pharma sector in 2014 saw US-based Horizon Pharma acquire Irish-based Vidara Therapeutics for €474 million.

Sale of State Assets

The Government's program for the sale of state assets has been another factor in the 2014 market, stemming from the economic downturn. Having committed to the sale of a number of State assets including Coillte

(State forestry), Bord Gáis Energy (the State gas utility) and its remaining share (25%) in Aer Lingus (airline), 2014 saw the conclusion of the first of these sales, being the sale of Bord Gáis Energy. The third most valuable deal of H1 2014 was the privatisation of Bord Gáis Energy, following its sale for €1.1 billion to a group including UK multi-national Centrica and Canada's Brookfield Renewable. This was the most significant sale of a semi-state corporate asset by the Irish State since the privatisation of Aer Lingus in 2006.

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Bank Deleveraging

The recent trend of delevearaging by domestic Irish banks and a number of foreign banks continued throughout 2014 at an even more accelerated pace than in recent years. Ireland was the busiest loan sales market in Europe in 2014, with portfolios with a face value of €28.5 billion sold in the first nine months of the year, more than 14 times the level achieved in the same period in 2013.

This has been a key factor in driving M&A activity with a large number of loan portfolios coming to the market from the likes of RBS / Ulster Bank, Bank of Scotland and most notably IBRC. The liquidator appointed to wind-up IBRC (formerly Anglo Irish Bank plc) by the Irish government under special emergency legislation in 2013 has overseen asset sales of €19 billion in 2014. Again, US acquirers were to the fore with groups such as Apollo, CarVal, Kennedy Wilson and Oak Hill all acquiring various assets and loan pools.

Capital Markets

Irish companies are beginning to return to the capital markets following the listing of two real estate investment trusts (REITs), the Green REIT Plc and Hibernia REIT plc, in 2013. Hibernia REIT plc, launched less than a year after Ireland introduced the tax framework to facilitate REITs, raised €365 million and listed on the Irish Stock Exchange and London Stock Exchange in December 2013 while Green REIT Plc raised a further €400 million in 2014. The Dalata Hotel Group also raised €265 million in funding through an initial public offering in Dublin and London in March 2014. All three have invested significantly in Irish properties during 2014, with Dalata currently in talks with the Moran & Bewley's Hotel Group about a possible reverse takeover for an estimated €450 million. In another encouraging development, the Irish Residential Properties REIT plc, a subsidiary of Toronto-based Canadian Apartment Properties Real Estate Investment Trust, secured €130 million debt funding in addition to €200 million raised from its IPO in April 2014.

PROJECTIONS FOR CONTINUED GROWTH IN 2015

A real positive from 2014 is the greater proportion of domestic driven M&A activity, which we project will continue into 2015. As Ireland makes strong progress on the road to recovery, nearly one third of all deals in the first half of 2014 were domestic, compared with 27% in the whole of 2013. Driving this are highly competitive domestic markets in need of consolidation. A notable example is the flurry of activity in the food and food services sector, which included the management buyout of Freshways from Kerry Group, the acquisition of Rowse Honey by Valeo Foods, Cardinal Caryle's acquisition of Lily O'Briens, WHW Bakeries' acquisition of Irish Pride Bakeries and the acquisition of Nutramino by Glanbia. We expect a similar level of activity to continue in 2015, given the highly competitive nature of this market.

An example of international interest in this sector was the proposed Fyffes-Chiquita merger in the fruit and fresh produce industry, which was ultimately rejected by Chiquita shareholders in light of a competing bid from Brazil's Cutrale-Safra. This deal would have granted US-based Chiquita Brands International access to Dublin-based Fyffes' 16% market share of European banana distribution - the largest on the continent - as well as allowing the combined company to control 14% of the global banana market.

Another sector likely to continue its recent upward trend is in IT & Telecoms, which saw a large amount of activity in 2014. Notable deals included Charterhouse Capital Partners LLP's acquisition of Skillsoft Limited for €1.4 billion and the acquisition of CarTrawler by a consortium including BC Partners and Insight Venture Partners for €450 million.

"We believe there are real prospects for long-term growth in the Irish M&A market as the country continues to attract foreign investors, as evident from the continued dominance of US companies as the top acquirers into the country."

—CIAN MCCOURT, A&L GOODBODY

MOST ACTIVE JURISDICTIONS

Given the continued level of international interest, it is no surprise that nine of the top ten deals in the first half of 2014 involved overseas acquirers. This highlights the positive sentiment among foreign corporates towards Ireland, with the economy improving and valuations continuing to be attractive, particularly with a weakening euro fx rate. The US remains the number one source of direct investment. The growing political opposition to inversion transactions by US companies did ultimately slow progress in the latter half of 2014, following measures introduced by the US Treasury Department to make inversion by US companies more difficult. However, such deals will always be largely driven by strategy and it is likely that US bidders will continue to look to Ireland because of the quality of Irish targets.

With signs of recovery in the UK also apparent, we expect a number of UK trade and private equity participants to re-enter the Irish M&A market in the next year.

LONG TERM PROSPECTS FOR THE IRISH M&A MARKET

In summary, the M&A market in Ireland is mostly reflective of the Irish economy, that is it is undergoing a broad and increasingly quicker recovery, an increase in growth with strong international investment and improving levels of domestic demand. We believe there are real prospects for long-term growth in the Irish M&A market as the country continues to attract foreign investors, as evident from the continued dominance of US companies as the top acquirers into the country. This international commitment is augmented by the recent rise in domestic M&A across a variety of sectors, with the number of Irish purchasers increasing in 2014. While domestic targets in recent years have included distressed assets as part of bank deleveraging programmes, there are now numerous examples of investors targeting strong performing Irish companies showing prospects of continued growth.

Another positive development looking ahead to 2015 is the expected enactment of the Irish Companies Bill. This will introduce the most significant reform in Irish company law in 50 years, consolidating the existing legislation as well as a number of court judgments. Positive reforms envisaged by the Bill include the establishment of an omnibus statutory validation procedure for certain activities (such as transactions with directors, financial assistance, capital reductions and solvent windings up) and the introduction of a domestic merger regime for certain companies. When it becomes law, the Bill will add greater clarity to the existing Irish company law framework, further enhancing Ireland's attractiveness as an investment location. ■

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Israel M&A Outlook: Cautiously Optimistic

Over the past year, the corporate and M & A space in Israel has given many reasons to be optimistic, and many reasons to be realistic.

Over the past year, the corporate and M & A space in Israel has given many reasons to be optimistic, and many reasons to be realistic.

Israel remains a technological powerhouse. A powerful combination of innovation and entrepreneurial drive continues to attract the world's leading technological companies, venture funds and, more recently, "crowd-funding" investors, all of whom are looking for the idea, the development, the product that is ahead of the field, either for strategic reasons or simply for a financial return.

Following the huge (by Israeli standards) acquisition by Google in 2013 of Waze, the interactive navigation App, in early 2014 Rakuten Inc. of Japan acquired the Israeli internet messaging service company "Viber" in a deal worth close to US$1 billion. Microsoft, Apple, Facebook have all made recent acquisitions in Israel, highlighting Israel as a focal point of technological development for these global giants.

And it is not just in the technological sector. The Chinese State-owned Bright Food Group has agreed to buy control of Tnuva, Israel's largest dairy concern, in a deal valuing Tnuva at approximately US$2.5 billion.

The seller is Apax Partners, one of the world's largest investment funds. More modestly, the Sanpower Group of China has acquired Natali Seculife, a telemedicine provider, with a view to rolling out Natali's technology in the vast Chinese market. These two deals are indicative of the growing wave of interest from China in the Israeli marketplace. Since the acquisition in 2011 by China National Chemical Corporation (ChemChina) of Makhteshim Agan Industries, the world's largest generic agrochemical producer (now rebranded as "Adama"), there has been a remarkable increase in Chinese investment in Israeli technology and Israeli know-how.

Some of the world's largest Private Equity Funds are looking closely at Israel for opportunities. As a general rule, these Funds are looking for more mature companies, with proven revenue history and especially with export sales. There are numerous such opportunities in Israel of companies still controlled by the founding shareholders or by the second generation, or owned by Kibbutzim. At the time of writing, Oaktree Capital is completing its acquisition of the water, waste and energy activities in Israel of Veolia, and many other Funds are looking at "old economy" targets in Israel.

2014 has seen a resurgence of IPO activity for Israeli companies on exchanges overseas. Mobileye, a manufacturer of software aimed at preventing motor accidents, completed the largest ever IPO of an Israeli company in the USA. Also noteworthy were ReWalk Robotics, a developer of robotic skeletons enabling paraplegics to walk again, which completed its IPO on NASDAQ and Matomy Group, an online marketing and digital advertising group, which completed its IPO on the London Stock Exchange.

So there are many reasons to be optimistic, yet not all published deals have come to fruition. Woodside Petroleum of Australia cancelled its plans to acquire a 25% stake in the Leviathan natural gas field in a deal worth more than US$2.5 billion, and Spanish satellite operator Hispasat cancelled its plans to acquire SpaceCom, the Israeli company that operates the Amos satellite fleet. Although this was not stated expressly, there were indications in each case that the deal failed due to difficulties to reach an understanding with the Israeli regulators. In November, Adama postponed its planned IPO on the New York Stock Exchange, when investors failed to agree the target listing price.

Much has been written about Israel's Law for the Promotion of Competition and Reduction of Concentration which came into effect at the end of 2013. One of the main provisions of the Concentration Law is to mandate separate ownership for Significant Real Entities (broadly defined as an entity which is not a Financial Entity, with an annual group turnover in excess of NIS 6 billion or which has raised credit with Israeli banks and financial institutions in excess of NIS 6 billion) and Significant Financial Entities (defined as a bank, an insurer, a company managing provident or pension funds and so on, whose group assets exceed NIS 40 billion). As a result of the Law, some of Israel's largest corporate groups will have to reorganise, subject to a transitional period of up to 6 years. It is this need to separate the ownership of "Real" and "Financial" Entities that prompted Apax Partners to sell its controlling interest in Tnuva to Bright Food (Apax also owns Israel's largest provident fund manager), and has prompted the Delek Group (the major Israeli player in the recent Mediterranean Sea natural gas discoveries, among its many business operations) to sell control of the Phoenix Insurance Company to the New York based Kushner Group, in a deal valuing Phoenix at approximately US$1 billion. In light of the Concentration Law, many of Israel's largest corporations are for sale (banks, financial institutions, real estate, traditional industries) without any obvious buyers on the horizon. The traditional Israeli buyers for such assets are in practice barred for acquiring these "Significant Entities" by the terms of the Concentration Law itself.

The year 2014 showed that many of Israel's so-called "tycoons" had "feet of clay." The heaviest fall was that of Nochi Dankner, whose IDB Holding Group imploded under the weight of public and bank debt, but this was just one of a number of large corporate groups that had borrowed too easily in the public debt markets and could not service their debt when market conditions changed. In mid-2014, Zim Integrated Shipping Services, Israel's national shipping line, completed Israel's largest ever debt rescheduling (US$3.4 billion), as a result of which control of the company passed from the Ofer Family to the company's creditors.

The high-profile corporate insolvencies during 2014 drew attention to the "Corporate Rehabilitation" Chapter recently introduced into Israel's

"A powerful combination of innovation and entrepreneurial drive continues to attract the world's leading companies."

Companies Law, modeled closely on Chapter 11 of the US Bankruptcy Code. However, as a number of high profile rehabilitation proceedings dragged through the courts in Israel, with controlling shareholders fighting hard not to lose their corporate empire and struggling to avoid lawsuits for past corporate practices of questionable validity, the feeling began to grow that the rules embodied in the new "Corporate Rehabilitation" Chapter in the Companies Law still gives the management of a failing corporation (and in Israel there is very often an extremely strong nexus between ownership and management) the ability to prolong and manipulate a corporate insolvency situation for the benefit of controlling shareholders and at the expense of public bondholders. A Committee headed by the Director General of the Ministry of Finance has recently submitted its final recommendations after reviewing the legal arrangements for re-scheduling of indebtedness in Israel. The principal recommendation is that a company that defaults in making payments due to public bondholders must immediately apply to the court to commence an insolvency (or rehabilitation) process. Another important recommendation is that all new issuances of public debentures must include financial covenants, with a stipulation that if the corporation does not comply with these covenants, an observer on behalf of the bondholders will immediately be added to the Board of Directors of the company, to ensure that the assets of the company are not disposed of at an undervalue and that the company does not enter into reckless transactions. A far-reaching interim recommendation of the Committee—that a controlling shareholder of a corporation would automatically lose control in the event of a delay in repayment of any public indebtedness—was left out of the final recommendations of the Committee.

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Foreign investors looking to invest in any regulated industry in Israel (this will include the financial sector, telecommunications, the defence sector and others) must always be aware of Israeli bureaucracy. The approval process for any shareholder wanting to take a significant interest in a company operating under licence will be thorough and detailed, and may take many months. In mid-2014, the Supervisor of Capital Markets at Israel's Ministry of Finance refused to approve a Chinese consortium as acquirer of Clal Insurance (a major Israeli insurance, pensions and finance group being sold off as part of the fall-out of the IDB Holding meltdown).

"The year 2014 showed that many of Israel's so-called "tycoons" had "feet of clay."

In one sector at least, the unwillingness of the regulator to approve a potential acquirer has led to a fundamental change in how the regulator will control that particular industry. It has traditionally been a condition of the Supervisor of Banks at Israel's central bank, the Bank of Israel, that all commercial banks are controlled by a clearly identified control group which holds a substantial portion of the equity in the bank (the size of the control block in each case depended on the size of the bank in question). After the Bank of Israel refused to grant a permit for the Cerberus Funds to control Bank Leumi in 2005, the State of Israel failed to find an alternative buyer for a control block of shares of the Bank (then owned by the State as a legacy of the bank share crisis that hit the Israeli economy in the mid 1980s). Israel's banking legislation was amended in order to accommodate the possibility of a bank without a clearly-defined control group. The legislation was aimed at ensuring that either a substantial shareholder in a bank could control that bank, or that no one could control the bank. In 2014, for the first time, we saw the control of a centrally-controlled Israeli bank being "decentralised", when the Bronfman Group began selling a portion of its control block of shares in Israel Discount Bank, as a result of which the Group immediately lost effective control of the Bank, in line with new guidelines set down by the Bank of Israel. It is expected that more banks may follow in this direction, due at least in part to the ownership restrictions set down in the Concentration Law.

Along with all the optimism, there are many reasons to be realistic too. 2014 was an extremely active and a very positive year for M&A and corporate activity in Israel. This is all the more remarkable in light of the fact that the most significant event in Israel during the year was the "Protective Edge" military operation in Israel which captured the world's attention throughout the summer. The business sector is vibrant again after a number of quiet summer months, so we look forward to 2015 for optimism, but never leaving reality behind. ■

Alan Sacks
Alan Sacks heads HFN's international practice. Alan arrived in Israel shortly after having qualified as a Solicitor in England, and since then has divided his practice between two main areas of corporate law and banking and finance.

NISHLIS | LEGAL MARKETING SETTING THE BENCHMARK

A Year for the Books: Israeli M&A Reaches New Heights in 2014

WRITTEN BY IDAN NISHLIS, CEO, NISHLIS LEGAL MARKETING AND DEBORAH KANDEL, HEAD OF INTERNATIONAL DESK AT NISHLIS LEGAL MARKETING

Israel might be a small country, the size of New Jersey, but it is a hotbed for innovation and 2014 has seen a number of successful investments and exits, with Israeli companies being bought by some of the world's largest companies and an impressive increase in the value of Israeli M&A transactions.

Although 2013 was reported as being a ground breaking year for Israeli companies, with M&A transactions reaching $8.3 billion, an increase of 16% from 2012, data so far for 2014 have already beaten that. A recent recap of Israeli M&A transactions conducted by Globes, one of Israel's largest financial papers, revealed that Israeli companies, specifically in the hi-tech and biomed sectors, have remained attractive to foreign investors over the past ten years regardless of any foreign influences such as politics, security issues and domestic economy. More specifically, 2014 has already proved to be the most lucrative year for Israeli M&A, with transactions summing up to approximately $10.7 billion. The previous two years saw a significant drop in the number of Israeli companies making acquisitions internationally, but 2014 has seen an upturn in these transactions and it looks like this trend will continue.

The 2014 M&A "map" of transactions involving Israeli companies reveals a clear image, according to which the technology sector was the most attractive with 42% of all related M&A's and the biomed sector accounting for approximately 8.5%, even though the largest deal for 2014 was in the consumer sector. Additionally, Israeli companies are becoming more attractive targets for the Far East, especially China. In the past year at least five M&A transactions were conducted between Israeli and Far Eastern companies, including the largest M&A deal of the year so far, which was the acquisition of Tnuva (one of Israel's leading food suppliers) by China's Bright Food Group Co. This transaction is believed to have helped set the positive tone for the future, allowing Israeli companies

Israeli Law Firm Deal Count

FIRM	TOTAL DEAL VALUE	DEAL COUNT
Herzog, Fox and Neeman	$10.1B	14
Gross, Kleinhendler, Hodak, Halevy, Greenberg & Co.	$2.8B	10
Yigal Arnon & Co	$1.2B	10
Meitar, Liquornik, Geva, Leshem, Tal & Co.	$1.7B	9
Fischer, Behar, Chen & Co.	$2.1B	5
Gornitzky	$382M	5
Naschitz, Brandes, Amir	$277M	5
Erdinast, Ben Nathan & Co.	$251M	4
Epstein, Rosenblum, Maoz (ERM)	$113M	4
M. Firon & Co.	$65M	4

SOURCE: BASED ON DATA COLLECTED BY MERGERMARKET AND NISHLIS LEGAL MARKETING

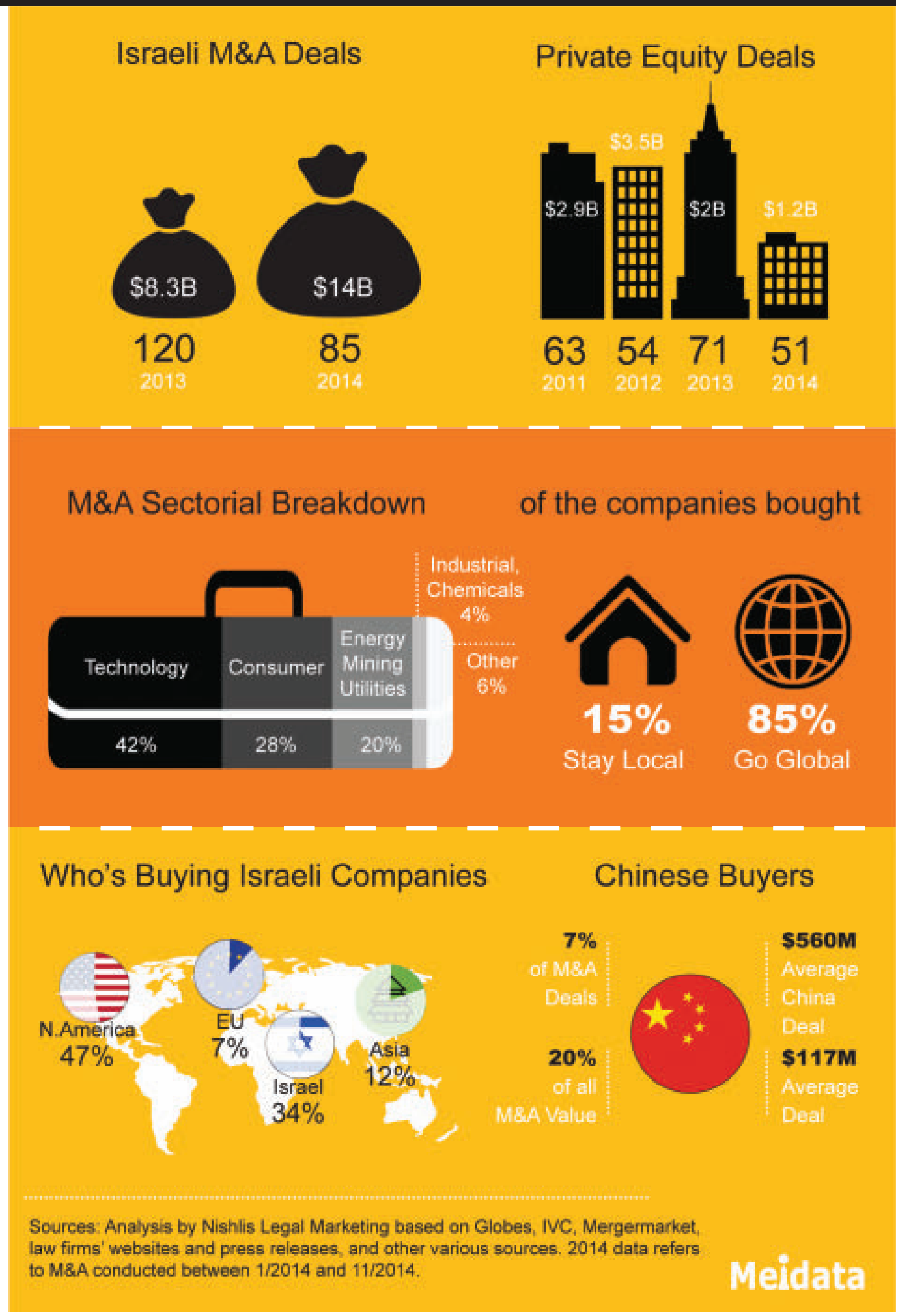
Foreign Law Firm Deal Count

FIRM
Freshfield Bruckhaus Deringer LLP
Wilson Sonsini Goodrich & Rosati P.C.
Fenwick & West LLP
DLA Piper
Davis Polk & Wardwell LLP
White & Case LLP
Linklaters
Latham & Watkins LLP
Clifford Chance LLP
Dorsey & Whitney LLP
Goodwin Procter LLP
Schwell Wimpfheimer & Associates

to bloom both in Western markets, as it has done thus far, but also in the new, uncharted territories of the Far East.

This steady increase in cross-border M&A transactions has resulted in an increase of international law firms in the Israeli market and has also changed the playing field among local Israeli firms. While in the past only the top ten Israeli law firms were involved with cross border M&A, we are now seeing smaller firms, with specific expertise in certain jurisdictions being involved, representing both the bidders and the targets. Similarly the international firms involved in these deals is no longer limited to a handful of names and more international firms are setting up official Israel desks to try to emphasize their experience in Israel and maximize on new opportunities. ■

TOTAL DEAL VALUE	DEAL COUNT
$2.7B	4
$2.1B	4
$280M	4
$480M	3
$1.5B	2
$1.3B	2
$1.2B	2
$560M	2
$397M	2
$380M	2
$350M	2
$50M	2



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STUDIO LEGALE DELFINO E ASSOCIATI
WILLKIE FARR & GALLAGHER LLP

The Introduction of Multiple Voting and Loyalty Shares in Italy

A recent amendment to the Italian corporate law grants investors with more flexibility in structuring their deals in Italy.

With the recent enactment of Law Decree No. 91/2014 (the ***"Competitiveness Decree"***), some important changes have been made to the Italian Civil Code and Legislative Decree No. 58/1998 (the ***"Finance Act"***) in terms of voting rights in joint stock companies, both listed and non-listed.

THE OLD PRINCIPLE OF "ONE SHARE, ONE VOTE"

Article 2351, paragraph 4, of the Italian Civil Code has been entirely replaced by the Competitiveness Decree which has introduced the possibility - until now expressly forbidden - to envisage in the By-laws of any non-listed joint stock company the issuing of shares with multiple voting rights, with a maximum of three votes per share, which may be granted without restrictions or only *"for decisions concerning particular topics or subject to the fulfillment of conditions which shall not be merely potestative."*

The Competitiveness Decree has also introduced in our legal system the possibility of fractioning the multiple voting shares by attributing, for instance, to the holder thereof 1.5 or 2.5 votes for each share held, as well as the possibility to grant multiple voting rights in relation only to a portion of the shares held by a given shareholder (*e.g.*, up to a number of shares representing 4% or whatever different percentage of the company's corporate capital).

The resolutions amending the By-laws for the introduction of multiple voting shares shall be considered as extraordinary resolutions. As a result, a notary shall act as secretary of the relevant shareholders' meetings and the concerned resolutions shall require – with respect to companies that have been registered in the Register of Enterprises up to August 31, 2014 – the favorable vote of a number of shares which shall be equal to at least two thirds of the corporate capital represented at the relevant meetings.

Furthermore, all the shareholders existing at the time of the issuance of the multiple voting shares shall have the right to obtain, on a *pro rata* basis, their portion of the concerned shares at the time when they are issued.

The old principle of *"one share, one vote"* aimed at ensuring a direct link between the investment made (and the risk borne) by a shareholder and the influence that such shareholder shall have on the company, on the assumption that the shareholders making the largest investments (and bearing, as a result, the highest risks) have the interest to maximize the value of the company and, therefore, to pursue the interest of the company and not the (sometimes conflicting) interest of the individual shareholders.

The principle of *"one share, one vote"* ultimately aimed at ensuring a proportionality between power and risk, within the context of a general depersonalization of the shareholding.

MAURIZIO DELFINO
PARTNER

THE COMPETITIVENESS DECREE

The Italian company law was the subject of a deep reform in 2004 which introduced into our legal system the possibility of creating different classes of shares which better suited the nature and extent of the investment made by the shareholders in a company.

However, the reform did not overrule the principle of *"one share, one vote"* and it provided that the majority of the corporate capital shall, in any event, be represented by ordinary shares.

With the introduction of the Competitiveness Decree, the old principle of *"one share, one vote"* has been finally overruled, thereby granting a greater flexibility to the shareholders in determining the organization of the company and the criteria based on which they may influence its functioning.

In the opinion of the Legislator, although such flexibility may (i) encourage the controlling shareholder (who might no longer be the shareholder bearing the highest risk) to pursue opportunistic self-interests which are detrimental to the company and the minority shareholders; and (ii) reduce the contestability of the company (due to the reduction of costs required to hold a significant stake in the company); it should also (a) incentivize the listing of private companies; and (b) reduce the financial barriers existing under the previous system in order to achieve a controlling position in a company.

Finally, the assignment of voting rights in a way which is not proportional to the investment made by the relevant shareholders, if carried out through the issuance of multiple voting shares, should increase the opportunities of the relevant company to collect new resources from the financial markets, whereas, if carried out through *"loyalty shares"* (see the pertinent paragraph below) should incentivize the long-term investments in the relevant company and increase the value thereof.

Listed Companies

For listed companies, the Competitiveness Decree has introduced, in the Finance Act, the possibility to issue both (i) loyalty shares, and (ii) multiple voting shares.

Loyalty Shares

Pursuant to Article 127-*quinquies* of the Finance Act, all listed companies are allowed to grant an increased right to vote, up to a maximum of two votes per share, as *"loyalty bonus"* to long-term shareholders and specifically with respect to shares which remain in the ownership of the same shareholder for a continuous period of not less than 24 months.

The loyalty shares do not constitute a special class of shares. Therefore, the increased right to vote which result from the holding of such shares depends on the shareholders and the holding period and does not pertain to the shares, with the consequence that such increased voting right cannot be transferred to any other person by means of assignment of the relevant share certificates, with the exception only of a succession upon the death of an individual shareholder or a merger or demerger involving a corporate shareholder.

"The non-proportional assignment of voting rights should increase the opportunities of the company to collect new resources from the markets."

The increased right to vote is automatically extended to any new share issued pursuant to a gratuitous capital increase of the company. The

By-laws of the company may, in turn, provide for such extension to apply also in the event of a non-gratuitous capital increase, as well as for the right of the relevant shareholders to waive the extension.

The Competitiveness Decree clarifies that the decision amending the By-laws for the introduction of the loyalty shares does not give rise to the withdrawal right otherwise set forth under Article 2437 of the Italian Civil Code, to the benefit of the dissenting shareholders.

"Loyalty shares can incentivize the listing of companies as they are an instrument to obtain financial resources without losing control."

The increased right to vote has no effects on any other rights which pertain to the relevant shares, for example, the quorum required for a shareholder to call a shareholders' meeting, or to bring or waive an action against the directors or the statutory auditors of the company, or to challenge a resolution adopted by the shareholders' meeting.

The Legislator believes that the loyalty shares can incentivize the listing of private companies as they constitute an instrument for the existing shareholders to obtain financial resources from the market, without putting their control at risk. In this respect it should be noted that the loyalty shares can be issued - to the benefit of existing shareholders - during the listing process, without the 24 months continuous holding of the relevant participations being required in such a case.

Multiple voting shares.

The issuance of multiple voting shares by listed companies (Article 127-*sexies* of the Finance Act) is allowed, unless the By-laws otherwise provide, only to the extent that such shares have the same characteristics and rights of the pre-existing shares, in order to keep unchanged the proportions between the various classes of shares already circulating in the market.

Furthermore, the issuance of multiple voting shares by listed companies is allowed only upon (i) a gratuitous capital increase (Article 2442 of the Italian Civil Code); (ii) a non-gratuitous capital increase, to the extent, however, that all the existing shareholders are granted an option right to acquire the new shares, on the same terms and conditions, on a *pro* rata basis; and (iii) a merger or a demerger of the relevant company.

Differently from the loyalty shares, the multiple voting shares issued by a listed company shall be considered as a special class of shares. Therefore, the increased voting rights which result from the possession of such shares shall be considered as a characteristic of the relevant shares and shall not depend on the shareholder or the holding of the relevant interest for a given period. This means that the increased right to vote pertaining to the multiple voting shares is automatically assigned to any person who acquire such shares, by means of any transaction, and become a new shareholder of the company.

CONCLUSIONS

The issuance of multiple voting shares may favor the listing of private companies and the carrying out of their recapitalization in a more efficient way. The issuance of loyalty shares and the possibility to increase the number of votes of a shareholder based on the holding period of the relevant shares may, in turn, encourage a more active participation of the shareholders in the company and their long term investments.

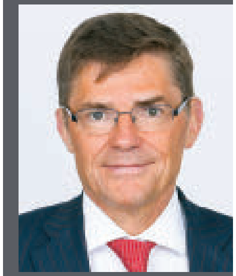
However, such new instruments should be accompanied by the introduction of new tools in order to protect the interests of minority shareholders. In addition to the measures already existing in our legal system, new forms of protection for minority shareholders could be further enhanced by the introduction of specific provisions in the By-laws of the relevant companies, for example, (i) a limit to the number of votes attributable to each share; (ii) an overall limit to the number of multiple voting shares which may be issued in relation to the corporate capital of the company; (iii) a limit to the increased voting rights pertaining to the multiple voting shares, in relation to certain topics only; or (iv) the sterilization of the multiple voting shares in accordance with the provisions of the EU Takeover Directive in case of a public offer occurring. ■

Q&A

REPORTER MARIA JACKSON PUTS THE QUESTIONS TO ALLEN & OVERY

LUXEMBOURG: A GLOBAL PLATFORM

International law firm Allen & Overy discusses Luxembourg's advantages for multinational investors.



MARC FEIDER
CORPORATE AND SENIOR PARTNER

FABIAN BEULLEKENS
CORPORATE PARTNER

WHAT HEADLINE FACTORS UNDERPIN LUXEMBOURG'S SUCCESS AS A GLOBAL FINANCIAL CENTER?

A&O: Judging Luxembourg by its area of 999 square miles or by its population of around half a million people would not do justice to its political and economic importance in relative and absolute terms. Luxembourg is a founding member of the European Union (EU) and hosts the head offices of some of the most influential EU institutions, such as the European Court of Justice and the European Investment Bank.

Luxembourg has developed over the last 80 years into one of the most prominent and visible continental, if not global, platforms for investment funds, private banks, insurance and reinsurance companies as well as finance and holding companies. Luxembourg has some 150 banking institutions, a dynamic investment fund and fund distribution industry and a thriving insurance and reinsurance sector. It is the second largest center for investment funds globally, the first for fund distribution globally, the leading captive reinsurance market in the EU and the leading wealth management center in the Eurozone. The investment fund industry is one of the most important pillars of the financial sector, with top quality services across the value-chain, most notably in fund creation, distribution, custodianship and administration.

Whilst the financial sector is a key contributor to Luxembourg's GDP, the country's GDP is also boosted by other diverse sectors such as satellites, logistics, the automotive industry, ICT, biotech and greentech.

The success of Luxembourg is due to a large number of factors such as: (i) its strategic location at the heart of Europe; (ii) its skilled and multi-lingual workforce; (iii) its capacity to strike an often subtle balance between safety and investor protection on the one hand and business friendliness, liberal foreign investment policy and pragmatism on the other; (iv) its traditional social and political stability; and (v) a legal and regulatory framework that is continuously updated as a result of regular consultation between the government, the legislative bodies and the private sector.

Creative legal and protective regulatory frameworks associated with local expertise and know-how have helped drive a major expansion in investment funds, pension funds, venture capital and private equity companies, securitization vehicles, hedge funds, specialized investment funds, family offices, IP holding companies and covered bonds.

Various financial institutions and major international corporations have established their European headquarters in Luxembourg or are operating out of Luxembourg via holding and finance companies. The structuring industry involving, amongst others, holding companies, finance companies and securitization vehicles all leverage what Luxembourg stands for: value creation and preservation in a safe (Luxembourg has a AAA rating), stable, predictable and business-friendly environment.

HOW HAS LUXEMBOURG MANAGED TO ESTABLISH ITSELF AS A PREEMINENT LOCATION FOR STRUCTURING PRIVATE EQUITY SOLUTIONS?

A&O: Over the last decade, Luxembourg has become a leading global private equity center, providing private equity players with a gateway for private equity investments into and/or from Europe. This position has been consolidated through the use of both regulated and unregulated investment vehicles that are both flexible and attractive, starting with the introduction of Luxembourg's Investment Company in Risk Capital (SICAR) in 2004, the Specialized Investment Fund (SIF) in 2007, and more recently, the new limited partnership regime in 2013.

SIF or SICAR structures are commonly used if there is a need to establish a regulated private equity fund. Both are subject to the supervision of the Luxembourg regulatory authority for the financial sector

Luxembourg has developed over the last 80 years into one of the most prominent and visible continental, if not global, platforms for investment funds, private banks, insurance and reinsurance companies as well as finance and holding companies.

and benefit from very flexible corporate rules, including rules on redemption of shares and distributions. They can also be organized as umbrella vehicles with several ring-fenced compartments.

Unregulated holding companies (Soparfis), whose purpose is limited to holding participations in other companies and carrying out related activities (such as group financing activities), are commonly used in private equity transactions, including as holding/financing vehicles and as acquisition vehicles. They are generally incorporated in the form of a public limited liability company or a private limited liability company, which are subject to the general provisions of the Luxembourg companies act.

Following the recent introduction of the new limited partnership regime in Luxembourg, many private equity investments are starting to be structured through limited partnerships and special limited partnerships (which have no separate legal personality), offering a high degree of contractual flexibility (including when determining voting and distribution rights).

WHAT ARE SOME OTHER TYPES OF VEHICLES WHICH MAKE LUXEMBOURG AN ATTRACTIVE JURISDICTION?

A&O: Luxembourg is also a jurisdiction of choice for the establishment of joint venture vehicles (which may be established either as companies or partnerships with or without legal personality).

Corporate joint ventures present some advantages (e.g. the limited liability of partners), but they are usually seen as being structurally less flexible than contractual joint ventures. Luxembourg law allows joint venture partners to determine their respective rights and obligations (whether governance related or financial) with a high level of flexibility, for example in relation to veto rights on key matters and disproportionate funding obligations and profit entitlements.

These rights and obligations are usually set out in a joint venture agreement which does not need to be filed or published in Luxembourg and may be governed by Luxembourg law, or by any other law which the partners feel more familiar with.

Subject to confidentiality concerns, the main provisions of the joint venture agreement are often integrated into the articles of association of the joint venture vehicle (assuming it is established as a company) with a view to enhancing the enforceability of such provisions towards the joint venture vehicle itself and, as the articles of association are filed and published, towards third parties.

The articles of association or the partnership agreement of a Luxembourg vehicle may be drafted in English but, as the articles of association are to be filed and published, a French or German translation will need to be attached.

BESIDES THE STRUCTURING OF PE INVESTMENTS AND THE SET-UP OF JOINT VENTURES, WHAT OTHER CORPORATE AND M&A-RELATED MATTERS DOES THE FIRM HANDLE?

A&O: A substantial proportion of our practice relates to legal services to multinational corporates who have chosen Luxembourg as their international or European headquarters. This often involves advising across a wide variety of subjects, from general Luxembourg corporate law compliance to the set-up of complex management incentive packages and strategic advice on the most appropriate corporate governance structure.

In addition, we are regularly requested to provide pre-litigation or litigation advice, in particular for issues relating to directors' liabilities or minority shareholders' claims.

While tax factors are among the drivers for migration to and incorporations in Luxembourg, other compelling reasons often exist. For example the decision by five major Chinese banks (Agricultural Bank of China, China Merchants Bank and Bank of Communications, Bank of China, ICBC and China Construction Bank) to choose Luxembourg as their European headquarters was driven in part by the pragmatic regulatory framework and general business-friendly environment. This trend for 'substantive' operations being based in Luxembourg is further illustrated by the planned launch of the first European Islamic Bank, Eurisbank, in the Grand Duchy.

LUXEMBOURG HAS RISEN TO BECOME A LEADING EUROPEAN MARKET FOR CAPTIVE REINSURANCE; HOW HAS IT FOUND FAVOR WITH INVESTORS IN THIS SPACE?

A&O: A reinsurance captive is a company set up to reinsure the risks of a group. Luxembourg established a comprehensive legal, tax and regulatory legislation for reinsurance companies (including captives) two decades before the adoption of the 2005 European Directive on reinsurance. This early legislation, which among other things allowed captives to cover significant or exceptional risks through the 'equalization provision' (in addition to the technical reserves), made Luxembourg an attractive place for the setting-up of captives. Today Luxembourg has become the largest domicile for reinsurance captives in the EU.

Benefits of setting up a captive typically include the reduction of costs and a better management of a group's risks. Although captives are usually (very) long-term vehicles, captive owners may at some point want to exit their captive vehicles (e.g. as a result of a merger between groups each having their own captives). In terms of exit options, Luxembourg offers multiple solutions including an active market for selling captives. We regularly advise sellers and buyers of reinsurance captives and we have developed a specific expertise with our insurance colleagues to ensure a smooth and efficient sale process. Those sales are conditional on the approval of the transaction by the Luxembourg Insurance Regulator (the Commissariat aux Assurances) and usually require the seller to undertake a portfolio transfer or novation prior to completion.

BEYOND THE FINANCIAL SECTOR, HAS LUXEMBOURG ANY SPECIFIC EXPERTISE IN OTHER INDUSTRIES?

A&O: Luxembourg's economy is diversified. While, as mentioned, financial services play an important role (the financial sector accounts for approximately 25 percent of GDP), other sectors such as steel production (the world's largest steel company, ArcelorMittal, is headquartered in Luxembourg and is the country's biggest private sector employer), logistics and car components are very well developed.

In addition, Luxembourg has developed a vibrant ICT sector over the last two decades. Besides the national flagships, SES, the world's largest satellite producer, and RTL, the leading European entertainment network, several internet companies such as Amazon, PayPal and eBay have established their European activities in Luxembourg.

The presence of these global players combined with an active promotion policy by the government creates a vibrant and dynamic environment for start-ups, which is supported by a favorable legal regime. The best illustration of this local 'silicon valley' is Skype, which was founded in Luxembourg in 2003 and financed in its early stages by a local private equity fund.

Another example is logistics – Luxembourg has developed significant expertise as an intercontinental logistics hub in Europe, in particular for contract, air and rail freight-based logistics activities.

WHAT SKILLS AND EXPERIENCE DISTINGUISH ALLEN & OVERY AS A KEY PARTNER FOR MULTINATIONAL INVESTORS LOOKING AT CONDUCTING A DEAL IN LUXEMBOURG?

A&O: At Allen & Overy, we distinguish ourselves through our experience in acting on a range of complex and high-value work, be they cross-border or domestic transactions. Thanks to our global network comprised, to date, of 46 offices in 32 countries and strongly established relationships with 'best-friend' law firms in countries where we have no physical presence, we are able to offer our clients seamless multi-jurisdictional legal advice.

Our status as market leaders in corporate and M&A in Luxembourg can be reflected through the number and calibre of deals we have led from our Luxembourg office. A highlight of the year, and a demonstration of both our M&A expertise in Luxembourg and our ability to strengthen our relationships with major private equity firms, was our role in Pamplona Capital Partners' acquisition of healthcare giant Alvogen. Our Luxembourg office led a multi-disciplinary A&O team drawn from nine offices, as well as five 'best friend' relationship firms.

This is just one example of our capability – we lead complex transactions from Luxembourg and do not just provide structuring advice.

We won the award for Benelux Law Firm of the year at the FT Mergermarket M&A Awards 2013 for the sixth time, and topped the league table rankings as number 1 in Benelux for M&A deals in 2013 both by volume and value.

Beyond our core M&A and corporate expertise, ours is a full service office with top tier capability in every area. One example is banking & finance - we work closely with our market leading banking and finance team on transactions in the financial sector and in advising financial institutions on the myriad of legal issues that affect their businesses.

ABOUT THE AUTHORS:

Marc Feider, corporate and senior partner

Marc heads the Luxembourg corporate practice. He specializes in private equity, mergers and acquisitions, securities and stock exchange-related work, takeovers and joint ventures. He has vast experience advising clients across all sectors, particularly financial institutions, private equity, insurance, energy, communications, media and technology.

Marc is a board member of the Luxembourg Private Equity and Venture Capital Association (LPEA).

Fabian Beullekens, corporate partner

Fabian has extensive experience in corporate law, mergers and acquisitions, private equity, joint ventures and equity capital markets across all sectors, in particular insurance and reinsurance, financial institutions and media and telecoms. He is a member of the Luxembourg, Brussels and New York Bars.

Fabian regularly publishes articles and speaks at seminars on a broad range of topics, including recently on public takeover bids, directors' duties and M&A trends.

Q&A

REPORTER MARIA JACKSON PUTS THE QUESTIONS TO CREEL, GARCÍA-CUÉLLAR, AIZA Y ENRÍQUEZ

ENERGIZING GROWTH: MEXICO'S M&A SCENE IS SET TO BOOM

Creel, García-Cuéllar, Aiza y Enríquez outlines the opportunities heralded by Mexico's reform package

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Mexican President Enrique Peña Nieto continues to focus on strengthening Mexico's attractiveness to foreign investment. The M&A team from leading business law firm, Creel, García-Cuéllar, Aiza y Enríquez, highlight how these changes will boost the country's already favorable M&A environment.

WHAT ARE THE HEADLINE FACTORS UNDERPINNING MEXICO'S ATTRACTIVENESS AS A HUB FOR LATIN AMERICAN DEALS?

CREEL: Mexico's demographic trends show an economy less dependent on exports, a growing middle class and an increased consumerism (with more access to consumer credit), which suggests investment opportunities in sectors serving domestic consumption, such as financial services, healthcare, retail, education, lodging and agro-industry. In addition, considering that labor and other costs have risen in other emerging economies, such as China, coupled with the fact that Mexico is a leading nation in terms of free trade agreements, Mexico has regained competitiveness, becoming an attractive destination for foreign investors.

Even though the Mexican stock exchange has experienced periods of volatility in recent years, Mexico's stock exchange index has reached record highs, with active domestic equity and debt capital markets slowly achieving greater depth. The availability of credit to Mexican small and mid-cap businesses from local financial institutions is evident and is expected to show consistent growth as a result of the recent reforms to the financial system. In general, the business environment in Mexico has been welcoming and is still improving, as reflected in the 2013-2014 Doing Business Report issued by the World Economic Forum, which highlights Mexico's 'sound banking system', 'reasonably good transport infrastructure' and 'a large and deep internal market allowing for important economies of scale'.

The structural reforms that the Federal Government has managed to approve during the past two years, coupled with sound economic fundamentals, have caused many analysts to suggest that the Mexican economy is well positioned for a period of steady growth. Despite the fact that Mexican and foreign investors alike recognize that questions regarding the ability of the country's institutions to deal with the current crisis of security, justice and the rule of law are warranted, it seems that for now they have embedded such issues as part of the country risk. While it cannot be assumed that investors will be willing to live with the current climate indefinitely, it is positive sign that Mexico's government has now recognized the existence of such problems and the necessity to react with structural changes that will resolve the issues and bring a new political agenda to the table. This is undoubtedly a step in the right direction, although it remains to be seen how such issues, together with the structural reforms that have been taken since late 2012 and that ended in 2014, will be reflected in improvements to Mexico's competitiveness, its environment for doing business, and in turn, to its GDP.

In any case, it is still undeniable that the executive branch of all levels of government need to address security issues, while doing everything within their power to strengthen the functioning of Mexico's judicial institutions and consequently build up the rule of law. Equally important is that federal and local members of the justice system take palpable actions that promote and send clear signals to domestic and international investors that the rule of law is a primary concern in Mexico and that impunity is unacceptable. Equally, all Mexicans and foreigners alike that do business or live in Mexico need to take strong actions against corruption.

WHAT ARE THE KEY INDUSTRY SECTORS CURRENTLY DRIVING DEALS IN MEXICO?

CREEL: As expected, activity in real estate M&A this year remains bolstered not only by active Mexican capital markets, which are a reflection of the solid investment opportunities that institutional and retail investors consider can be found in Mexico, but also by the Mexican Government reforms.

In addition to the technology and internet sectors which have clearly been very active during 2014, the ability to capture funds through the issuance of equity, debt, certificados de capital de desarrollo, or CKDs, as well as certificados fiduciarios bursátiles inmobiliarios by FIBRAS, continues to contribute to the flurry of domestic transactions in the real estate M&A market in Mexico. Another sector that has grown significantly, and is expected to continue growing, is infrastructure-related M&A. During the last six years, private sector participants interested in investing in projects with long-term and stable revenue streams have participated in Mexican public-private partnership opportunities in which include toll roads, hospitals, and schools. It is expected that domestic and foreign funds (including pension funds) seeking the stable yields provided by these type of projects will boost infrastructure M&A activity in the coming years.

"As a result of the energy reform, opportunities for investment will be available across the whole Mexican energy sector."

Looking at the TTRecord.com quarterly reports for Q1 through Q3 2014 confirms a trend of a constant increase in the number of deals by strategic, private equity and venture capital investors (in each case, both foreign or domestic). The comparison among 2012, 2013 and 2014 is indeed impressive and it clearly appears that 2014 will indeed surpass prior years on all counts, either by deal value or by number of deals (e.g., 112 M&A deals and 61 PE/VC to date in 2014).

WHAT ARE THE MOST COMMON INVESTMENT VEHICLES USED BY INVESTORS INTO MEXICO?

CREEL: Two general considerations should be taken into account by any investor when deciding upon an investment vehicle in Mexico; first, the tax treatment of the different Mexican vehicles in the respective jurisdiction of the investor, because, for example, it is our understanding that U.S. 'check the box' treasury regulations distinguish between 'partnerships' (pass-through entities) and 'corporations' (non pass-through entities) for federal tax purposes. In such regard –as we have been informed- Treasury regulation number 301.7701-2(b)(8) issued by the U.S. Internal Revenue Service (IRS) sets forth a list of foreign entities which per se shall be considered as 'corporations' (including the "Sociedad Anónima").

Second, the most convenient vehicle will depend on whether the investor will be purchasing 100 percent of the target company (or its assets), or whether the purchaser shall have minority shareholders; in which case, the investor should not only consider tax implications of its structure but also different corporate governance, exit strategies and other provisions sought out by investors that have minority shareholders. In this respect, as a result of the recent amendments to the General Law on Commercial Companies (GLCC) published in June 2014, the Sociedad Anónima (or SA), the Sociedad Anónima Promotora de Inversión (or SAPI) and the Sociedad de Responsabilidad Limitada (or SRL) are the most adequate investment vehicles for a capital contributing minority partner to accomplish its negative control objectives which, before such amendment, could only be had through a SAPI governed by the Stock Market Law (SML). One of the most important developments that came into effect as a result of the amendments to the GLCC, is that it now expressly recognizes (as it is done in the SML with respect to the SAPI) the validity and effectiveness of shareholders' agreements among the shareholders of an SA. Furthermore, with such amendments to the GLCC, strategic or other investors (e.g., private equity or venture capital) can now provide for and agree on provisions readily available in the U.S. and other jurisdictions such as voting agreements, lock-ups, calls, puts, repurchases or redemptions, drag-alongs, tag-alongs, registrations rights and squeeze-outs of minority shareholders.

ARE THERE ANY RULES RESTRICTING FOREIGN INVESTMENT IN MEXICO?

CREEL: In general, under the Foreign Investment Law (FIL), foreign investors may invest in both listed and unlisted Mexican companies, subject to a limited number of restrictions on investment in certain economic sectors which are, under the FIL, specifically reserved to Mexican nationals and/or the Mexican Government. Therefore, foreign investors need to take foreign investment laws and its regulations into account during the initial phase of any project in order to ascertain that the investment is viable.

Since 2013, Mexico has focused on a general all-encompassing overhaul of the laws regulating foreign investment in very important sectors as telecommunications and media. Other than such specific limitations on foreign investment participation, the Foreign Investment Commission also needs to approve any proposed investment by foreigners in a company whose assets are worth in excess of the Mexican pesos equivalent of approximately $200 million.

TO WHAT EXTENT DOES THE FRAMEWORK OF PURCHASE AGREEMENTS DIFFER FROM OTHER INTERNATIONAL JURISDICTIONS?

CREEL: The execution of documents aimed to evidence the preliminary agreements of the parties and to build-up the framework in which the preparation and negotiation of a definitive agreement will be structured are common practice in Mexico. Although no specific regulation exists, these types of preparatory agreements are commonly drafted to resemble an offer, a promise to execute a definitive agreement or an atypical contract not specifically set forth in the statute (gentlemen's agreement, memorandum of understanding, head of terms agreement or other) but that generally has the same framework as the former. Provisions commonly used deal with due diligence, a no-shop or exclusivity, confidentiality and binding or non-binding effect.

For the last decade, Mexican commercial practitioners involved in cross-border transactions have undoubtedly been influenced by foreign investors that prefer agreements that 'look and feel', in many respects, like those used in other jurisdictions, but that comply with all particular formalities that need to be followed in order to execute a valid and enforceable agreement in Mexico. Customary arrangements commonly used in definitive agreements include

• Purchase Price: holdbacks, carve-outs, cash-outs and escrow provisions used to adjust the purchase price and give the necessary certainty to the purchaser and the seller (as applicable) that sufficient funds to pay the purchase price exist, that it will receive the purchase price or that it will be timely indemnified from any losses or purchase price adjustments.

• Representations and Warranties: even if a complete due diligence is performed, it is essential for the buyer to request extensive representations and warranties from the seller as well as for the latter to assume the obligation to indemnify the investor in the event of inaccuracy of any representation, should there be claims in the future that would affect the target company and or the acquirer of the assets.

• Covenants: Pre-closing and post-closing covenants of the parties in a Mexican transaction are those commonly used in other jurisdictions. As in other jurisdictions, prior to closing parties should focus on covenants aimed to assure that the parties will collaborate and take all necessary steps required to obtain and fulfill closing conditions. Stand still provisions regarding the conduct of business between signing and closing of the transaction with respect to the target company, its assets and business are common practice.

• Closing Conditions: In both stock and asset acquisitions –as in other jurisdictions- additional closing conditions could consist of buyer completing its due diligence process, the accuracy of representations and warranties made by either party, the parties obtaining antitrust approvals, third party consents (from clients or suppliers) or other governmental approvals or the execution of other transactional agreements (shareholders' agreements, stock options, license agreements, services agreements, and transition agreements).

• Indemnity: Usually the most important and negotiated provisions of any acquisition agreement. No standard indemnity provision exists for Mexican acquisitions. De minimis amounts or deductibles (i.e., a minimum amount that shall be exceeded before any indemnification right is owned by the indemnifying party) and capped indemnities (i.e., a maximum amount to be indemnified) are common practice in Mexico as are the survivability of any indemnity for a misrepresentation. In any case, counsel should keep in mind that these provisions are an elementary clause of the agreement because Mexican statutory dispositions do not provide a suitable protection in the event of a breach to the representations contained in the agreements subject to Mexican law.

WHAT REFORMS HAS MEXICO RECENTLY UNDERTAKEN THAT COULD STRENGTHEN ITS INVESTMENT PROFILE?

CREEL: In the past year and a half, Mexico approved significant changes to its regulatory framework across several sectors, such as energy, telecoms and financial services, as well as in respect of antitrust, tax and employment matters. These reforms, coupled with sound economic fundamentals, are expected to result in a period of steady expansion for the Mexican economy. The critical question is how and when the impact of such structural reforms will be reflected in improvements to Mexico's competitiveness and its environment for doing business.

The overhaul relating to telecoms and antitrust, includes, among other relevant changes, the regulators' authority to require a preponderant company (agente preponderante) to divest assets, the auctioning of new private television networks and the elimination of foreign investment restrictions in telecoms and media, as well as the imposition of asymmetric conditions applicable to companies that are designated as preponderant in their industry to level the playing field for smaller players in those industries (to date, Televisa and America Movil have been designated as preponderant). Thus far, the reform has resulted in the resurgence of M&A activity in this market, including the sale by AT&T

of its stake in America Movil for over $6 billion, the acquisition by Mr. Salinas Pliego of Televisa's interest in Iusacell, and the announced acquisition by AT&T of 100 percent of Iusacell. Likewise, America Movil has publicly announced that it will be divesting sufficient assets so as to cease qualifying as a preponderant agent, although through the date of publication, no transaction has been announced. The flurry of activity is expected to continue, and given the capital intensiveness of the industry, it is likely that large multinationals as well as private equity firms will be key participants.

The reform that has many fingers pointing to Mexico relates to the oil and energy sector. If the sector that has been monopolized by the state-run Petroleos Mexicanos (PEMEX) since the 1938 expropriation of all oil and gas companies operating in Mexico can be opened to international and domestic investors on a transparent basis, providing adequate legal certainty to investors in respect of their investment, the result will be significant opportunities that can boost the country's economy to a next level. The challenge lies in implementing the reform in a nation that continues to be plagued by corruption scandals and shady transactions, which practices Mexicans must begin to eradicate, in order to fully realize its potential.

TO WHAT EXTENT IS THE ENERGY REFORM PARTICULARLY EXPECTED TO BOOST M&A IN MEXICO?

CREEL: As a result of the energy reform, opportunities for investment will be available across the whole Mexican energy sector (e.g. exploration and extraction of hydrocarbons; oil processing and refinement; natural gas processing; shale gas; transport, storage and distribution of hydrocarbons and their derivatives; power generation and commercialization; and transmission and distribution, construction, maintenance and operation of power grids). Mexico has been dependent on the importation of refined oil and gas for years, and given the natural resources available in Mexico, with the proper infrastructure and legal framework, Mexico could eventually remove such dependence.

Furthermore, a well-implemented energy reform should lead to significant investment in a wide range of services and infrastructure that is required to support those kinds of projects (e.g., roads, hospitals, schools, shopping centers, retail office space, housing projects, etc.), which would result in an undoubted positive effect on the Mexican economy.

> *"Not only traditional strategic investors are searching for opportunities in the Mexican market, but also private equity and other financial sponsors."*

The pillars of the reform that encourage private participation lie in the fact that PEMEX will be allowed to partner with companies that bring the necessary experience as well as the required capital to finally be able to realize the potential of natural resources available in Mexico and its waters. The framework implemented through recently-enacted secondary legislation seeks to provide greater transparency, certainty and accountability to those who participate in these type of projects.

We have seen that not only traditional strategic investors are searching for opportunities in the Mexican market, but also private equity and other financial sponsors, who have a limited investment horizon and should bolster M&A activity in the years to come, when they seek to realize their exits. With the legal framework for Mexico's Energy Reform now fully in place, we believe substantial M&A activity will start first with foreign companies acquiring Mexican entities to gain a foothold and local talent (which may become important to satisfy the new 'local content' rules), and will then continue with joint ventures to bid for the E&P contracts and to develop the new opportunities in the oil, gas and power sectors.

WHAT CREDENTIALS DISTINGUISH CREEL AS A KEY PARTNER FOR FOREIGN INVESTORS LOOKING TO DO A DEAL IN MEXICO?

CREEL: Among the key considerations that a foreign investor should bear in mind when choosing a law firm in Mexico to advise on an M&A transaction is (i) the level of quality and expertise of the individuals at the firm performing the work and (ii) the alignment of interests of the individuals performing the work with those of the client. We believe that Creel's full service offering is unique in the market for transactional firms that are involved in sophisticated transactions. The ability to provide clients with a one-stop shop that can render tailored and in-depth advice in respect of M&A, tax, environmental, antitrust, IP, labor and employee benefits, banking and finance, real estate, insurance, etc. by professionals that are focused in their respective areas of expertise places Creel in a distinct position in the market.

In addition, Creel's innovative organizational and compensation model fosters collaboration and team work among partners and associates of the Firm, truly aligning the interests of the Firm with the interests of our clients. The sophisticated transactions regularly managed by the Firm denotes the confidence that clients deposit in our ability to handle complex matters by assembling transaction execution teams that deliver high-quality product in respect of identifying key issues in the diligence process, as well as in negotiating transaction agreements in terms satisfactory for investors.

Q&A

REPORTER MARIA JACKSON PUTS THE QUESTIONS TO BORENIUS

FINLAND: A FAVORABLE OUTLOOK

As the Finnish M&A market continues to perform strongly, Helsinki-headquartered law firm Borenius highlights the increasing convergence of capital markets with traditional M&A.

JARI VIKIÖ
MANAGING PARTNER

JUHA KOPONEN
PARTNER AND HEAD OF CAPITAL MARKETS

JOHANNES PIHA
PARTNER

Finland's M&A environment remains robust. Figures from corporate intelligence agency Mergermarket show that during the first 11 months of 2014, deal volume climbed to 134 deals, up from 130 during the same period in 2013. Importantly, Finland's transactional performance is supported by several factors, with good access to financing being a prominent driver of M&A.

Finland's private equity scene also continues to look healthy. The first six months of 2014 represented one of the most active years ever for private equity in Finland, with 223 private equity investments made in Finnish companies, according to figures from the Finnish Venture Capital Association (FCVA). Most notably, early stage companies attracted a record amount of foreign investment, with foreign venture capitalists investing around $24 million (EUR20 million) through a total of 22 investments - the highest number of investments since 2008.

As foreign investors flock to Finland, partners from Attorneys at law Borenius discuss the key trends affecting the country's M&A market.

Established in 1911, Attorneys at law Borenius is one of the largest and most experienced law firms in Finland. The firm's services cover all areas of corporate law.

In addition to its national offices in Helsinki and Tampere, the firm also has a well-established office in St. Petersburg, which regularly advises both Russian and foreign clients in cross-border transactions involving Russia. The firm also has a representative office in New York.

WHAT IS THE CURRENT ENVIRONMENT FOR M&A DEALS IN FINLAND?

BORENIUS: Activity in Finnish M&A remained strong in 2014 after a busy 2013. According to data compiled by Mergermarket there were 134 announced deals during the first 11 months of 2014, compared to 130 deals during the same period in 2013. The aggregate disclosed deal value for announced acquisitions of Finnish targets decreased slightly to approximately EUR9.8 billion in the first 11 months of 2014, compared to EUR10.1 billion in the same period in 2013. Part of the reason for the slight year-on-year decline in value was Nokia Corporation's EUR5.44 billion sale of its mobile phone business to Microsoft in 2013.

The deal-making environment remained on a similar level to 2013, despite the turmoil in Russia, which is providing a challenging outlook for the Finnish economy. The availability of financing has remained good, with the adoption of the Finnish high-yield bond market in the beginning of 2014 adding liquidity to the leveraged finance market.

There are certain signs that the market will continue to improve, which is supported by the increased level of large structured deals and the enhanced presence of dual-track processes. Most deals are still being prepared and negotiated quite extensively and the number of failed structured sales processes has increased. The number of IPOs have also contributed to the market in 2014, as the market regulated (MTF) First North Helsinki NASDAQ OMX has attracted several growth companies to seek listings. There have been six completed listings to the NASDAQ OMX Helsinki First North market in 2014 and two listings to the NASDAQ OMX Helsinki official list.

WHAT HAVE BEEN THE MOST ACTIVE INDUSTRY SECTORS FOR M&A DEALS IN FINLAND OVER THE PAST YEAR?

BORENIUS: We saw a rebound in big-ticket deals within the more traditional sectors during 2014. In the biggest deal of the year, valued at EUR3.24 billion, Finnish banking group Pohjola acquired the shares it did not own in its subsidiary Pohjola Bank. In another sizeable deal, Swedish steel company SSAB acquired Finnish metal company Rautaruukki in a EUR1.8 billion transaction. In October 2014, Danish energy company Danfoss made a EUR1.04 billion tender offer for Finnish electric drive maker Vacon.

Activity in the healthcare sector has remained strong and the expected growth in future spending in the public health and social services sector has resulted in numerous deals and a strong pipeline. Headline healthcare transactions in 2014 included Nordic Private equity fund CapMan's public tender offer for Finnish nationwide dental clinic Oral Hammaslaakarit Plc, Swedish private equity fund Adelis' acquisition of healthcare provider Med Group, Finnish private equity fund Intera Partner acquiring Finland's largest eye care provider and second-largest optical retailer Silmäasema, as well as Triton and KKR-owned healthcare provider Mehilainen acquiring healthcare provider Mediverkko.

Activity also remained strong in the energy and infrastructure sectors. In November 2014, E.ON and Fortum sold their shareholdings (20 percent and 31 percent, respectively) in Finnish gas company Gasum to the Finnish State for an aggregate compensation of EUR510 million.

THE FIRST HALF OF 2014 SAW 223 PRIVATE EQUITY INVESTMENTS MADE INTO FINNISH COMPANIES, WHAT IS ATTRACTING PE HOUSES TO THE FINNISH MARKET?

BORENIUS: The activity of private equity investors remained relatively high during 2013–2014, with the majority of deals falling into the midsize category. Many private equity investors are still expected to come under increased pressure to dispose of portfolio companies already held beyond the planned investment horizon and to invest committed capital. In sales processes, the trend has moved towards a higher level of differentiation in terms of structure, with the popularity of large-scale controlled auctions decreasing and the focus instead shifting to more concentrated efforts with a limited number of bidders. Also the above mentioned healthcare sector has been one significant driver, although some sponsors are arguing that the valuation levels in healthcare are already too high.

"Activity in Finnish M&A remained strong in 2014 after a busy 2013. There are certain signs that the market will continue to improve, which is supported by the increased level of large structured deals and the enhanced presence of dual-track processes."

WHAT ARE THE MOST COMMON FINANCING ALTERNATIVES FOR TRANSACTIONS?

BORENIUS: Most investments take the form of equity. There is a tendency towards preference shares replacing traditional shareholder loans. The reasons for this relates to new restrictions in the deductibility of interest in loans from related parties as well as to the fact that without a shareholder loan the parties may avoid the need for an intercreditor agreement. There also are some mezzanine funds actively operating in the market, but given the relatively small deal sizes and good availability of senior financing, mezzanine is quite seldom used.

Deals are also leveraged, as everywhere else in Europe, depending on the market conditions and availability of debt financing. In 2014, we saw a strong emergence of the Finnish high-yield bond market and some of the deals were financed by high-yield.

A traditional senior secured term loan facility made available by a bank or a club/syndicate of banks is still the most common source of debt financing in the Finnish private equity market. Credit funds and other non-traditional lenders have not been active in Finland so far.

In 2014, high-yield bonds made their foray into Finland, both as corporate bonds as well as private equity bonds, and instantly became a real alternative to replace part of the senior financing (or the entire mezzanine financing). Investors seem to have an increasing appetite for them. Similarly, the absence of maintenance-based financial covenants is deemed by private equity sponsors as a key benefit of high-yield bonds. For example, in May 2014, Paroc Group, which was taken over by its lenders in 2009, issued a EUR430 million six-year U.S. high-yield bond and Elematic Oy Ab, a portfolio company of Pamplona Capital Management, issued a EUR35 million four-year high-yield bond. In September, AC Alpha Oyj, a portfolio company of Ahlstrom Capital Oy, issued a EUR65 million unsecured and unguaranteed high-yield bond to finance the acquisition of Destia Oy, a Finnish infrastructure company. We expect more private equity sponsors to tap the high-yield bond market in the future, particularly as a source of refinancing existing portfolio company debt.

WHAT ARE THE PREFERRED STRATEGIES FOR EXIT IN FINLAND?

BORENIUS: The most common exit strategy is still through a trade sale. However, unlike in the past, genuine dual-track sale processes have become much more popular. This is due in great part due to the demand for European equity by many institutional investors and due to successful IPO exits in Sweden.

Trade sale

Finnish funds generally limit their liability extensively in sale and purchase agreements when exiting an investment. Usually, only the most fundamental warranties (title, capitalization) are given in the name of the funds, and management shareholders tend to take on more extensive liability. It is very typical for general liability to be limited to 10-30 percent of the exit value and for warranties to be in force for no longer than 12–18 months (usually liability past the next audited accounts is accepted). Title and capitalization warranties are usually excluded from the general limitations of liability.

It is not uncommon for escrow structures to be used in order to guarantee the availability of funds in cases of breach. A typical escrow period tends to reflect the agreed claim period and covers some 10 percent of the purchase price paid, again depending on the agreed total liability cap.

However within the last12 months Finland has seen a surge in the use of W&I insurances. Although the insurance is usually taken by the buyer, especially in an auction process it is often encouraged to do so by a private equity seller.

IPO

While the London Stock Exchange saw 10 times as many IPOs in the first half of 2014 as in the first half of 2013 and while the Swedish market also had very increased activity in terms of private equity exits, this unfortunately has not materialized as an exit strategy in Finnish leveraged buyouts. There have been a few dual-track processes, which in the end have led to trade sales. The rather small size of the private equity target companies is one of the primary reasons

"In 2014, high-yield bonds made their foray into Finland, both as corporate bonds as well as private equity bonds, and instantly became a real alternative to replace part of the senior financing (or the entire mezzanine financing). Investors seem to have an increasing appetite for them."

for the unattractiveness of the IPO exit market in Finland. At the same time, the trade sale exit alternative has proven faster and cheaper to implement and generally more effective to investors and shareholders.

The substantive liability of the investors as selling shareholders depends largely on the detailed contents of the underwriting agreement or similar contractual arrangement with the lead arranger of the IPO. Typically, the issuing company itself will give more extensive warranties to the underwriter. The selling majority shareholders (such as private equity investors) generally succeed in limiting their warranties to the fundamental facts such as ownership and authority etc. It is more likely that the management or other private shareholders have to agree to more extensive substantive warranties as well as lock-up periods, which usually range from six to 12 months. Also private equity shareholders often have to agree to lock-up periods. As the board of directors of the issuer is required to guarantee the accuracy of the IPO prospectus, the composition of the board of an IPO candidate is sometimes changed prior to the IPO itself as the investor's representatives in the board may wish to drop out and other outside industry experts or professional board members and corporate governance specialists join the company. The current Finnish Corporate Governance Code requires that the majority of the directors shall be independent of the company and in addition, at least two of the directors representing the majority shall be independent of the significant shareholders of the company.

WHAT IS THE PLAYING FIELD FOR PUBLIC-TO-PRIVATE TRANSACTIONS?

BORENIUS: We occasionally see private equity players launching tender offers for listed companies in Finland. Such deals are often friendly negotiated deals with an attractive premium where the majority stakeholders are committed to the deal. A few years ago, despite lower valuations, the unavailability of acquisition finance hindered such offers, but more recently the market has picked up and deals have been announced, or are being negotiated or proposed. Under the Finnish takeover rules, a bidder must disclose the financing arrangement necessary to consummate the bid, and the target's board will most likely require that a financing commitment be in place at the time of the execution of the combination agreement.

The Finnish mid-cap listed companies have been attractive acquisition targets due to their small size and concentrated ownership pools, combined with strong local positions in their respective markets and global potential.

The key issues in a public tender offer in Finland for a private equity fund are no different from other markets. Financing is clearly a concern, as well as getting firm commitments from main shareholders and negotiating the terms of the deal (including pricing, premium and closing conditions among other things) with the target's board. Larger cross-border deals would naturally be subject to competition law scrutiny as well. The acquisition of a Finnish target company in a defense-related or otherwise strategically crucial sector may also be subject to government approval.

An updated and slightly revised Takeover Code came into force on 1 January 2014. Much like its predecessor, the new Takeover Code contains recommendations regarding the actions applicable to public takeover bids. The Helsinki Takeover Code addresses questions and practices related to the actions of both the bidder and the target company, as well as the management and shareholders of the target company. The obligation to comply with the Helsinki Takeover Code is based on the provisions of the Finnish Securities Markets Act and the 'comply or explain' principle. Hence, in its announcement, the bidder must also declare whether it will adhere to the Code or not and give a reasonable explanation for non-adherence, if any. The Code is also available in English, as are the Finnish Securities Markets Act and all of the regulations issued by the Finnish Financial Supervisory Authority.

WHAT SUPPORT CAN BORENIUS PROVIDE TO CLIENTS LOOKING AT M&A AND PRIVATE EQUITY TRANSACTIONS?

BORENIUS: Our strategic initiatives that derive from the 1990s private equity environment in Finland have helped us to secure a leading position both in fund formation and deal making. Our market share in fund formation and secondaries has for many years been over 50 percent, giving the firm unprecedented access to both to private equity funds and their investors. We have represented a deep list of private equity and venture capital houses in making investments and exits, as well as target companies' management in these transactions. Additionally our tax practice, which is the largest of any Finnish law firm, puts us in the excellent position where we can provide 'the whole deal' to our PE customers.

We advised on 30 M&A transactions during the first 11 months of 2014. These transactions included, among others, the voluntary public tender offer for the shares in NASDAQ OMX Helsinki-listed Oral Hammaslääkärit plc, where we acted as the legal advisor to the offeror CapMan, the sale of Paroc Oy to the funds managed by CVC for EUR700 million, which was preceded by the EUR430 million high-yield bond Paroc issued a few months earlier, and most recently the sale of a 50 percent stake in Gasum to the Finnish State for EUR510 million, where we represented the sellers E.ON and Fortum.

"The Finnish mid-cap listed companies have been attractive acquisition targets due to their small size and concentrated ownership pools, combined with strong local positions in their respective markets and global potential."

In 2014 our capital markets practice was particularly active in high-yield transactions for corporate and private equity issuers. In the first eleven months in 2014, we advised on six completed high-yield deals, which is more than any other Finnish firm on the market. In addition to our high-yield experience, we have also been involved in IPOs as an exit alternative for private equity and corporate shareholders.

ABOUT THE AUTHORS:

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Jari advises on banking and finance, M&A and private equity related transactions with particular emphasis on large and medium size deals.

Jari has been involved in numerous large domestic and cross border mergers and acquisitions and frequently represents various domestic and international private equity houses and other companies in transactions. He also acts as a member of the board of directors in many portfolio companies advising on corporate issues.

Jari has been a partner at Attorneys at law Borenius since 2001, and managing partner since 2008.

Juha Koponen, partner and head of capital markets
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Juha Koponen is a dual-qualified (Finland and New York) transactional lawyer, who focuses his practice on capital markets, M&A and private equity transactions. He has advised issuers and underwriters on public and private offerings of equity and debt securities, including IPOs, high-yield debt offerings, convertible debt issuances and rights offerings. He has also advised bidders and target companies on tender offers.

Prior to joining Attorneys at law Borenius in March 2014 as the head of capital markets, Juha was a partner with another major Finnish law firm. His prior experience includes working as an associate at Fried, Frank, Harris, Shriver & Jacobson LLP for three years (New York and London) and as a corporate legal counsel at Nokia Corporation focusing on securities regulation.

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Johannes advises clients on a wide range of issues relating to private equity, mergers and acquisitions, ownership structuring and fund formation.

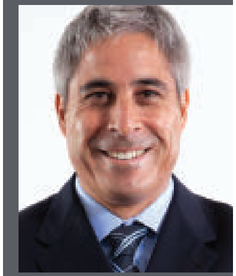
Johannes has been involved in numerous domestic and cross-border transactions acting for both private equity sponsors and industrial clients. Further he has advised clients in ownership and equity structuring in infrastructure projects, and in general corporate matters.

Q&A

REPORTER MARIA JACKSON PUTS THE QUESTIONS TO MIRANDA

PERU: FUNDS AT THE FRONT

As local and foreign investment funds step up their participation in Peru, Miranda & Amado Abogados explains the key trends underpinning growth.



ROBERTO MACLEAN
PARTNER

Miranda & Amado Abogados is one of Peru's leading full-service law firms, with top-tier expertise in corporate, banking, projects and regulatory work. The firm regularly advises local and multinational clients in some of the largest and most sophisticated transactions to hit the Peruvian market.

As recent reforms put Peru's funds space into the spotlight Roberto MacLean, partner at Miranda & Amado, discusses Peru's attractions for foreign investors.

THE IMF EXPECTS PERU TO BE THE FASTEST-GROWING ECONOMY IN LATIN AMERICA AND THE CARIBBEAN REGION IN 2014; WHAT ARE THE KEY MARKET FUNDAMENTALS DRIVING GROWTH?

M&A: Local opinions are divided as to how much Peru will grow in 2015. Growth has classically depended on mining projects. However, with several mining projects slowing down, Peru is beginning to look at other sources of growth to try to broaden its economic potential. Among these are the agriculture sector, ports, irrigation, airports, urban highways and transport, education, services, and goods for the growing middle class, as well as construction.

Peru is a mining country and remains strongly dependent on commodity prices, but the government has realized that it must develop policies to unlock other sources of wealth, increase local demand and diversify production capacity in ways that make the country less vulnerable to the cycles of commodity prices. Recent discussions at the largest national yearly executive conference focused on the need to upgrade the country's infrastructure, education and security enforcement systems, and also to diversify the country's production (with a current discussion on whether this should be purely driven by the private sector or with the help of government). The fact that the country's economic performance is solid, with low debt and good levels of reserves, is not in itself the source of Peru's future growth, but the basis upon which the country will have the space it needs to adapt to a new environment of low commodity prices.

TO WHAT EXTENT ARE PRIVATE EQUITY HOUSES, AND ASSET MANAGERS GENERALLY, INCREASINGLY LOOKING AT PERU?

M&A: Private equity firms began their activities in Peru at the end of the 1990s. Prominent private equity firms Nexus Group, AC Capitales and Enfoca were among the key names to begin their activities around this time. At first fundraising was limited and transactions were small, but in the last few years private equity houses have begun to enter the league of much larger transactions. Success begets success, so as fundraising became more interesting and more opportunities began to appear in the market, larger funds such as Carlyle, Advent and Citigroup Alternative Investments started to explore Peru and eventually set up shop, either in Peru or in Bogotá or Santiago de Chile.

Currently, M&A transactions are being driven by several trends. On the buy side, many local companies are looking to consolidate their local operations (and Peru has no merger controls in place to restrict this). In addition, foreign companies are moving to launch operations in Peru, Peruvian and other businesses from the MILA are pressing ahead with strategies to grow within the region, and investment funds are looking for investment opportunities in Peru as it has reached investment grade. On the sell side, we are seeing a considerable number of family companies whose owners have decided to give way to competition and cash in their returns (often, returns that have escalated way beyond their expectations) and eventually become the clients of those same funds trying to buy their companies.

However, Peru is still a relatively small economy and the size of its companies is also relatively small. Outside of the mining and energy sectors, few industrial companies are worth $100 million or more.

Peru's financial and capital markets are not too developed, meaning that exit strategies for funds will not necessarily be under the most ideal conditions. Our market has not seen many exits yet. Former Citigroup Alternative Investments fund (now with Rohatyn group) made a successful investment in a local fishing company, and exited the company via a combination of an IPO and private sale. Similarly, local fund Enfoca invested successfully in a local home improvement company and in 2014 exited through a private sale to a competitor.

With its pros and cons, Peru presents a developing opportunity for private equity funds in many sectors, including real estate, construction, infrastructure, energy, retail and manufacturing.

WHAT TYPES OF FUNDS ARE CURRENTLY THE MOST ACTIVE IN PERU?

M&A: Local pension funds are the most active and currently hold more than 60 percent of their investments in Peruvian debt (mostly) and equity instruments. Foreign pension funds have also been increasingly active in Peru. Most notably, in 2014 Canada's Pension Plan Investment Board purchased a stake in Peru's main natural gas pipeline operator. Other international pension funds and sovereign funds have also been looking at potential investments in Peru, but have not closed transactions yet.

"Private equity firms began their activities in Peru at the end of the 1990s. Prominent private equity firms Nexus Group, AC Capitales and Enfoca were among the key names to begin their activities around this time. At first fundraising was limited and transactions were small, but in the last few years private equity houses have begun to enter the league of much larger transactions."

As mentioned before, private equity funds have also been active. Many funds are looking for opportunities, but only a few have actually invested. As mentioned above, local funds Nexus Group, AC Capitales and Enfoca have paved the way, but now global funds such as Carlyle, Advent, Rohatyn, Compass, Altra Investments and Linzor Capital Partners are becoming progressively more visible in the market. Not all of them necessarily compete for the same assets, which makes it all more interesting, since we are now seeing different types of funds targeting companies of different sizes.

Then there are certain specialized funds, focused in specific areas like energy, infrastructure or real estate. In this category are Brookfield and Sigma, both of whom have received mandates from local pension funds mainly. In real estate, Terranum has been very active.

There is still no developed market in Peru for venture capital.

HOW ARE THE RECENT CHANGES TO PERU'S PENSION FUNDS LAW EXPECTED TO BOOST ALTERNATIVE INVESTMENTS?

M&A: In 2014, the regulations relating to investment by pension funds evolved dramatically to allow pension funds to find more investment options at both the local and international level.

With respect to investment funds, the main change is that the regulation now treats funds differently and provides for certain investment limits according to the type of fund. Before the new regulations, all funds fell into the same bucket; now investments in infrastructure funds will not take away a pension fund's capacity to invest in real estate funds or in private equity funds investing in other commercial companies.

Another relevant change is that the regulatory limit on investments outside of Peru is now 42 percent of the portfolio. This creates fundraising opportunities for funds that wish to raise in Peru for investment abroad.

TO WHAT EXTENT WILL PRIVATE INVESTORS HAVE A ROLE TO PLAY IN PERU'S AMBITIOUS INFRASTRUCTURE PLANS?

M&A: Peru's infrastructure program depends heavily on private investors. The country has a great deficit of small, medium and large infrastructure projects, from local highways and sanitation to large highways, gas pipelines, transmission lines, etc. While the government may tackle small projects with its own budget, it lacks the capacity and funds to invest in every sector in need of modernization. In this context, large projects are developed through public-private partnerships, where the government grants concessions for private parties to develop energy projects, ports, highways, mines, sanitation infrastructure, irrigation projects, among others. While many large projects are promoted by the government, many important projects begin as private initiatives, and all large projects are developed by private investors. Over recent years, most of Peru's infrastructure projects have been led by construction companies who use the concession model as a way to develop their construction businesses. Since all of these projects require a certain amount of equity, and an enormous amount of debt, investment funds look for opportunities to participate in these projects by purchasing debt instruments and, if possible, taking positions on the equity side as well - this is when funds like Sigma provide access to pension funds into projects.

The investment trust created by the pension funds is intended not only to provide funds for infrastructure projects, but also to provide opportunities for pension fund administrators to take advantage of the current stage of Peruvian development.

WHAT ARE THE OTHER HEADLINE BUSINESS TRENDS DRIVING DEALS IN PERU?

M&A: In 2013, according to weekly business journal Semana Económica, the hottest sectors for M&A in Peru in terms of value were energy, fishing, pension funds, mining and telecoms. In terms of number of transactions, the energy, mining and manufacturing sectors scored highly. During the last two years, the energy sector has witnessed a particularly high level of M&A activity. Looking forward, according to a recent forecast by Semana Económica, investment funds are expected to increase activity in oil and gas, energy, logistics, transport, telecoms and entertainment.

WHAT SKILLS AND EXPERIENCE DISTINGUISH MIRANDA & AMADO ABOGADOS AS A TOP CHOICE FOR MULTINATIONAL CLIENTS LOOKING TO INVEST IN PERU?

M&A: First, we have a large and experienced team comprised of a combination of transactional lawyers, industry experts and regulatory specialists, which enables the firm to assist buyers and sellers across a wide range of sectors and industries. Our lawyers also stay ahead of global trends to provide cutting-edge advice in relation to new industries opening up in Peru, which is evidenced by the fact that we dominate pathfinder deals in every single sector.

"With its pros and cons, Peru presents a developing opportunity for private equity funds in many sectors, including real estate, construction, infrastructure, energy, retail and manufacturing."

Second, in addition to our ample experience in negotiating and closing M&A transactions, our team has expertise in structuring long-term arrangements between investors, through company bylaws, shareholder agreements and other legal and contractual mechanisms designed to build trust and resolve inevitable conflicts. Our corporate and M&A practice is used to working closely with all practice areas of the firm. Our lawyers are transactional heavyweights and know how to lead transactions and call upon our extensive resources to ensure all supplementary demands are met.

Third, we possess all the skills necessary to avoid or resolve disputes among shareholders or between shareholders and management. These qualities mark us as a top choice for legal advice when entering into an investment that is not merely the purchase of a 100 percent interest in a company.

Fourth, our lawyers speak fluent Spanish, English, German and Portuguese. Most of our attorneys have received LLM and/or other postgraduate degrees abroad, and nearly all of our transactional lawyers have spent some time working for firms in the U.S. and U.K. This international perspective means that we can engage totally with the global corporate structure of our clients and assist individual managers meet their corporate policies and standards.

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Mergers and Acquisitions in Poland

The Polish M&A market emerged with strength and is poised to continue to outpace regional peers.

Poland emerged over the last decade as the leading location for foreign investment in Central and Eastern Europe (CEE), and one of the prime markets in the entire European Union (EU). In addition, the domestic capital and investment market has been stimulated by consumer demand as well as export market opportunities, enhanced by stable economic growth and prudent fiscal management promoted by the government. As a result, the Polish M&A market emerged in strength as the economy developed, and based on recent deals and trends it seems well-positioned to continue to outpace regional peer jurisdictions.

Since the beginning of the market transformation following the collapse of the Soviet era, Poland has distinguished itself from its CEE peers. In 1989, Poland was nearly bankrupt, and home to a large but inefficient agricultural sector, inadequate and nearly unbearable roads and rail services. Popular wisdom regarded CEE neighbors like Hungary and pre-split Czechoslovakia as more likely prospects. But rigorous economic "shock therapy" and a large, hard-working and aspirational population put Poland on the right track.

The early days of the market in Poland and across the region involved many privatization sales as national governments sought to generate income and revitalize moribund industries. In 1989, the Polish government controlled most of the country's businesses and there were few private enterprises. In early 1991, the Warsaw Stock Exchange (WSE) was re-opened. Later that year, the government announced a sweeping privatization program, calling for half of state-owned assets to be privatized in the next three years. The development of the WSE as a regional leader facilitated several key privatizations by initial public offering (IPO), such as the listings of Telekomunikacja Polska, copper mining giant KGHM and petrochemical leader PKN Orlen. This active public equity market has seen the full range of acquisition transactions that have become more commonplace on the London or New York exchanges, including simple take-overs, hostile take-overs and "white knight" defenses.

All of the CEE countries experienced a boom, or at least strong growth, from their relatively low bases prior to 2007. Since the financial crises, GDP growth in most CEE economies has been depressed. But Poland, which uniquely avoided recession, has delivered a healthy 3.5% per year growth rate, fueled by lower exposure to weak export demand generally and a close connection to the robust German economy.

As Poland joined the EU in 2004, huge export markets were made much more easily accessible. EU funds have poured in (over $100 billion through 2013), along with private investment, to stimulate

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the improvement of the transportation and energy infrastructure necessary to support a world-class economy. Foreign investors recognized that Poland's large population would create demand for consumer goods and services, and that Poland's highly educated and reasonably de-regulated and lower cost work force would make the country a prime location for manufacturing, R&D, off-site services and technology centers.

THE IPO MARKET

By the end of the first decade of the 21st century, most of the country's largest companies had listed their shares on the WSE. The WSE is the largest national financial instruments exchange in CEE and one of the fastest-growing exchanges in Europe. As at 31 December 2013, WSE was a leader in the CEE region in terms of capitalization of listed companies, the value of turnover in shares and the volume of turnover in derivatives. Nearly all of the largest banks, industrial companies, energy producers and distributors and private sector media operators trade as public companies. More than 400 companies are now listed on the main market, including Italian bank UniCredit, which has a secondary listing in Warsaw. Another 220 smaller firms are listed on New Connect, Warsaw's equivalent of London's Alternative Investment Market.

While the world-wide economic crises that began in 2007 certainly has affected the pace of IPOs, Poland has continued to experience a vibrant equity market.

Zespół Elektrowni "Pątnów-Adamów-Konin" S.A., the fifth largest electricity producer in Poland in terms of installed generation capacity and electricity output, made its debut public offering on the WSE in October 2012. The IPO, valued at over PLN 680 million (approximately $212 million) was Poland's largest IPO in more than a year, since the PLN 5.37 billion sale of state-owned coal mine Jastrzębska Spółka Węglowa S.A. in June 2011.

The largest IPO in Poland in 2012 was the $640 million initial public offering by Alior Bank S.A. on the WSE in December 2012. The underwriters on that blockbuster deal were Barclays Capital, J.P. Morgan, Morgan Stanley and Ipopema S.A.

The first IPO of 2013 was coordinated by Citigroup Global Markets Limited, DMBH, Société Générale, UBS and Deutsche Bank AG, London Branch, raising PLN 238.6 million for Polski Holding Nieruchomości (PHN). PHN, a state-owned company, is one of the largest (in terms of market value of real estate portfolio) developers, holders and managers of commercial and residential real property in Poland. It holds and manages 305,000 square meters of office, retail, logistic and residential properties.

2013 was brought to a rousing close by the IPO of Energa S.A. on the WSE. The value of the IPO was PLN 2.4 billion ($780 million), making it the largest IPO in Central Europe in over two years. Energa is a regulated power-distribution business, delivering electricity to 2.9 million homes and businesses. It is the third largest energy supplier in Poland, and a national leader in production of energy from renewable sources.

The prime example of a 2014 capital market transaction is the PLN 995.5 million rights issue launched by Grupa Lotos S.A., Poland's second-largest refiner. The prospectus was approved by the Polish Financial Supervision Authority (PFSA) in November 2014.

FINANCIAL SERVICES SECTOR

With deregulation and economic stabilization, Western European banks moved aggressively into Poland to help consolidate the banking sector, and to expand the scope and depth of the offered services. At the same time, a few of the leading domestic players, adopted modernization strategies to keep them at the front of the pack. Transaction activity over the past few years has continued the consolidation trend, with opportunities driven by regulatory and commercial pressure resulting from the financial crises. Many sellers are facing distress in their home markets, or pressure from shareholders and regulators to scale back expansion. Buyers are seeking opportunities to capitalize on their own strength and accelerate market share growth by acquisition. All activity in the sector is closely supervised by the PFSA, the financial sector regulator.

"In one major move, BNP Paribas has positioned itself to become an increasingly important player in the Polish banking market."

—STEPHEN HORVATH, PARTNER, GREENBERG TRAURIG LONDON

The PFSA is deservedly proud of its stewardship of the Polish market, avoiding any bank failures or bail-outs during the financial crisis. The PFSA has supported both foreign investment and domestic development in the banking sector, while also insisting on opportunities for public investment by requiring listing of large banks and provision of adequate free float in the shareholding. This strong regulatory posture has not, however, limited the acquisition and consolidation opportunities over the past few years.

In early 2012, the Austrian bank Raiffeisen Bank International snatched up the Polish business of the troubled Greek bank EFG Eurobank for over €500 million. The business, Polbank EFG, was operated as a branch of the Greek bank, and the transaction was complicated by having to first convert Polbank from a branch into a licensed bank, which was then combined with Raiffeisen's own Polish bank.

The last year has witnessed two other milestone transactions in the banking sector, as well as consolidation at the smaller end of the scale.

Poland's largest bank PKO Bank Polski S.A. (PKO BP) acquired Nordea Bank Polska and certain affiliates from Norway's Nordea AB for approximately PLN 2.8 billion. As part of the acquisition, Nordea Bank AB will provide PKO BP over a period of seven years with approximately PLN 15 billion of financing for mortgage loans granted by Nordea Bank Polska. This acquisition supports execution of PKO BP's strategy, enhancing its position as the leading bank in CEE. It was an attractive opportunity for PKO BP to expand its leadership position in retail, grow its distribution network in large Polish cities, increase its affluent client base and significantly strengthen its corporate franchise. The transaction was approved by the PFSA in March 2014, clearing the way to completion of one of the largest finalized acquisitions in the Polish banking sector announced in 2013.

PKO BP also has been active on other fronts. In late 2013 PKO BP sold a majority stake in eService S.A. to the American company EVO for PLN 430 million. eService is Poland's largest payments processing operator in terms of the number and value of transactions involving payment cards. EVO is the largest private firm acquiring and processing payments for merchants in terms of the value of the transactions processed in the USA and Canada. The transaction comprised, among other things, a share purchase agreement, the establishment of a joint venture, a shareholders' agreement and a strategic alliance agreement to govern cooperation between PKO BP and EVO over the next 20 years. This deal introduced a new concept in the Polish market by combining bank payment processing with a state of the art technology, and know-how offered through a joint-venture structure by one of the leading and most innovative electronic payment companies in the world. It is expected that this deal will revolutionize the electronic payment system in Poland, and will provide the Polish bank with a platform for expansion into other markets.

In December 2013, the French bank BNP Paribas announced its agreement with the Dutch Rabobank Group for the acquisition of the 98.5% stake held by Rabobank in Bank Gospodarki Żywnościowej S.A. (BGZ). Valued at PLN 4.2 billion (€1 billion), this was the largest banking acquisition in Poland completed in 2014. BNP Paribas expects to consolidate its own Polish subsidiary, BNP Paribas Polska, as well as its Polish consumer finance operations, into BGZ.

Recently, the local Alior Bank agreed to acquire its smaller rival Meritum Bank S.A. The purchase agreement was signed in October 2014 for a value of PLN 352.5 million.

Consolidation and change will continue to characterize the banking sector in the coming year. Already, GE is mooting the sale of Bank BPH, a major market participant, and it is likely that Alior Bank itself may be the subject of a significant change of ownership. Recently the country's largest lender PKO BP, its top rival Bank Pekao (controlled by Italy's UniCredit), and the third-ranked player BZ WBK (controlled by Spain's Banco Santander) have all signaled that they would look into possible acquisitions.

MEDIA & TELECOMMUNICATIONS SECTORS

The media and telecommunications sectors in Poland have exploded, as elsewhere, with new technologies pushing digital services in place of older traditional media and land-line phones.

The leading transactions in this area are a series of deals put together by Polish media entrepreneur Zygmunt Solorz-Żak. Solorz-Żak is the Chairman and founder of Cyfrowy Polsat, the largest digital broadcaster in CEE. In April 2011, Cyfrowy Polsat acquired Telewizja Polsat for approximately €1 billion in the largest ever deal in Poland's media sector. The transaction was financed by a PLN 3 billion LBO and revolving facility, followed by a high yield offering of €350 million senior secured notes in May 2011.

Later that year, Solorz-Żak paid PLN 18.1 billion ($ 6.6 billion) to acquire Polkomtel, Poland's second-largest mobile network operator. The company had been placed on the market by its original shareholders: Poland's largest power group, PGE Polska Grupa Energetyczna; oil refiner and petrochemical giant PKN Orlen; Poland's leading copper concern KGHM Polska Miedź; the leading exporter of Polish coal Węglokoks; and mobile operator Vodafone. The debt financing was arranged by a consortium of banks, co-ordinated by Crédit Agricole and Deutsche Bank, and underwritten by Crédit Agricole CIB, Deutsche Bank, The Royal Bank of Scotland, Société Générale and PKO BP. The transaction was one the largest leveraged buyout in Europe since 2008, the largest acquisition ever made in Poland at that time, and one of the largest transactions in the history of CEE M&A.

In 2013, Cyfrowy Polsat agreed to acquire Polkomtel, which will allow it to offer a modern quad-play service. Cyfrowy Polsat completed the deal by acquiring Metelem Holding Company Limited, the sole owner of Polkomtel, in exchange for Cyfrowy Polsat shares valued at PLN 6.15 billion. The acquisition closed in mid- 2014, creating the largest media and telecommunication group in the region and one of the largest corporations in Poland.

Part of the transaction included the refinancing of the existing indebtedness of Cyfrowy Polsat. From a consortium of more than 20 financial institutions led by ING, PKO BP and Société Générale, the company raised new loans totaling PLN 3 billion, which enabled it to repay its existing term loan facility and Senior Secured Notes (totaling in excess of PLN 1.9 billion as at the end of 2013).

Another key player in the sector is Telekomunikacja Polska S.A. (Orange Poland), which in 2013 sold its Wirtualna Polska portal to its peer o2 Group,

"The Polkomtel acquisition was an historic milestone in Poland's post-credit crunch economy. The market is primed for major transactions again."

—JAROSŁAW GRZESIAK, MANAGING PARTNER,
GREENBERG TRAURIG WARSAW

in a transaction financed by private equity firm Innova Capital, for PLN 375 million. Wirtualna Polska is Poland's oldest web portal, ranked second among all Polish portals, before its merger with the o2 Group, the owner of the o2.pl portal.

The markets are already looking ahead in the coming year to the proposed sale of the controlling stake in TVN S.A. (Poland's other leading private sector broadcaster) by TVN's lead shareholders ITI Group and Groupe Canal+, which most likely will be the major M&A transaction in 2015. ■

bbh PRAGUE BRATISLAVA MOSCOW

M&A Market in Russia: Turbulent Times

In 2014 M&A value was at its lowest level in 5 years but small deal activity was booming. How did the Ukrainian crisis affect the M&A market in Russia and what are the predictions for 2015?

With vast natural resources and an ever-growing domestic market, Russia has long had the potential to be an attractive country for M&A activity. Moreover, Russia's accession to the World Trade Organisation in 2012 opened new opportunities for economic advancement and diversification. The automotive sector is said by many to be one of the keystones of Russia's economic rebirth, but it is clear that the energy and natural resources sector, stemming from the vast array of natural resources, has also had an indisputable impact on Russia's economic growth. Russia is not always a straightforward place to do business, and is a country of controversies. The Ukrainian crisis and Crimea accession, followed by introduction of U.S. and EU sanctions on Russia, have brought business uncertainty and this has had dramatic impact on the M&A landscape.

After a number of buoyant years on the M&A market, 2014 saw a drop in the aggregate value of M&A deals to the lowest level since the 2009 crisis. The ongoing geopolitical situation and reduced market confidence led to the aggregate value of large deals worth over USD 500 million to 50% lower than comparable numbers for 2013. This is no doubt in large part due to the European and American sanctions which target some of Russia's largest corporations such as Gazprom, Rosneft, state owned banks and other financial institutions, together with the impact of lower oil prices, a significant devaluation of the rouble and an economy in recession.

An absence of large privatisations in 2014 led to inbound M&A by volume of deals to drop by over 50% when compared with value of deals in 2013. Whilst the number of mid-size deals in 2014 remained broadly comparable with numbers in 2013, volume of smaller transactions concluded in 2014 which were worth less than USD 250 million appears to be unaltered by the political situation. Whilst there was a significant decrease in the total value of M&A transactions in 2014 (when compared to comparable value of deals undertaken in 2013), a large transaction between Rosneft and TNK-BP due to its size had a big impact on the aggregate value of M&A transactions in 2013.

In 2014, the energy and natural resources sector continued to dominate the M&A market. One of the largest deals in the energy sector was a joint venture deal worth USD 2.4 billion between Alliance Oil and Independent Petroleum Co. Another noteworthy deal was the consolidation of four utility companies by Volzhskaya TGK for a total of USD 4 billion. This sector has always been a driver to other sectors of Russian economy and in 2014 it triggered the growth of the total value of M&A transactions.

An increase in the number of transactions can be noticed in a non-manufacturing retail & services sector. This sector amounts to 25% of the total value of all M&A transactions in 2014 providing around 20% of the total amount of transactions while the energy sector up makes around 40% of the total value providing for about 5% of the total amount of the transactions.

Another well-known driver of Russian economy - the real estate market has recorded a decrease of investments by 43% in the first 9 months of 2014; nevertheless 5 real estate transactions took place in September 2014.

Corporate and retail banking deals drove the banking and insurance sector, where one of the largest deals was Alfa Group's acquisition of Bank of Cyprus for USD 304 million.

It is also worth noting that about 85% of transactions on the Russian M&A market were domestic transactions with around 7.5% constituting outbound and inbound M&A. However both outbound and inbound transactions made 30% of the total value. Many domestic low-value transactions along with a small number of big M&A transactions involved non-Russian investors.

Completed transactions in Russia amounted to only about 20% of the total value of the market in autumn 2014. The average value of a transaction has decreased by 40% as compared to 2013, but the exact figures are still yet to be published following the end of the year since dispersion heavily depends on the exact month of the year (e.g. autumn 2014 average price of the transaction is almost 50% lower than in January 2014).

SHIFTING EASTWARDS

Another development in the current times of tense relationships between Russia and EU/US, is seen in Russia's shifting of focus eastwards. The first quarter of 2014, has witnessed an intensified business co-operation between Russia and China. Russia's shift towards Asia in energy, infrastructure, finance and natural resources sectors was exemplified at this years' APEC summit in Beijing, where Russia signed 17 major bi-lateral business deals with China. It is anticipated that the alliance between the world's second and eighth largest economy will lead to further M&A activity. We have already seen a high profile deal agreed between Russia's Gazprom and China's National Petroleum Corporation in May 2014 for USD 400 billion. This deal could see China, to a certain extent; replace Europe as Russia's main gas export market. The other major energy deal was Rosneft's subsidiary Vankorneft's offer to China National Oil and Gas Exploration and Development to control a 10% stake in its second largest oil field, Vankor.

"Many domestic low-value transactions along with a small number of big M&A transactions involved non-Russian investors."

It is expected that China will continue to look for sources in Russia to power its growing economy. One of the deals on the list is the construction of a storage pump plant on the Shapsha River in the Leningrad Region by the Power Construction Corporation of China, which will cost in the region of USD 3 billion. Another scheduled deal is a transaction between Russian hydroelectricity generator RusHydro and Sanxia, the "Three Gorges" company, to finance, construct and operate several hydro electronic power plants in the far east of Russia.

M&A LEGAL FRAMEWORK

The Federal Antimonopoly Service of the Russian Federation ("FAS") is the central authority to enforce merger rules in Russia. Since the introduction of the strategic clearance under the Federal Law No. 57-FZ on the Procedure for Making Foreign Investments in the Companies Which Have Strategic Importance for National Defence and State Security ("Strategic Investments Law"), governmental interference in merger control procedures has been reduced substantially. Federal Law No. 135-FZ on the Protection of Competition sets out competition rules for both domestic and foreign mergers. Transactions that may be caught by Russian merger control include acquisitions, incorporations, mergers and accessions of companies.

The Russian legislation contains special rules in respect of mergers in particular sectors. These rules are set out in the Strategic Investments Law and relate to 42 strategic economic sectors. Foreign investors who wish to invest in a sector which falls within one of the strategic sector categories need to obtain clearance from the Governmental Committee prior to completing the transaction. There is no formal deadline for submission; however parties should allow sufficient time for review of the underlying documents by the authorities. There are no forms of accelerated procedures for any types of mergers. All filings and formalities need to be complied with, irrespective of whether the transaction raises a concern about fair competition or not.

Transactions need to be cleared if they fall within the definition of concentration and if they meet certain jurisdictional and financial thresholds. If clearance is not obtained, companies could face a fine of up to USD 14,000. A fine can be imposed on entities as well as individuals. FAS also has a power to retrospectively invalidate a transaction if clearance has not been obtained prior to completion. By analysing FAS's past decisions, it appears that in instances where FAS has concerns about the abuse of a dominant position on the market or unfair competition, it tends to issue conditional clearances rather than blocking the transaction completely. Conditional consents normally contain behavioural remedies, such as specific actions or information disclosure requirements. Data shows that only 2% of transactions were prohibited from going ahead last year, whereby half of those prohibited transactions were caused by the parties' non-compliance with administrative formalities leading to lack of transparency of the ownership structure.

Under the Russian merger control legislation, there are also specific rules on acquisition of majority stakes in companies operating in sectors such as nuclear energy, media, gas transportation etc. Furthermore, there are specific rules on investments in the banking and insurance sector. Joint ventures are currently subject to the FAS only if they result in establishment of a new entity. There are no additional jurisdictional or financial thresholds which would qualify joint ventures for FAS approval. There are ongoing debates about a possible reform of the merger control rules in Russia which would introduce clearance procedure for joint ventures.

Specific rules on transfer of LLC shares should also be taken into account. In 2009 a new ruling on the sale and purchase of LLC shares was enacted. In particular, all sale and purchase agreements should now be signed in the presence of a Russian notary. Prior to signing the documents on LLC share purchases, the sale and purchase agreement should be reviewed by the notary. Since notarization of Russian level share-purchase agreements being mandatory is quite a lengthy process, parties to a transaction opting for English law should always consider such notarization as a CP.

However, the most recent changes to the Russian Civil Code and changes to the corporate legislation planned to be introduced in spring 2015 already stipulate for more flexible post-M&A structuring of company governance. Ability to limit executive powers of the sole executive body by using a number of directors with interdependent powers and diversified governance structure if supervisory and management boards are used are the key novelties in Russian corporate law.

WHAT DOES THE FUTURE HAVE IN STORE?

There remains a question mark over how the M&A activity in Russia will develop in the short or medium term. It remains to be seen how much the Ukrainian crisis will affect Russia's M&A pipeline. Companies are no doubt revising their strategic plans and waiting to understand how the geopolitical situation in the region will evolve. Some companies have postponed their commercial activities in the hope that the situation will be resolved in due course and some companies have perceived it as an opportunity to exploit the domestic market.

There is also an unexpected market driver which may provide for an additional number of "internal" M&A transactions in 2015 to help companies survive turbulent times, namely "deoffshorization", a new Russian government initiative to bring part of its residents' income back to the country. The initiative is not new compared to the OECD activity related to tax haven use, but it is expected that it will cause a number of holding restructurings if tax haven-based structures are used and these are used in Russia quite extensively. A small number of transactions aimed at securing properties aimed at optimization of existing holding structures in order to decrease possible extensive tax and administrative burden may also add to the number of M&A transactions in 2015, following the introduction of deoffshorization deals. Despite the fact that the law is fairly onerous and is promised to be eased in the spring of 2015, there are lengthy transition periods set by the law to give Russian beneficiaries of the holding structures enough time to think the situation over and start optimizing their asset holding structures.

Due to the slowdown of Russian GDP growth, decrease in capital investments, an insignificant dropdown in industrial production and the continuing sanctions-war preventing major Russian companies to obtain long-term borrowings and investments abroad, the M&A market has shrunk in its value. It is also expected that the slowing-down of the Russian economy, depreciation of the Russian rouble and political issues may keep pressing the market down even in the first quarter of 2015. Economic and political issues may install a degree of uncertainty about the trends and future of investors' investments, but since the market has turned back to domestic sources, it is time to think whether it is time to consolidate Russia-based production resources which may be underestimated and more accessible to buy in this turbulent time.

The most favourable sectors to invest in are: oil and gas sector with project discontinuation by ExxonMobil, Total, Shell, Statoil, Schlumberger and Halliburton; cement production where the price of cement has decreased or the real estate sector with a general dropdown of prices because of the depreciation of Russian rouble and the economy slowdown.

It is commonly believed that the long term trend on the Russian market will be further "russification", meaning further strengthening of the role of state-owned players, particularly in the energy and financial services sectors. Further, it is assumed that the German model, which entails increased local production and distribution, often using joint ventures, and increased investments in local plants and staff trainings, will be increasingly applied. It is also believed that privatisation programmes will remain open to foreign strategic investors, especially in the transportation and utilities sectors. ■

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ROJS, PELJHAN, PRELESNIK & PARTNERJI

Crisis and New Beginnings

How the sovereign debt crisis and a systemic failure of the domestic banking sector have brought about what promises to be an exciting period in the local M&A market.

The obverse of the Slovenian one-denomination Euro coin carries the phrase "to stand and withstand". The expression is taken from and signifies the first printed literary work in Slovene, published in 1550. With an admittedly interpretative and slightly critical undertone, the content of the phrase can also be put to use in order to describe two facets of Slovenia's corporate M&A market. One had characterized the market, until recently — namely Slovenia's stance towards foreign investment and privatization in the larger part of the past two decades, since the State's proclamation of independence in 1991— a subtle inclination to withstand any significant influx of foreign investment. The other relates to the State's recent struggle to cope with and withstand the consequences of the recent recession, followed by a sovereign debt crisis and a simultaneous critical capital-shortfall in the domestic banking sector. This second facet also designates a turn in perception, which entails some exciting "new beginnings" for the local M&A market.

THE NEW PROPELLERS OF M&A ACTICITY

Slovenia's transition from a centrally planned socialist economy, marked by the State as the owner of all capital, has generally been denoted as gradual. For various reasons— some grounded in a genuine restraint against destabilizing the economy after the State's secession from the Yugoslavian market and others in the struggle of daily politics to perpetuate its importance— the State retained controlling ownership stakes in a significant number of major companies. These stakes ranged from what where designated strategic investment sectors (energy, telecommunications, transport, banking and insurance) to indiscriminate remnants of the planned-economy era (stakes in retailers, breweries, clothing companies and the like). Coupled with an ungracious administrative and tax environment this platform persisted and (with occasional exceptions) withstood notable foreign investment.

The reality of the sovereign debt crisis in the EU, intensified by a capital shortfall in the banking system, has revamped this context. Faced with the EU's demand to consolidate the State's finances, the Slovenian government has initiated in 2013 an extensive privatization process, covering 15 of the State's majority stakes in Slovenian companies. To date, the sales of Helios Group (one of the largest regional paint and coatings manufacturers, acquired by the Austrian Ring Group), Aerodrom Ljubljana (the principal airport in the country and hub for the national carrier Adria, acquired by the German Fraport) and Fotona (a manufacturer of high-performance lasers for medical, dental and aesthetic applications, acquired by Gores Group, a Los Angeles-based investment firm) have been concluded. The process is set to cover twelve other companies, including the national telecommunications operator Telekom Slovenije, the national airline carrier Adria, one of the largest regional sport equipment manufacturers Elan, and the second largest bank in the country's financial system NOVA KBM. These deals are expected to be the main drivers of M&A activity in 2014 and 2015.

At the same time, through the enforcement of security interests on non-performing assets, State-held banks have set in motion an unprecedented activity on the selling side, driven by the sale of distressed assets. This process has for example led to the initialization and in 2014 the closing of likely the largest M&A transaction on the Slovenian market to date, the acquisition of Mercator (the largest Slovenian retailer, with a significant market presence in Croatia, Serbia and Bosnia and Herzegovnia) by Agrokor to create a regional mammoth stretching through six countries. Since sales of distressed assets form a part of the banking sector's restructuring, which remains an absolute necessity for Slovenia, they are expected to significantly boost activity on the M&A market, particularly in respect of small and mid-sized M&A transactions. A wide portfolio of assets, ranging from non-performing receivables to hotel properties is on sale.

FOREIGN INVOVEMENT

The majority of recent M&A transactions have been fuelled by foreign investment, with private equity increasing its presence in Slovenia. The Report on Direct Investment 2013, issued by the Bank of Slovenia1, indicates a net increase of foreign direct investment amounting to EUR 1,147.2. Investments from EU Member States prevail and account for 82,3 % of the value of all foreign direct investment in the first. Neighboring Austria accounts for by far the most significant share, with 34,3 % of all foreign direct investment, followed by Italy (8,4%), Germany (7,7%) and France (7,3%). Well-informed buyers from neighboring countries have indeed played a key role in some of the more notable transactions recently: aside of the sale of Mercator to Croatian Agrokor and the acquisition of the Helios Group by the Austrian Ring Group, Fructal, a fruit products manufacturer, was sold to a Serbian investor in 2011 and Droga Kolinska, a drink and food producer was purchased by the Croatian Atlantic Grupa.

The footprint of US private equity is expected to increase in 2014 and 2015, most notably with several US private equity firms rumored to be throwing their hats into the race for Telekom Slovenije. Otherwise, potential Chinese and Indian investors seem to be testing the market, but remain cautious, and there has yet been no palpable sign of a significant change in approach from these regions.

FINANCING

Debt rather than equity remains the primary source of financing for acquisitions in Slovenia, which is perhaps a consequence of the overall uncertainty in the equity market. A macroscopic refinancing and restructuring procedure continues to dominate the domestic debt market, which was heavily affected by the impact of the financial crisis. A wide-spread capital shortfall made Slovenian banks particularly reluctant to finance any substantial acquisition. In an effort to stabilize and recover the failing banking sector the State has segregated and taken over roughly EUR 4.6 billion in non-performing assets from the banking sector with the creation of the Bank Assets Management Company. An economy-wide private debt restructuring process is now underway under the umbrella of the BAMC. It aims to reignite the economy by recovering what there is to recover from non-performing assets, and revamping the crediting activity of Slovenian banks.

"Faced with the EU's demand to consolidate the State's finances, the Slovenian government has initiated in 2013 an extensive privatization process, covering 15 of the State's majority stakes in Slovenian companies."

—DAVID PREMELČ, PARTNER, ROJS, PELJHAN, PRELESNIK & PARTNERS

The "cleaning-up" of banks' balance sheets through the BAMC should bring an increase of activity on the domestic debt market in the following years. But for now, perhaps as a consequence of a turn in mentality brought about by the brutal effect of financial crisis, local lenders remain cautious to say the least. It should therefore not come as a surprise that in nearly all cases acquisition financing sources have come from foreign financiers. An increasing number of transaction in Slovenia are being financed through the high-yield bond market.

Typically, the target's existing debt remains in place upon a change of control. Investors are however usually required to enter into protracted discussions with existing lenders and restructuring negotiations have become an important aspect of deals.

RECENT DEVELOPMENTS IN THE LEGISLATIVE FRAMEWORK

The financial crisis highlighted certain shortcomings of local legislation, which had not been well-suited to deal with the predicament. Prior to the economic meltdown, financial restructurings were a rarity. After the economic downturn hit, one of the practical risks that lenders were facing was that through measures of financial restructuring and realization of share pledges they had the ability to step into the share-holder structure of the borrowers and take control. The resulting change of control in joint-stock companies would typically trigger a requirement to publish a mandatory takeover bid for shares of minorities. The additional fund-flow that this would require was (for obvious reasons) not an option. This issue stimulated an amendment of the local Takeovers Act, which now provides for an exception from the requirement to publish a takeover bid in respect of cases, where the threshold is exceeded in the course of financial restructuring, subject to prior approval by the Securities Market Agency. The individual exception applies for five years, which is considered sufficient time for lenders to restructure the target and sell it to an investor.

> **"With stability and certainty returning to the economy the local market should become an exciting option for investors in the coming years."**
>
> —BOJAN ŠPORAR, PARTNER, ROJS, PELJHAN, PRELESNIK & PARTNERS

An important consequence of any person (acting alone or with its concert parties) exceeding the takeover threshold, yet failing to publish a successful takeover bid, is the standstill of that person's voting rights. Foreign investors should however not fear "losing" voting rights as all necessary steps towards reaching a successful takeover bid are firmly in their scope of control. Of particular importance in this regard is the interpretation given by the Securities Market Agency to the requirement that an acquirer who exceeds the takeover threshold of one-third of voting rights in a target company cannot exercise any voting rights until the acquirer "issues a mandatory takeover bid" (Article 63 of the Takeovers Act). The Securities Market Agency has adopted a wide interpretation of this rule and considers that an acquirer has and keeps its voting rights even after exceeding the threshold, provided that the acquirer then follows all procedural steps necessary to publish the takeover bid. In practice, the Securities Market Agency's interpretation permits an acquirer to take action and obtain management control over the target immediately upon completion of the acquisition of shares without the need to wait until completion of the takeover bid. Recent practice of the Agency suggest that this view has firmly settled in and may be relied on in future deals.

OUTLOOK

For Slovenia, 2014 seems to have marked a turning point in the long-lasting crisis. With stability and certainty returning to the economy the local market should become an exciting option for investors in the coming years. The processes, which have been initiated to cope with the consequences of the financial turmoil, are expected to continue – they will represent the primary context of M&A activity in 2015 and onwards. The anticipated sale of Telekom Slovenije and the sale of Nova KBM Bank are pegged to represent the keynote transactions. Distressed asset sales are also expected to continue, albeit with some fears that they will bring about subsequent withdrawals of foreign bank activity from Slovenia. Several foreign banks are rumored to have been preparing an exit strategy. In addition, as a result of large capital-shortfall, two local banks (Factor banka and Probanka), have been ordered to close-shop and put under regulated liquidation which will result in full divestment and the cessation of their activities. This should have the effect of further concentrating the domestic financial sector, but since local debt financing is not expected to represent the principal motor for future M&A activity, it should not be of any relevance to the prospects of the market. ■

DAVID PREMELČ
PARTNER

BOJAN ŠPORAR
PARTNER

JAKOB IVANČIČ
JUNIOR ASSOCIATE

ABOUT THE AUTHORS

David Premelč
Rojs, Peljhan, Prelesnik & partners

David joined RPPP in 2006 and has since practiced corporate law, with a primary focus on mergers and acquisitions, corporate litigation and arbitration, media law and data protection. As part of his commercial law and M&A specialization, David has advised many domestic and foreign clients in M&A transactions and corporate restructuring, which include some of the most notable transactions in the financial, media, retail and industry sectors. His recent M&A work includes advising NKBM, the second largest Slovenian bank, in its sale of Zavarovalnica Maribor (the third-largest insurance company in Slovenia), advising Agrokor in its acquisition of Mercator, advising Cimos in its sale of Litostroj Power, advising Antenna Group in its joint venture with Telekom Slovenije, advising Zavarovalnica Triglav (the largest insurance company in Croatia), advising Styria Media Group in its acquisition of Moje delo. David also regularly represents clients in administrative litigation as well as in international and domestic arbitration proceedings and is consulted with on a daily basis on data protection and media law issues.

Bojan Šporar
Rojs, Peljhan, Prelesnik & partners

Bojan Šporar joined (the then) Colja, Rojs & Partnerji in 2007 after his traineeship at Linklaters and court articling at the High Court in Ljubljana. His fields of expertise include M&A, and banking and finance transactions, in which he regularly assists foreign and domestic institutions on banking rules and financial regulations. Bojan's recent M&A work includes advising a client on takeovers, project documentation and financing with respect to the Helios privatisation and heading the core legal team advising Agrokor in its acquisition of Mercator, the largest Slovenian retailer, these being the largest transactions in Slovenia since Novartis' acquisition of Lek (also handled by the firm). He has advised among other OMV AG with respect to a real estate storage capacity acquisition in Slovenia and Kimberly Clark in its acquisition of Balder, a high-technology company. Bojan's recent work also concerned innovative work in bank and leasing companies' originated securitisations (synthetic and traditional) and structured finance deals.

Jakob Ivančič
Rojs, Peljhan, Prelesnik & partners

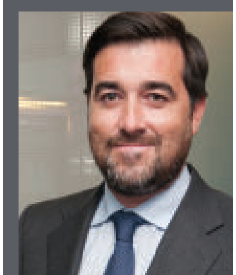
Jakob Ivančič holds a bachelor's degree in law from the University of Ljubljana. He graduated with honours (cum laude) in 2013 and joined Rojs, Peljhan, Prelesnik & partners immediately upon graduation. Jakob has worked on several M&A projects recently, including the acquisition of Mercator, Slovenia's largest retail chain, by Agrokor, the sale and financial restructuring of Helios Group and the acquisition of LIV, one of the largest regional manufacturers of sanitary products, by Fluidmaster. Jakob's practice areas include banking and finance, restructuring and insolvency law, and intellectual property. Jakob was seconded to Allen & Overy, A Pędzich sp. K's banking department in September 2013.

Q&A

REPORTER MARIA JACKSON PUTS THE QUESTIONS TO GARRIGUES

SPAIN'S ROAD TO RECOVERY

As foreign investors flock to Spain, Garrigues maps the key trends driving deal flow.



FERRAN ESCAYOLA
PARTNER
GARRIGUES

Spain's M&A outlook looks vibrant. Long-term investors continue to bet on recovery, which is translating into a healthy pipeline of deals, particularly in the real estate and financial services sectors.

Ferran Escayola, New York-based partner at preeminent Spanish law firm Garrigues, examines the key features of the strengthening investor climate.

WHAT ARE THE KEY TRENDS DRIVING M&A ACTIVITY IN SPAIN?

GARRIGUES: The Spanish M&A market is on a path to recovery, supported by the overall positive performance of Spain's economy during the last 12-18 months. This positive regional performance, combined with a global low interest rate environment, the return of CEO confidence, and key structural reforms in both the Spanish financial and labor markets, has set the stage for a recovery in activity and an increase in international investor interest.

Since 2013, the Spanish economy has been showing signs of stabilization and has in fact returned to a path of slow but continuous growth, with GDP projected to grow 1.3 percent in 2014 and 1.7 percent by 2015, according to the International Monetary Fund. This growth has been largely driven by domestic demand, reflecting the improvement in financial conditions and consumer confidence. Industry activity is accelerating, the positive pulse of the services sector has been maintained, and tourism indicators are at record highs. As a consequence, and with inflation and interests rates remaining at low levels, investors have started to place their money back in the country, as evidenced by the decrease of the Spanish sovereign risk premium. The various stimulus measures undertaken by the Spanish government have resulted in Spain becoming one of the top ten countries worldwide in terms of foreign direct investment inflows.

As a result, Spanish private equity investment volume in 2013 reached EUR2.35 billion - 80 percent of which was realized during the second half of the year, according to research published by the Spanish Private Equity and Venture Capital Association. Spanish private entities raised EUR478 million during 2013, which marks a 90 percent increase compared to 2012. Still well below the 2004-2008 peak levels, the Spanish economy is on track for recovery and international investors are positioning themselves for the uptick. The most significant trends for private equities are the return of large, strategic, cross-border deals, particularly in the biotechnology/genetic engineering (10.4 percent of investment), healthcare (7.4 percent of investment) and telecoms, media and technology sectors (52.5 percent of investment).

We have also seen significant activity in the real estate sector due to low prices, an increase of alternative financing, and new investment options such as the Spanish REITs, or 'SOCIMIs' (ex. Lar España Real Estate, Triangle, GMP, Hispania Inmobiliarios and Merlin Properties). Also, a considerable number of deals have been driven by financial institutions offloading portfolios such as of non-performing loans, consumer loans and residential mortgages (ex. Caixabank, Banco Sabadell, Cataluña Banc and Bankia). Private equity funds such as Blackstone purchased Cataluña Banc's real estate platform of foreclosed real estate assets.

During 2014, we have seen a number of strategic M&A transactions driven by further consolidation of the European telecoms, media and technology sector, such as the sale of ONO to Vodafone, or the acquisition of Jazztel by Orange, which are pending completion.

Another trend has been a number of Spanish corporates seeking growth via M&A in attractive markets outside the Eurozone (Telefonica acquired Brazilian GVT, Ferrovial acquired Australian Transfield) or streamlining their portfolios by disposing of non-core assets (Telefonica sold Telefonica Czech Republic to PPF).

TO WHAT EXTENT HAS THE MARKET WITNESSED A RENAISSANCE IN PRIVATE EQUITY DEALS?

GARRIGUES: Private equity buyers are pulling the trigger on deals in Spain after several years of remaining on the sidelines, as evidenced by the capital inflows and number of transactions. The main reasons behind this trend are the lack of traditional lending by domestic banks and that the belief valuations are relatively low matching the spread between sellers and buyers.

This trend has been shared by both national and international private equity funds, although the most important transactions have been carried out by international names such as Triton Partners (acquisition of Befesa Medio Ambiente to Abengoa), Doughty Hanson (acquisition of Clínica Teknon to Magnum Industrial Capital Partners) and Bridgepoint (acquisition of the stake owned by CVC in Dorna Sports) in 2013, to name a few.

Also in 2013, the U.S. private equity group Apollo acquired via auction process a unit of one of Spain's nationalized banks, EVO Banco, in the first investment of its kind in the country since the start of the financial crisis.

In April 2014, CVC acquired Deoleo, the Spanish olive oil producer, outbidding Carlyle, PAI and Rhone Capital, and last July CVC acquired 62 percent of Grupo Hospitalario Quiron for EUR1.2 billion to create the leading Spanish hospital group.

"Private equity buyers are pulling the trigger on deals in Spain after several years of remaining on the sidelines."

Spanish infrastructure assets were also in the spotlight: in June 2014, Cinven acquired the fiber network of Gas Natural Fenosa (Gas Natural Fenosa Telecomunicaciones) for over EUR500 million, allowing it access to 30,000 kilometers of network across Spain, Central America, Panama and Colombia; and in October, KKR acquired a 33 percent stake in Acciona Energia International for EUR400 million.

HOW SUCCESSFUL HAVE RECENT PE EXITS BEEN; WHAT ARE THE PREFERRED EXIT METHODS?

GARRIGUES: There have been a number of private equity divestitures during 2013 and 2014, with funds seeking to monetize investments they completed during the last economic cycle either via trade sale, IPO or disposing their portfolios at a secondary level. Trade sale to a third party has been the dominant route for private equity firms to unload their Spanish investments (39 percent of divestments in 2013), followed by sales to the previous owners (20.5 percent of the divestments in 2013) and secondary buy outs (11 percent of the divestments in 2013). Notwithstanding, funds have started considering IPOs as an alternative exit route for their investments.

In May 2014, Carlyle and Investindustrial listed Applus, the industrial testing specialist which they acquired in 2007 on the Madrid Stock Exchange, for EUR1.1 billion. They rejected interest from rivals looking to acquire the company outright, choosing instead to sell part of its stake in an IPO. Another U.K. fund decided to turn to the market in April: Permira listed eDreams Odigeo, a Spanish online travel company which it had acquired in 2010.

But we have also seen examples of underlying companies acquired by third companies. In March 2014, Providence Equity Partners sold ONO, Spain's second largest cable operator to Vodafone for $10 billion. The transaction enabled Vodafone to take advantage of the rapid increase in the adoption of Internet and mobile products and services in the Spanish market.

IN 2014, SPAIN SET OUT NEW LEGISLATION GOVERNING PRIVATE EQUITY INVESTMENTS; WHAT ARE THE KEY FEATURES OF THE NEW REGULATIONS?

GARRIGUES: The new regulation regarding private equity was published on November 13, 2014. Law 22/2014 on private equity and close-ended collective investment (inversion colectiva de tipo cerrado) (the 'PE Law') is the result of the implementation of UE Directive 2011/61 and has been enacted for the purposes of generating efficient investment channels, ensuring market stability and investor protection and fostering balanced growth.

The PE Law establishes five types of collective investment entities, the existing private equity entities (entidades de capital riesgo); close-ended collective investment entities (entidades de inversion colectiva de tipo cerrado) that without having a commercial or industrial purpose, raise capital from a number of investors through marketing activities to invest in all types of financial or non-financial assets under a defined investment policy; the European private equity funds (fondos de capital riesgo europeo); and a special type of private equity entities - SME private equity entities (ECR-Pyme).

The main legal features contained in the PE Law are the simplification of the incorporation requirements, the inclusion of restrictions for investments in their investment policies, disclosure requirements regarding strategy, regulation on leverage and investment risk policies. Also regulated is the minimum share capital: EUR1.2 million for a private equity entity; EUR1.65 million as minimum commitment for private equity funds; and EUR0.9 million for SME private equity entities; which may be divided into different classes of shares.

The PE Law also introduces a new regimen of commercialization and marketing, establishing differences between commercialization in Spain and in the UE together with penalties and sanctions in the event of non-compliance.

WHAT OTHER REFORMS HAS SPAIN RECENTLY UNDERTAKEN OR PROPOSED THAT COULD SIGNIFICANTLY STRENGTHEN ITS INVESTMENT PROFILE?

GARRIGUES: While the Spanish economy and its real estate market are expected to show little growth for the next three years, the Spanish government is taking the necessary steps to improve the financial situation and provide comfort to international investors, through different measures ranging from the restructuring of the banking sector to the enactment of new legal solutions to attract direct investment, such as: (i) a reviewed regime for Spanish REITs (SOCIMIs); (ii) legal reforms to promote the Spanish Alternative Fixed-Income Market (MARF) and boost the high-yield bond market; and (iii) allowing new asset disposal structures such as Banking Asset Funds (BAFs) to acquire, in very attractive tax terms, real estate assets, portfolios, loans or credits related to developers' activities.

From July 2012 to January 2014, the Spanish government undertook a major program of financial sector reform. The program included the incorporation of SAREB, a majority-private-owned company managed by an asset management corporation owned by the Spanish government. The so called Spanish 'Bad Bank' received most of the 'bad assets' from Spanish banks and 'cajas' with the aim to dispose the approximately 200,000 assets transferred by financing entities, which represents an investment opportunity due to low asset prices.

On the venture capital side, the Spanish government implemented an investment vehicle named Axis, which is a venture capital manager owned by Instituto de Crédito Oficial (a state-owned bank attached to the Ministry of Economic Affairs and Competitiveness). Axis manages four different funds –'Fond-ICO Global', 'Fond-ICOpyme', 'Fondo ICOinsfraestructuras' and 'Isabel La Católica Fund'- to promote the creation of venture capital funds, provide support for SME's expansion plans, in the form of finance and a long-term business vision, participate in projects involving transport infrastructure, energy and services and provide equity co-investment with business angels and other non-institutional investors for the financing of innovative companies.

IN 2013 GARRIGUES LAUNCHED INDEPENDENT OFFICES IN MEXICO, PERU AND COLOMBIA; TO WHAT EXTENT ARE YOU SEEING INCREASED DEMAND FROM LATIN AMERICAN INVESTORS INTO IBERIA?

GARRIGUES: Through our new offices in Mexico, Peru and Colombia, and the existing Sao Paulo office, Garrigues offers a multidisciplinary focus on practice areas and industries that are particularly relevant to the increased demand in Ibero-American two-way investment M&A, not only to serve intra-regional or U.S.-related transactions, but also the new cross-Atlantic investment market for Latin American investors into Spain and Portugal.

2013 was the first year in which Latin American investment in Spain was greater than Spanish investment in Latin America. Headline M&A transactions included the acquisition of Campofrio Food Group by a subsidiary of Mexican Alfa, the acquisition by Mexican Grupo Alsea of Spanish Grupo Zena (Fosters Hollywood, La Vaca Argentina Domino's Pizza and Burger King franchises), or the most recent $875 million investment by Carlos Slim's Inmobiliaria Carso in Spanish builder FCC.

We expect Ibero-American deal flow to continue and increase in equity and debt transactions, particularly in retail, consumer goods, hospitality, media and financial services.

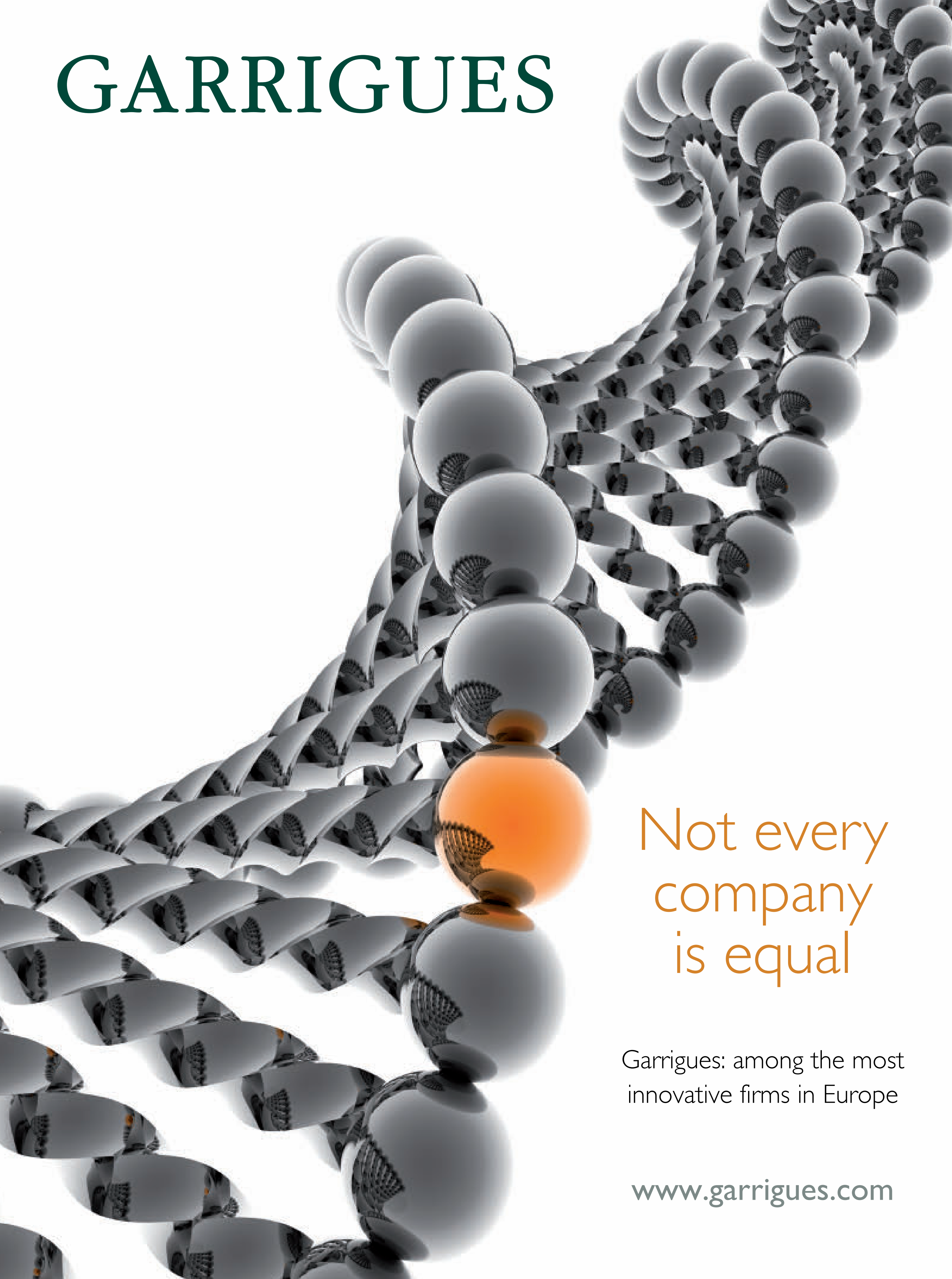
ABOUT THE AUTHOR:

Ferran Escayola, partner

Ferran Escayola is the managing partner of Garrigues' New York office. His practice focuses on Spanish corporate and commercial law, domestic and cross-border mergers and acquisitions, private equity and acquisition finance. In particular, Ferran has significant experience in multijurisdictional private equity acquisitions and foreign investments.

Ferran has 15 years of professional experience. Prior to joining Garrigues in 1999, he was an associate in the corporate and business law department of an international firm.

Ferran graduated from Universidad Autónoma de Barcelona in 1995 and completed a specialization in European Community Law. He proceeded to obtain a Masters of Law (L.L.M.) in International Economics Law (with honors) from Howard University School of Law and supplemented his studies by completing a post-graduate program at Harvard Law School. From July 2005 through June 2006, he worked as a foreign associate in the M&A department of Skadden, Arps, Slate, Meagher & Flom, LLP, in New York.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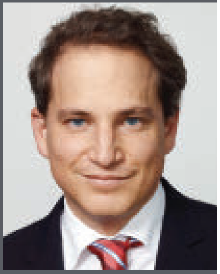
Q&A

REPORTER MARIA JACKSON PUTS THE QUESTIONS TO HOMBURGER

SWITZERLAND: INVERSION TRANSACTIONS

Swiss law firm Homburger discusses the key advantages of Switzerland as a destination for corporate inversions

DANIEL DAENIKER
MANAGING PARTNER



DAVID OSER
PARTNER

Switzerland continues to be a jurisdiction of choice for companies to locate their international corporate and tax headquarters, as evidenced by the steady stream of multinationals that have set up operations in the country over recent years. The incentives for companies to come to Switzerland remain unchanged: competitive tax rates, excellent transport links, a central European location, access to a highly-skilled and diverse workforce, clusters of business competence and flexible labor laws.

Daniel Daeniker and David Oser, both partners in the corporate team at Homburger, discuss the recent uptick of inversion transactions, in particular out of the United States, and the key features that make Switzerland and its legal regime an attractive jurisdiction.

IN BASIC TERMS, WHAT IS AN "INVERSION" TRANSACTION?

HOMBURGER: Most inversions today are accomplished via a merger with another company, often a smaller company incorporated in the foreign country of choice. Early deals were reverse mergers: a company incorporated in one jurisdiction was acquired by a foreign subsidiary incorporated in the target jurisdiction. The exiting company's corporate structure was thus "inverted".

Switzerland has seen a number of these early inversion transactions, when companies such as Paris Re, Orascom, Noble Biocare, Ace, Transocean, Noble Corporation, Weatherford, Foster Wheeler and Allied World moved the corporate and tax headquarters of their respective group holding companies to Switzerland. These companies mostly originated from Bermuda or the Cayman Islands, where U.S. companies had inverted to in the early 2000s.

Switzerland has so far not been as prominent in inversion transactions achieved through mergers with other companies. Many of these inversions resulted in a move of the corporate and tax headquarters of the group holding company to Ireland (e.g., Actavis / Warner Chilcott), the U.K. (AbbVie / Shire plc) or the Netherlands (Applied Materials / Tokyo Electron). Transactions that did involve Switzerland were the combination of Lafarge and Holcim, where the top company will be domiciled in Switzerland, and the proposed Sulzer-Dresser Rand (triangular) merger, which ultimately did not go through.

The new wave of inversions has sparked controversy, particularly in the U.S., and calls for reform to make inversions less attractive or flatly prohibit them. U.S. legislation dating back to 2004 effectively eliminated group-internal inversions from the U.S. If a company wants to invert, it must therefore merge with another company. U.S. law also requires that the inverted company's shareholders own less than 80 percent of the combined entity in order to qualify for the lower taxes of the foreign country where it inverts to.

INVERSION TRANSACTIONS FIRST BECAME PREVALENT IN THE 1990S, WHAT HAS DRIVEN THE RECENT UPTICK IN THESE TYPES OF DEALS? HOW DOES SWITZERLAND COMPARE?

HOMBURGER: There are various factors that influence a company's decision to reincorporate to another jurisdiction. In the case of Switzerland, reasons often given are its central location that permits management better to coordinate and interact with the group's worldwide operations, its liberal labor laws (in particular its absence of works council consultation and approval requirements), its long-term stability and predictability and its excellent infrastructure and education system.

Of course, tax benefits are also relevant factors that led, and continue to lead, companies to make Switzerland their jurisdiction of choice. Tax has likely been the biggest driver in the most recent uptick of inversion transactions. Particularly since U.S. companies' corporate tax rates are among the highest in the world, compared with countries such as Switzerland where corporate tax rates are significantly lower:

• In Switzerland, group holding companies are exempt from cantonal taxes and only federal tax is payable at an effective tax rate of 7.8 percent. A holding company privilege applies to companies whose primary activity is the holding of qualifying investments, who have no active trade or business in Switzerland and if two-thirds of their total assets/income are in the form of subsidiary investment/dividends.

• A full dividend income exemption is generally available for shareholdings of at least 10 percent with no holding period requirement.

• While the domestic rate of withholding tax applied to dividends is generally 35 percent, there are significantly reduced rates with countries where a double taxation treaty exists. Moreover, in most inversion transactions, in particular if effected through a merger transaction, the holding company of the combined group will acquire significant additional paid-in capital (APIC), also referred to as contribution reserves, which will allow the combined company to pay back cash to shareholders in the form of withholding tax free dividends for years.

WHAT ARE THE KEY FEATURES OF SWITZERLAND AND ITS LEGAL REGIME THAT DISTINGUISHES IT AS A LEADING JURISDICTION FOR INVERSION TRANSACTIONS?

HOMBURGER: In addition to the reasons outlined above, what we believe has also become increasingly important for companies considering an inversion transaction, is the corporate law structure that they find in their jurisdictions of choice. Homburger has recently participated in a detailed analysis of Swiss, Irish and Delaware law, and one of the key findings has been that – while in its tradition a civil law jurisdiction – Swiss law's flexibility and its overall approach come very close to the U.S. approach. In particular, the rules applicable to directors' duties and decision-making are applied in practice very similarly:

Tax benefits are relevant factors that continue to lead companies to make Switzerland their jurisdiction of choice. Tax has likely been the biggest driver in the most recent uptick of inversion transactions.

• Board meetings can be conducted and decisions made in the same way as for a Delaware corporation.

• Switzerland has its own version of the business judgment rule, which in its effect is almost identical to the U.S. original.

• Derivative actions by shareholders on behalf of the company against directors are possible in some circumstances, but are very rare in practice. There has not been any successful director's liability lawsuit on record outside bankruptcy. U.S. courts, which have ruled on derivative actions brought by U.S. plaintiffs against directors of Swiss companies, have consistently rejected jurisdiction and insisted on the application of Swiss corporate law.

• Directors' and officers' indemnification is possible, D&O insurance at the expense of the company is permitted, and companies can advance costs to directors and officers, except in case of an egregious breach of duties.

• Companies incorporated in Switzerland that are only listed on a foreign, particularly a U.S. exchange, are, unlike companies incorporated in other European jurisdictions, not subject to the "home country's" securities and takeover rules. Among other things, this means that there is no additional layer of complex prospectus and related requirements in connection with equity issuances that need to be reconciled with the applicable U.S. rules and regulations, including those of the SEC. Companies that elect to also list on SIX Swiss Exchange are at liberty to prepare consolidated financial statements under U.S. GAAP; no reconciliation to International Financial Reporting Standards (IFRS) is required.

Some commentators have noted that Switzerland may have lost favor in recent years because, among other things, of tighter banking regulations and new rules stipulating that shareholders should be allowed to vote on directors' and executives' compensation. Our experience is that the new regulations are not as relevant as has been suggested:

• Tightening banking regulation is rarely a factor to consider in connection with inversion transactions, since financial institutions have so far not used these structures in merger or similar transactions. Moreover, Switzerland is in line with the general regulatory trend following the recent financial crisis.

• It is true that Switzerland has introduced new "say-on-pay" rules in 2014, requiring Swiss-incorporated companies listed on a stock exchange to, among other things, seek annual shareholder ratification of directors' and executives' compensation. The rules implement a popular ballot initiative sponsored by a group spearheaded by Thomas Minder, today a member of Switzerland's Senate, and are therefore often referred to as "Minder" or the "Minder Ordinance." Unlike in other jurisdictions, the shareholder vote on compensation is binding, rather than advisory.

Switzerland has therefore gone into the lead when it comes to "binding" shareholder votes on compensation (recognizing though, that the EU is currently proposing a "binding" say-on-pay regime across the EU applicable to EU-registered companies that have a listing on an EU-regulated market). However, a review of the 2014 proxy season shows that the effects of these rules are not as drastic as has been suggested. In all but a single exceptional case, shareholders approved all director-proposed charter amendments to implement the Minder Ordinance with overwhelming majority. Proxy advisory firms such as ISS or Glass Lewis have consistently supported these proposals, except where companies have not complied with "overboarding" recommendations or have not excluded stock option grants to non-executive directors, something companies with a U.S. background have long been familiar with.

The implementation effort in the 2014 proxy season has also brought clarity to a number of important issues that were debated because of some of the prohibitions Minder introduced, such as the vaguely defined prohibition to pay severance, "advance compensation" or certain transaction-related incentive payments. In particular, it has been established that it remains permissible:

• to pay full compensation (including variable compensation based on prior practice or at target) during a 12-month garden leave period;

• to pay consideration for non-compete covenants after termination of employment;

• to have plans provide for accelerated vesting of equity awards, including in a change of control situation, and vesting at target.

Further, new hires can be compensated for any prejudice incurred in connection with the change of employment; sign-on bonuses thus remain possible.

There is general consensus that the proxy season 2015, where Switzerland will be seeing the first Minder say-on-pay votes, will be no different. In particular, there should hardly ever be a situation where companies will not be able to pay out compensation because of a shareholder "No" vote. The Minder Ordinance allows companies to seek shareholder approval on a forward-looking basis. This means that shareholders, for example at the 2015 AGM vote on the compensation for fiscal year 2016. If there ever should be a "No" vote, there is plenty of time for the company to convene an extraordinary general meeting and seek shareholder approval of an alternative proposal. Moreover, the Minder Ordinance does not prohibit companies to pay out compensation during any "interim" period during which shareholder approval remains outstanding.

It should also be recognized that shareholders do not vote on the individual director's and executive's compensation, but rather on the aggregate amount of compensation that the company can pay during the forward-looking period. In substance, even though shareholders are presented with specific aggregate figures, shareholders thus in effect vote on the remuneration policy of the company. This is similar to what is required in the U.K. and is currently being proposed at the EU level.

Overall, it is therefore fair to say that Switzerland continues to have a competitive and flexible corporate law structure that is well geared to inverted companies.

WHAT SKILLS AND EXPERIENCE MARKS HOMBURGER AS A PARTNER FOR INVERSION TRANSACTIONS INVOLVING SWITZERLAND?

HOMBURGER: Homburger is uniquely positioned for inversion transactions and the subsequent ongoing advice to inverted companies. Homburger was involved in the first wave of redomestication moves to Switzerland in 2006 to 2010, when companies such as Paris Re, Noble Biocare, Orascom, Transocean, Tyco International or TE Connectivity moved their corporate and tax headquarters of their group holding companies to Switzerland. More recently, we have been involved in transactions that were accomplished through a merger or similar M&A structure; for example, both authors have been advising Holcim on its merger with Lafarge. Homburger continues to advise a number of inverted companies on Swiss corporate law and tax issues and has developed a broad, international view of corporate law that is essential in servicing companies contemplating, implementing and succeeding in inversion transactions.

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Daniel Daeniker is managing partner of Homburger AG, one of Switzerland's leading law firms based in Zurich. He studied law at the Universities of Neuchâtel and Zurich, from where he graduated in 1987 and obtained a doctorate in 1992. He also studied at The Law School of the University of Chicago, from where he graduated as an LL.M. in 1996. He was admitted to the bar in 1990, became partner of Homburger in 2000 and has been managing partner since 2013.

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David Oser is a partner in Homburger's Corporate | M&A Team. He graduated from the University of Basel, from where he also received his PhD. David Oser holds an LL.M. degree from Columbia Law School and was admitted to the bar in Switzerland and New York in 1998 and 2001, respectively. Prior to joining Homburger he practiced at a New York law firm. He has been a partner of Homburger since 2008.

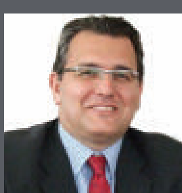
Q&A

REPORTER MARIA JACKSON PUTS THE QUESTIONS TO BENER

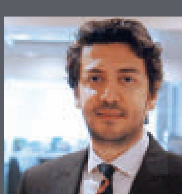
TURKEY: AN M&A GATEWAY

Bener Law Office discusses Turkey's growing profile as a center for international M&A deals

CEM DAVUTOĞLU
PARTNER



ONUR KORDEL
PARTNER



ONUR KÜÇÜK
PARTNER

WIN MICHAELSEN
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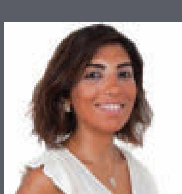

GÖZDE ESEN SAKAR
PARTNER

Bener Law Office is a full-service, independent Turkish law firm with a strong international practice. Around 70 percent of the firm's clients are multinational companies, and its core activities range from advising on entry into the Turkish market through to IPOs, high-profile M&A, privatization projects and dispute resolution. In 2014, the firm merged with corporate boutique Davutoğlu Attorneys at Law, which boosts the firm's capability in complex M&A and finance deals. This comes on the back of its recent high-profile hire of Şelale Kartal, formerly head of litigation at Cerrahoglu Law Firm, and its acquisition of four-lawyer litigation boutique Küçük & Küçük Law Firm in 2011. Bener has also recently moved into new offices, demonstrating its commitment to an ambitious growth strategy.

Partners Cem Davutoğlu, Onur Kordel, Onur Küçük, Win Michaelsen, and Gözde Esen Sakar outline Turkey's key attractions for investors, and explain how Bener's recent growth marks it as a key partner for foreign companies looking to conduct deals in the country.

HOW DO TURKEY'S SOLID BUSINESS FUNDAMENTALS DISTINGUISH IT AS AN ATTRACTIVE MARKET FOR FOREIGN INVESTORS?

BENER: Turkey is similar to other emerging economies in some aspects, yet very different with respect to others. Recently, Turkey's political situation has stabilized somewhat and the country regained its investment grade credit rating after an 18-year hiatus. Turkey's obvious advantages include a geographically strategic position and its 1995 Custom Union with the European Union (EU). The agreement allows free circulation of industrial and processed agricultural products in Europe and harmonizes Turkey's trade policies, legislation and custom tariffs with those of the EU. Turkey's large and relatively high-income market is young and powered by a dynamic private-sector economy. Its business infrastructure surpasses those in emerging Asian countries, as well as those in similar EU markets.

A sound macroeconomic strategy, in combination with prudent fiscal policies and major structural reforms in effect since 2002, has integrated the Turkish economy into the globalized world, while transforming the country into one of the major recipients of foreign direct investment ("FDI") in its region.

As structural reforms have strengthened the macroeconomic fundamentals of the country, the economy has continued to perform strongly: Turkey posted a real GDP growth rate of 5 percent between 2002 and 2012. Turkey's impressive economic performance over the past decade has encouraged experts and international institutions to make confident projections about Turkey's economic future. According to the OECD, Turkey is expected to be the fastest-growing economy among the OECD members during 2012-2017, with an annual average growth rate of 5.2 percent.

Alongside stable economic growth, Turkey has also reined in its public finances; the EU-defined general government nominal debt stock fell to 36.3 percent from 67.7 percent between 2003 and 2013. Hence, Turkey has been meeting the "60 percent EU Maastricht criteria" for public debt stock since 2004. Similarly, during 2003-2013, the budget deficit decreased from more than 10 percent to less than 3 percent, which is one of the EU Maastricht criteria for the budget balance.

Turkey's GDP has increased dramatically, climbing to $820 billion in 2013, up from $305 billion in 2003 - during the same period, GDP per capita has soared from $4,565 to $10,782. The visible improvements in the Turkish economy have also boosted foreign trade, while exports reached $152 billion at the end of 2013, up from $47 billion in

2003. Similarly, tourism revenues, which were around $14 billion in 2003, exceeded $32.3 billion in 2013.

Turkey is the 16th largest economy in the world and would equate to the 6th largest economy in the EU, according to GDP figures in 2013.

TO WHAT EXTENT DOES TURKEY'S POSITION AS A GATEWAY BETWEEN THE EU AND THE MIDDLE EAST PROVIDE GREAT OPPORTUNITIES FOR INVESTORS?

BENER: Turkey is a natural bridge between both East-West and North-South axes, thus creating an efficient and cost-effective outlet to major markets. It is a springboard to 1.5 billion customers in Europe, Eurasia, the Middle East and North Africa, providing access to multiple markets worth an aggregate $25 trillion in GDP.

Turkey is also the second biggest reformer among OECD countries in terms of easing its restrictions on FDI. It has a very business-friendly environment; notably, it takes an average of six days to set up a company in Turkey, while the average among OECD members is more than 11 days.

A sound macroeconomic strategy in combination with prudent fiscal policies and major structural reforms has integrated the Turkish economy into the globalized world, while transforming the country into one of the major recipients of FDI in its region.

Turkey receives both industrial and services projects in terms of FDI. Istanbul is the key conduit for these investments and attracted over half of the country's total FDI projects between 2007 and 2012, benefiting from its geographical location, well-developed infrastructure and educated workforce. Other major cities such as Izmir, Ankara and Bursa are also significant sources of FDI. Real estate, hospitality, construction, energy and heavy industries have been the dominant sectors in terms of FDI, however, knowledge-driven sectors such as business services, information and communication technologies, and financial services generated more than one third of FDI projects in recent years.

Stunning view from Bener's new building

Although investors across the globe recognize Turkey's potential, most of its FDI derives from developed countries. International investors are expecting Turkey to become a regional and global hub in the next decade.

IN 2013, TURKVEN ACQUIRED A MAJORITY STAKE IN MEDICAL PARK SAGLIK HIZMETLERI, TURKEY'S LARGEST HEALTHCARE GROUP; TO WHAT EXTENT DOES THE DEAL ILLUSTRATE SOME OF THE KEY TRENDS DRIVING TURKEY'S M&A MARKET?

BENER: The transaction clearly shows that private equity firms still see opportunities in the healthcare market. We represented the CEO of Medical Park and his family in the deal, who owned a 30 percent share of the company. He and his family members transferred 5 percent of his shares and remained one of the major minority shareholders. After several negotiations with private equity firms, the shareholders agreed to sell 50.1 percent of the shares of Medical Park to Turkven, a local private equity firm. It is important to note that the Carlyle Group, which acquired a 40 percent stake in Medical Park in 2009, fully exited from Medical Park. As a part of transaction, another reputable Turkish group, Sancak Group, also sold around 5 percent of its shares to Turkven.

In another high-profile indicator of international private equity interest in the Turkish health sector, in 2011 we saw the acquisition of a 50 percent stake of Acibadem Hospital Group by Khazanah and Integrated Healthcare Holdings, which is 70 percent owned by Khazanah and 30 percent owned by Japan's Mitsui, from Dubai-based private equity firm Abraaj Capital. Turkey has been able to attract an impressive level of FDI into its health and social work sector. FDI inflows to the industry increased at a CAGR of 39 percent from 2008 to 2012, reaching to $545 million in 2012. Turkey is expected to experience continued economic expansion and rising incomes which, in turn, will create more demand for health services and products. These increases are reflected in the healthcare spending projections. Furthermore, the Turkish government also has plans to increase the number of foreign patients and boost health tourism by setting up new hospitals under PPP schemes.

BENER ALSO ADVISED POLISAN IN ITS ACQUISITION OF A CHEMICALS PRODUCTION FACILITY IN GREECE; IS IT FAIR TO SUGGEST THAT TURKISH COMPANIES ARE BECOMING MORE ACQUISITIVE INTERNATIONALLY?

BENER: We acted for Turkish company Polisan in the acquisition of a chemicals production facility in Greece together with a local law firm, Dryllerakis & Associates. Polisan is mainly active in the coating business in Turkey but it also has interests in companies in the ports, textile and chemicals sectors. For diversification purposes, it looked to enter into a new line of business (the PET production business) within the chemicals industry. The main reasons behind the investment are: Greece is geographically close to Turkey, which makes shipments easier; Greece is a member of the EU, which opens a door into Eastern Europe and the Balkans; and there is also a chance of an economic rebound in Greece in the near future.

Many Turkish companies are now investing abroad. The investments are generally made by way of acquisition of companies operating in the same or very similar sectors. Generally speaking, the continuous economic growth of Turkey has created significant liquidity among Turkish companies, providing excellent conditions for outbound investment. On top of this, the economic crisis in Europe gifted Turkish companies with the opportunity to acquire competitors in Southern Europe, or enter into similar business lines there. From a different angle, the economic crisis in Europe put some Southern European companies into financial distress and they have been forced to sell foreign subsidiaries to survive. For example, La Seda de Barcelona, which is a leading Spanish company operating in the PET production business, entered into bankruptcy proceedings and the court-appointed administrator sold its Turkish subsidiary, Artenius TurkPET, to Indorama, which was selected through a bidding process. We acted for the administrator during the sale.

IN 2014, BENER LAW OFFICE MERGED WITH DAVUTOĞLU ATTORNEYS AT LAW, HOW DOES THE COMBINATION AUGMENT THE FIRM'S CORPORATE AND M&A EXPERTISE?

BENER: The merger with Davutoğlu solidifies Bener as a leader in advising on cross-border, complex M&A and finance transactions. The legal market today is more competitive than ever, especially for mid-to-large cross-border

Turkey is a natural bridge between both East-West and North-South axes, thus creating an efficient and cost-effective outlet to major markets. It is a springboard to 1.5 billion customers in Europe, Eurasia, the Middle East and North Africa.

mandates. The presence of several global firms in Turkey means that, to compete effectively, a domestic firm must bring all the experience and resources that the foreign law firms offer, while remaining flexible enough to tailor the strategy and approach to the individual deal. Davutoğlu's firm founder, Cem Davutoğlu, has 16 years' experience of providing bespoke corporate and financial services advice. Plus, Cem's reputation for uncompromising integrity means that the Bener name continues to be recognized as a dynamic solutions provider that puts the client's interests first. On a personal level, Cem's positive demeanor is a welcome addition to an already great team.

WHAT IS THE OUTLOOK FOR THE TURKISH M&A MARKET GOING INTO 2015?

BENER: Turkish M&A activity remained robust in 2013: there were 217 deals recorded with a total deal value of around $17.5 billion.

In 2013, privatizations mostly occurred in the energy sector, which reached a deal volume of around $6.6 billion. Toroslar, Ayedas, Baskent Dogalgaz, Kangal Thermal Power Plant, Dicle Elektrik, Doğu Aras Elektrik, Vangölü Elektrik and Hamitabat Elektrik were among the target energy companies acquired by Turkish groups via privatization.

The Turkish Privatization Authority also tendered two media companies (Show TV and Aksam Media Group) with a total deal value of $0.5 billion. In addition to energy assets, Galataport (an infrastructure project) has been retendered for the amount of $702m to Dogus Holding.

In 2013, energy took the lead in terms of number and value of M&A deals. Food & beverage, retail, services, wholesale & distribution were also among the most active M&A sectors. M&A in e-commerce and the internet & mobile services sectors also increased.

During 2014, M&A targeting Turkish companies was valued at $9.6 billion for the first three quarters. Until the end of Q3 of 2014, the most active sector by value was energy, mining and utilities. Recent headline deals included IC Ictas Energy's $2.67 billion acquisition of Yeniköy Yatagan Elektrik and Kemerköy Elektrik from the Government of Turkey; Elsan Elektrik's $1.09bn acquisition of Yatagan Termik from the Government of Turkey; and Safi Kati Yakıt's acquisition of Derince Port from the Government of Turkey, which was worth $543 million.

We believe that the consumer and retail sector has shown a very high level of activity in 2014. Also, financial investors are focusing strongly on the e-commerce, retail, healthcare and food & beverage sectors.

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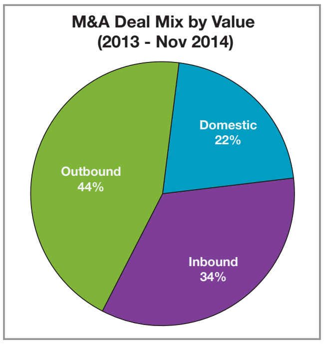
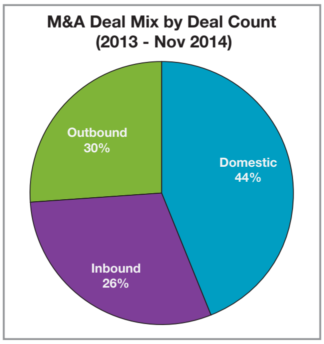
HERBERT SMITH FREEHILLS

M&A in the UK

The market landscape and key issues for international participants

The UK M&A market remains by far the leading target jurisdiction in Europe for cross-border M&A. Purely domestic deals are increasingly uncommon with cross-border activity accounting for the majority of deal count and almost 80% of value (see pie charts below).





SOURCE: THOMSON REUTERS

The US is a key jurisdiction – US entities are by far the largest acquirers of European (including UK) targets. Deals involving financial buyers now account for around a quarter of all M&A and almost 40% of value (see graph on next page). With the UK economy performing more strongly than many European neighbours and inbound M&A set to increase, it is important for non-UK buyers to understand where UK practice may differ from M&A in other jurisdictions.

ENGLISH LAW AND DISPUTE RESOLUTION

English law is chosen by buyers and sellers around the world to govern M&A agreements even where the deal has little or no connection to the UK. The basic principle under English law is that parties have freedom to contract on whatever terms they choose. There are very limited areas where English law principles will override the express terms of the contract and terms are rarely implied into a contract by English law or the English courts. This means that the principle of "caveat emptor", or "buyer beware," applies – a buyer will only get the protection that is written into the contract; there is also a lower possibility of claims outside the contract.

In terms of dispute resolution, generally English courts are considered fair and of good quality. Cases are decided by a judge rather than a jury and damages are also determined by a judge. Litigation costs generally are borne on a "loser pays" principle and unlike other jurisdictions there is little risk of punitive damages.

As well as English contract law, buyers may need to consider the requirements of the UK Companies Act 2006 (the main statute regulating companies in the UK), the UK Takeover Code (discussed further below) and relevant securities laws including the Listing Rules applicable to companies with UK listed shares.

PUBLIC M&A

In the UK, an acquisition (or takeover) of a publicly traded company is generally effected in one of two ways. Which method is used will be driven by certain factors on the deal, for example whether the takeover is hostile or recommended by the target board of directors.

The first method is a "contractual offer", similar to a US tender offer, where an offer is made by the bidder to the target shareholders who choose whether or not to accept. The offer will be subject to a series of conditions, in particular an "acceptance condition". If the bidder acquires or receives acceptances in respect of more than 50% of the shares in the target company, the bidder will be able to close the deal, though often it will decide only to close once it receives a higher level of acceptances. Generally, if the bidder acquires 90% of the target shares it is able to "squeeze out" the minority.

The other method is by way of a court approved "scheme of arrangement" proposed by the target board. Under this statutory procedure the scheme must approved by a majority in number, representing at least 75% in value, of target shareholders who vote. The scheme must then be sanctioned by the court and is only effective once the court order sanctioning the scheme has been registered at the companies' registry. The effect of the scheme is to make the bidder the holder of all of the shares in the target company.

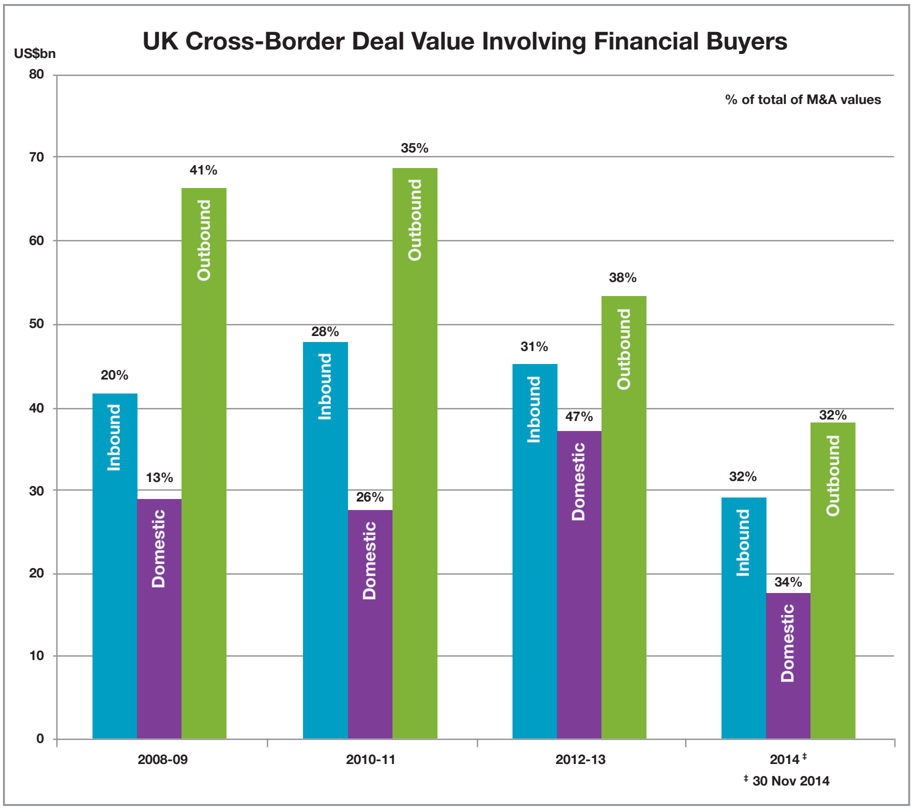
Whichever method is used, a takeover of a UK public company is governed by the UK Takeover Code and overseen by the UK Takeover Panel. The Takeover Code is based on a set of six General Principles underpinned by more detailed rules which govern, amongst other things, the timetable for the offer and the information which each party must give to the target shareholders.

The Takeover Panel itself is not interested in the merits of the bid but ensures that the Takeover Code is adhered to. It plays a very important, and active, role in regulating bids and its hands-on approach is different to most regulators. There is very little court intervention or tactical litigation in public M&A in the UK in part because of the role that the Takeover Panel plays.

Under the UK regime if a possible bidder's interest becomes known in the market, for example if there is a leak, then the interest of the possible offeror must be publicly announced and under the "put up or shut up" regime the bidder then has 28 days to announce either a firm intention to make an offer or that it does not intend to make an offer (after which it will be locked out for six months). The requirement to announce potential bids when there has been market rumour or untoward share price movements is tightly policed and enforced by the Takeover Panel. AT&T was forced to announce the end of its interest in a possible offer for Vodafone during 2014 following press speculation of a possible bid.

On public M&A, the Panel is a very active regulator and it is important to understand and pay heed to the Takeover Code from the outset

A particular requirement of the Takeover Code is that once a bidder announces a firm intention to make an offer it will generally be required to proceed with the offer. Aside from the acceptance condition, and UK or EU anti-trust conditions, an offer will often contain detailed business conditions including relating to material adverse change in the target (MAC). However, the threshold at which the Takeover Panel will permit a bidder to invoke such conditions is very high meaning that a bidder is rarely permitted by the Takeover Panel to invoke such conditions.



SOURCE: THOMSON REUTERS

There will be only limited due diligence, particularly in a hostile situation, and very limited warranty protection.

Unlike in the US and most other European jurisdictions there is also a wide-ranging prohibition on the target entering into offer-related arrangements, such as break fees and other deal protection measures, so a bidder will typically have little or no comfort that its offer will succeed when launched. Conversely the target board is not allowed to take action which might frustrate a bid and in the UK companies do not use "poison pills" or similar devices to ward off an unwanted bidder.

PRIVATE M&A

The sale and purchase agreement

A private or unlisted company is usually sold pursuant to a sale and purchase agreement entered into between the buyer and seller. The common form, used on a bilateral acquisition of shares or assets, is a long form sale and purchase agreement, prepared by the purchaser and its advisers. It will set out in full the terms of the transaction, its conditions and extensive warranties.

In an auction process, a shorter seller-drafted agreement is used at least as a starting point. The initial covenants offered by the seller are usually limited, and the prospective purchasers are invited to add protections that they feel are necessary and their approach to the documents will form part of the assessment of their 'bid'. Private equity sellers will also look to limit any warranty package effectively to title and capacity, reflecting their role in the management of the business and in part so that the proceeds of sale can be distributed to investors once the deal has completed without risk of recourse.

On private deals, there is freedom to contract, but it is a 'buyer beware' regime and the conditions and protection package may look different to that found in the US and other jurisdictions

The form of agreement used on a "distressed deal" where the seller is facing insolvency and the process is led by an administrator (appointed usually by the creditor bank(s)) is likely to contain only the mechanics of the deal required to transfer title, with little protection for the purchaser other than the capacity of the administrator to effect the transfer.

Conditions

Typically the conditions to an acquisition will be limited to specific issues which go to the heart of the deal, for example antitrust approvals without which the deal cannot lawfully close, as well as any other similar third party approvals and consents from key counterparties without which either party is not prepared to proceed. As discussed above, the UK Listing Rules may also require a UK listed company that is party to the transaction to get shareholder approval for significant transactions or transactions with 'related parties'. The inclusion of a general MAC condition concerning the target's economic condition is not standard practice, although their use did increase in popularity during the last recession.

Price adjustment

The most common price adjustment method is through the preparation of full completion accounts, or at least to reflect the key variables such as cash and working capital. Locked box processes became popular for sellers for their simplicity, speed and the certainty of price. Under a locked box mechanism, the price is agreed by reference to a historic but relatively recent balance sheet, the idea being that economic risk and benefit passes to the buyer as of the locked box date. This is then backed up by an indemnity from the seller in relation to any "leakage" after the locked box date such as transfers, dividends or other payments in favour of the seller group. However, as the locked box method is not appropriate in all cases and does not protect a purchaser in respect of changes in the trading position of the target after the locked box date, sellers will still seek completion accounts as a favoured adjustment in appropriate cases.

Warranties

The starting point in the UK is for detailed warranties to be set out in a schedule to the agreement. A "disclosure letter" will be produced by the sellers setting out any specific disclosures against the warranties and it is standard in the UK for there to be general disclosure made of all the data which has been provided in the data room. The remedy for a warranty breach is a contractual action for damages, requiring the buyer to demonstrate that the breach of the warranty has reduced the value of the target company – often difficult to establish. It is unusual to have warranties on an indemnity basis i.e. a recovery on a pound-for-pound (or dollar-for-dollar) basis. In the UK market, indemnities tend to be reserved to specific matters where a particular issue has been identified by the buyer.

Representations are different from warranties under English law. They give rise to a different measure of damages, and can also give rise to the remedy of rescission, allowing the buyer to walk away. Accordingly, they are infrequently given.

There is no "standard" set of limitations on the protection package in the UK and each deal will be driven by its own dynamics. An example of what parties may agree is as follows.

Some warranties, such as those relating to tax, accounts and fundamental warranties like title to shares, will be capped at the overall consideration for the deal. Depending upon the counterparties and the competitive pressure, there is likely to be a different cap on liability for other warranty breaches. This will probably be capped somewhere in the range of 20% - 70% of the overall consideration. The warranties are likely to have a duration of around 18 months to two years. There are likely to be minimum thresholds which have to be reached before a claim can be made. In a share sale, there will be a stand-alone tax indemnity for certain historic and current year tax liabilities.

Employee and pensions issues

There are rules (known as TUPE) which are designed to protect businesses and employees on business and asset sales (they do not apply on a share sale). The rules operate to transfer the employees of the business automatically and on exactly the same employment terms to the buyer. It is difficult to change the terms of employment or exclude employees from the transfer. There is also an obligation to inform and consult with the employees before closing.

On public M&A, the Takeover Code requires bidders to state their intentions with regards to employees and the impact of their strategy on the workforce. Parties to a takeover bid must also provide information to employees and the trustees of any pension scheme the target has. Employee representatives and pension scheme trustees also have an opportunity to publish their opinion.

Where a target has a defined benefit pension scheme, trustees can wield considerable power in the M&A process – they will often scrutinise a transaction to assess whether it will have negative effect on the scheme and the employers' ability to fund scheme liabilities. They may seek assurances and commitments to mitigate against that risk. Depending on the terms of the scheme, the trustees may have powers to impact the contributions required from the participating employers including the target. The UK Pensions Regulator also has power to require parties to contribute to or support a pension scheme. These powers need to be fully understood before embarking on an M&A process.

Merger control

The UK is an open market and foreign investment has been encouraged for a number of years. Intervention by the government on the grounds of public or national interest has not historically featured in the UK M&A market.

The basic principle is that, with a few exceptions, UK merger control is based on a competition test assessed independently of government, not a wider public interest test. Where a merger has a European dimension, the EU Merger Regulation will apply which is again a competition-based test.

The UK government has only limited power to intervene where there are specific public interest concerns, and which are currently limited to three areas: national security; media plurality, quality and standards; and financial stability. ■

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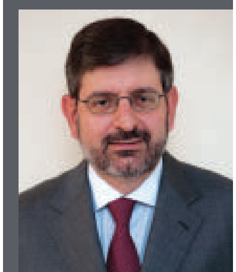
STEPHEN WILKINSON
GLOBAL HEAD OF M&A

Q&A

REPORTER MARIA JACKSON PUTS THE QUESTIONS TO D'EMPAIRE



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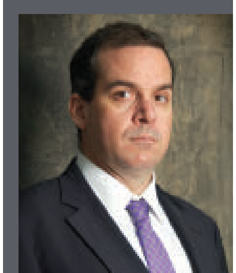

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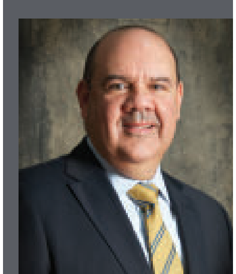

ARNOLDO TROCONIS
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VENEZUELA: OIL AND GAS M&A

Business law firm D'Empaire Reyna Abogados highlights the key opportunities in Venezuela's oil and gas sector

Venezuela houses some of the largest oil and natural gas proven reserves in the world. The country was a founding member of the Organization of the Petroleum Exporting Countries (OPEC) and is a global giant in terms of production and export of crude oil. In 2013, Venezuela was the fifth-largest petroleum producer in the Americas, behind the U.S, Canada, Mexico and Brazil.

Since the 1970s, the oil industry has remained in the hands of state-run oil and natural gas company Petróleos de Venezuela S.A. (PDVSA) and the company's royalties and tax payments have historically represented over half of the government's revenues. However, PDVSA's production is declining. The strategic importance of the oil and gas industry to Venezuela, combined with a slump in oil prices, has made it more imperative than ever that the country invests in new frontier developments to revitalize the sector.

Fulvio Italiani, Carlos Omaña and Arnoldo Troconis, partners at D'Empaire Reyna Abogados, discuss the key features of Venezuela's oil and gas investment regime and the opportunities that are opening up for foreign investors in this field.

D'Empaire Reyna Abogados is one of Venezuela's elite law firms. The firm has a strong track record in advising on energy deals, making it perfectly placed to advise multinational companies looking at investing into Venezuela's oil and gas sector. Among its recent experience, the firm advised Rosneft on the Venezuelan aspects of its acquisition of Precision Drilling from Weatherford.

D'Empaire Reyna Abogados is a full-service law firm and is also widely considered to be a leader in finance, tax, dispute resolution, labor and public law, in addition to corporate and M&A. The firm has participated in most of the headline transactions to involve Venezuela in recent years and other key deals include advising BTG Pactual on the local aspects of its acquisition of Globenet and advising Citi in a $5 billion financing to PDVSA.

WHAT RECENT FINDS HAVE AUGMENTED VENEZUELA'S POSITION AS A GLOBAL LEADER IN OIL AND GAS?

D'EMPAIRE: Venezuela has the fifth largest proven oil reserves in the world and the second largest proved natural gas reserves in the Western Hemisphere. According to Petróleos de Venezuela, S.A. (PDVSA)'s consolidated financial statements as of December 31, 2013, proved reserves were 40 billion barrels of conventional crude and 258.3 billion barrels of extra-heavy crude (making a total of 298.3 billion barrels). There is no doubt that Venezuela is one of the countries with the largest oil potential in the world.

The extent of Venezuela's natural gas reserves is also impressive. According to PDVSA's financial statements, as of December 31, 2013 the total proven developed and undeveloped reserves of natural gas were 197 trillion cubic feet.

Venezuela has been a major oil producer for 100 years and state-owned oil and gas company, PDVSA, is one of the world's largest oil companies. PDVSA is one of the largest foreign oil suppliers to the U.S. and an important oil supplier to several countries in the region. However, despite the large reserves and solid oil industry infrastructure and experience, PDVSA has been struggling with stagnant (or declining) production and exports over the last few years.

PDVSA's business plan for 2013-2019 outlines the development of production and refining projects totaling $257 billion and an increase in Venezuela's total crude oil production to 6 million barrels per day, as well as 10,494 million of cubic feet per day of gas, and to increment the natural gas liquids extraction capacity by 130,000 cubic feet per day and the refining capacity to 1.8 million barrels per day.

PDVSA has acknowledged that significant additional foreign investment will be required to fulfill the expectations of its business plan - in 2014, the company estimated the value of these requirements as approximately $20 billion.

The Orinoco Oil Belt is the most important area for PDVSA in terms of production (representing 42 percent of the national production according to official information as of December 31, 2013). Therefore, achieving the company's business plan goals will highly depend on increasing production in this region.

Experts in the business have suggested that PDVSA's business plan is too ambitious considering the current production and infrastructure status. The government seems to be aware of this since it recently announced that PDVSA expects to reach a production of 3.3 million barrels per day, despite the higher forecast in its business plan. PDVSA has also acknowledged that significant additional foreign investment will be required to fulfill the expectations of its business plan - in 2014, the company estimated the value of these requirements as approximately $20 billion. Recent joint venture agreements with foreign companies, as well as certain financing deals signed with international partners, indicate that PDVSA will not be making the necessary investments alone and could be counting more and more on external financing.

According to Francisco Monaldi, a leading Venezuelan expert in the oil and gas industry, Venezuela is clearly moving in the direction of opening out its oil sector. The reasons are a consequence of the following conditions:

- the government is in a critical fiscal situation;
- the local national oil company is in bad shape;
- production is declining;
- large and risky investments in exploration and new frontier developments are needed (particularly in the Orinoco Belt);
- PDVSA needs technology that only some international oil companies control;
- oil prices are declining.

HOW ARE OIL AND GAS ACTIVITIES GOVERNED BY VENEZUELAN LAW?

D'EMPAIRE: All hydrocarbon and gaseous reservoirs located in Venezuela belong to the Republic, are under the regime of public ownership and therefore are inalienable and indefeasible.

Oil and associated gas upstream activities can only be carried out: (a) directly by the Republic; (b) through wholly-owned state entities (e.g. PDVSA or its affiliates); or (c) through joint venture companies (empresas mixtas) where the Venezuelan government must hold more than 50 percent equity participation and private sector companies hold a minority participation.

New refining activities as well as commercialization of other hydrocarbons by-products not reserved by the government can be carried out: (a) directly by the Venezuelan government; (b) by the Venezuelan government through wholly-owned state entities; (c) through joint venture with the direct or indirect participation of the Venezuelan government and the participation of the private sector in any proportion; or (d) by private companies. Companies interested in carrying out refining activities must obtain a license from the Ministry of Oil and Mining

All activities related to non-associated gaseous hydrocarbons reservoirs located in Venezuela (exploration, exploitation, industrialization, transportation, distribution and domestic and foreign commercialization) can be carried out: (a) by the Venezuelan national executive directly; (b) by the Venezuelan government through state-owned entities; or (c) by foreign or national private entities, with or without the participation of the Venezuelan government.

Companies interested in engaging in the exploration and exploitation of reservoirs of non-associated hydrocarbons must obtain a license from the Ministry of Oil and Mining, which determines which areas will be opened for exploration and production of non-associated hydrocarbons gas (such areas can be awarded directly by private negotiation or pursuant to a public bid). All licenses must include the following provisions: (a) a description of the project, with an indication of who will or may consume or utilize any resulting production; (b) the term of the license (maximum of 35 years, subject to a maximum possible extension of a further 30 years); (c) a maximum exploration program of five years; (d) a precise indication of the exploration area; and (e) special payments in favor of the Republic.

Companies interested in engaging in the transportation and distribution of non-associated gas must also obtain a permit from the Ministry of Oil and Mining. In general, the rules on gas licenses described above also apply to gas permits.

TO WHAT EXTENT IS PRIVATE PARTICIPATION ENCOURAGED IN VENEZUELA'S OIL AND GAS INDUSTRY?

D'EMPAIRE: As mentioned above, private sector investment in upstream activities is permitted through joint venture companies (empresas mixtas) where the investors can hold a minority interest (49 percent or less, although the government generally limits the private sector participation to 40 percent). In addition, the government allows the private sector minority shareholder to participate in the management of the joint venture company, especially in the procurement and in the technical operation of the company.

In recent years, the government has signed joint venture agreements for the development of oil and gas projects with international partners from China, India, Italy, Japan, Russia, Spain, the U.S., Brazil and Vietnam, among others. These agreements, along with some financing agreements, intend to boost the current stagnant production through foreign investment. The most important partners are: Chevron, CNPC, Rosneft, Repsol, ENI, Petrobras, Statoil and Total.

In many cases, the Venezuelan government requires the private sector investors to provide financings to the oil and gas joint venture companies as a condition to allow equity participation in such companies. Financing from foreign joint venture partners during 2013-2014 reached $12 billion, mainly from the following companies: CNPC ($4 billion to be invested in the joint venture company Sinovensa), Chevron ($2 billion in Petroboscan), ENI ($1.7 billion for PetroJunin), Gazprom ($1 billion for PetroZamora), Repsol ($1.2 billion for PetroQuiriquire), Perenco ($400 million for Petrowarao), Suelo Petrol ($625 million for PetroCabimas) and Repsol & ENI ($1 billion in Perla).

"In recent years, the government has signed joint venture agreements for the development of oil and gas projects with many international partners. These agreements intend to boost the current stagnant production through foreign investment."

WHAT ARE THE ADVANTAGES FOR FOREIGN CLIENTS LOOKING AT INVESTING IN VENEZUELA?

D'EMPAIRE: Venezuela has significant competitive advantages in the oil sector when compared to other countries in the region. Most importantly, Venezuela has one of the largest oil reserves globally. Unlike other countries, such as Mexico, the cost of finding and development is very low, which results in one of the highest margins per barrel. On the other hand, Venezuela is a net exporter of oil. In other words, the fundamentals for an oil investment in Venezuela are generally very attractive.

However, investments in the oil sector still face significant challenges, including a significantly overvalued official exchange rate, restrictive labor laws which make it very difficult (if not impossible) to dismiss workers who do not comply with their duties, insufficient human resources, nationalization risk and governmental reluctance to give private sector investors increase participation in the management of the oil and gas joint venture companies.

Despite the significant challenges and risks, Venezuela's oil and gas sector provides opportunities for high returns. And as the government looks for new ways to boost production, a more favorable regime could potentially develop around the need to secure foreign investment.

WHAT PROTECTIONS ARE AVAILABLE TO FOREIGN INVESTORS LOOKING TO INVEST IN VENEZUELA?

D'EMPAIRE: Venezuela is a party to bilateral investment treaties (BITs) with several countries, which allows private investors to resort to arbitration to seek compensation in foreign currency and market value in case of expropriation or nationalization. Despite Venezuela's withdrawal from ICSID, several of the existing treaties permit arbitration under the Uncitral Arbitration Rules and the ICSID's Additional Facility rules. Therefore, channeling oil and gas investments through entities that are eligible for BIT protection provide adequate protection for private investors against nationalization or expropriation risk.

In addition, Venezuela is also a party to double taxation treaties with several countries, which protect investors against certain changes in tax legislation.

PDVSA frequently accepts the inclusion of arbitration provisions in the oil and gas financings, but continues to be reluctant in include such provision in the agreements governing the joint venture company.

HOW DOES D'EMPAIRE REYNA ABOGADOS' EXPERIENCE IN OIL AND GAS MARK IT AS A VALUABLE PARTNER FOR CLIENTS LOOKING AT BUSINESS OPPORTUNITIES IN VENEZUELA?

D'EMPAIRE: D'Empaire Reyna Abogados advises leading foreign oil and gas companies (including several oil majors) on a regular basis in connection with investment in the oil and gas sector. Our main strength is our full commitment and effectiveness in complex projects; we are well-equipped to resource sophisticated M&A transactions due to our expertise in the key supplementary practice areas that clients also need to support an oil and gas deal, including tax, finance, public law and environmental law.

The firm fields 47 attorneys, including 17 partners, and we pride ourselves on our ability to maintain international service standards. Most notably, our team includes several lawyers that are admitted to practice in the State of New York.

It is also very important to add that D'Empaire's oil and gas team is deployed on the ground in Venezuela, which gives the firm a firsthand look at current developments in the local oil and gas sector, ranging from relevant regulatory changes to key appointments in regulatory and managerial positions in the oil and gas industry. This is a significant advantage for foreign companies looking to get up to speed with Venezuela's investment environment. PDVSA and its affiliates are the only game in town in terms of the oil and gas business in Venezuela and through our ability to maintain excellent professional working relationships with the key oil and gas executives and regulators, we are optimally positioned to serve our clients' interests.

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Fulvio Italiani is considered among the leading M&A and corporate lawyers in Venezuela. He has participated in most of the significant acquisition, financing and oil and gas transactions in Venezuela in recent years. Fulvio Italiani has been consistently ranked as a star individual for M&A/Corporate by Chambers Latin America. In addition, Fulvio was honored with an award for Outstanding Contribution to the Legal Profession at the 2013 Chambers Latin America Awards for Excellence. According to Chambers & Partners, Fulvio Italiani was selected for the prestigious award in recognition of 'his business skills and legal expertise which have been of great benefit to national and multinational companies investing in the challenging economic climate of Venezuela'. Fulvio has also been named one of 'Latin America's Top 50 Legal Stars' by Latin Business Chronicle.

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Arnoldo Troconis is widely regarded as a top corporate lawyer in Venezuela. Chambers Latin America has ranked Arnoldo Troconis as a leading lawyer for several years. Troconis acted as a lead outside Venezuelan counsel to Telecom Italia Mobile (TIM) for more than eight years, from the date TIM first considered an acquisition in Venezuela in 1998 until the sale of its Venezuelan mobile subsidiary (Digitel) in 2006. Arnoldo Troconis was appointed by TIM to serve as a member of the Board of Directors of Digitel until 2006. He received his law degree cum laude from Universidad Católica Andrés Bello in 1988, an M.C.J from the University of Texas, Austin, in 1991, and a Tax Degree from Universidad Católica Andrés Bello in 1994. Before becoming a partner at DRA in 1996, he worked as an associate at Graves, Dougherty, Hearon & Moody, Austin in 1991. He is fluent in Spanish and English, and speaks Italian.

LNT & Partners

A New Wave of Mergers and Acquisitions in Vietnam

Significant changes in the law should spur a surge in M&A activity

Since the early 2000s, Vietnam's steady economic growth and ongoing efforts to reform its legal system provided encouraging signs for a thriving M&A marketplace to develop. This progress continued to gain traction in 2005 when Vietnam engaged in earnest preparations to join the World Trade Organization (WTO), finally acceding in 2007. In order to become a member, Vietnam issued a number of new laws and amended many others to satisfy WTO requirements.

The market responded favorably, and despite the global financial crises from 2007 to 2009, corporate investment into and within Vietnam steadily grew and the value of M&A transactions increased 15-30% annually until 2012. However, in 2013 the value of M&A transactions in Vietnam dropped precipitously from US$ 5.3bil (520 deals) in 2012 to US$ 3.8bil (370 deals). In somewhat of a rebound, the market is slowly regaining some momentum in 2014. The market has so far witnessed 400 deals valued at US$ 4bil, an appreciable difference from the year before.

The three most active sectors are consumer goods, finance and real estate. Among those, the consumer goods sector ranked first with total deal value of US$ 960 mil (accounting for 24% of the M&A market), the finance sector came in second with total deal worth of US$ 880 mil (accounting for 22% of the M&A market) and the real estate sector lagged behind at US$ 400 mil (accounting for 10% of the total M&A market).

While it is comforting to see that the total number and deal size of M&A transactions have regained an upward trend, the most interesting developments, portends a robust and active M&A market in the short- to mid-term.

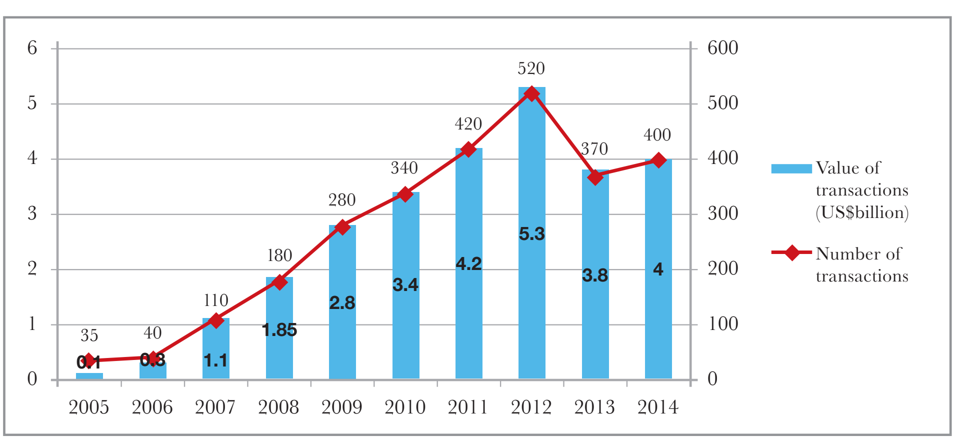
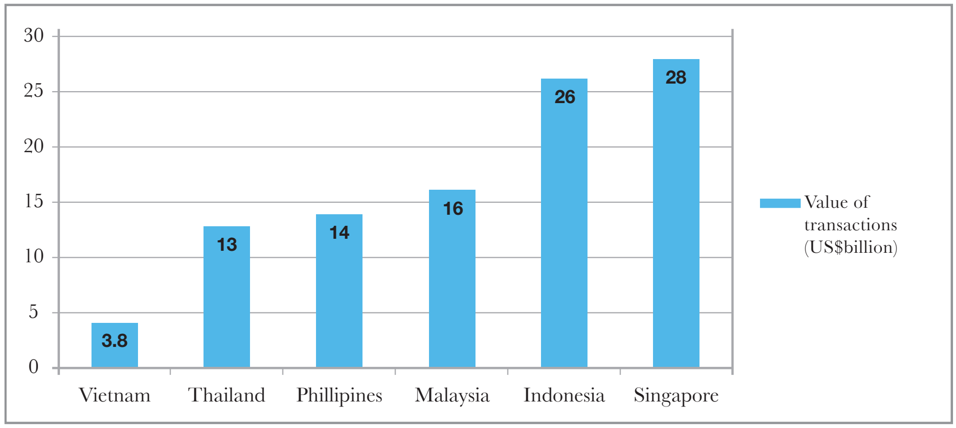


FIG. 1: FLOWCHART OF M&A IN VIETNAM, SOURCE: MAF RESEARCH GROUP

The emergence of local companies taking a more active role in buying companies will contribute to a stronger M&A market. The most active among them is the Vingroup JSC, a listed Vietnamese company specializing in real estate development. However, foreign companies from Japan and Korea continue to lead the pack in volume for M&A deals in Vietnam.

Another critical improvement is the new policies Vietnam instituted to manage banks, a key

FIG. 2: COMPARISON OF M&A TRANSACTION VALUE AMONG SE ASIA COUNTRIES IN 2013
SOURCE: MAF RESEARCH GROUP



sector for M&A activity. A strong and vibrant banking sector will further spur more M&A in the market. Along with an improved regulatory banking framework, the Vietnam government mandated the equitization of state-owned-enterprises (SOEs) within a clear timeframe and has even allowed the purchase price to be lower than par value in some cases. These developments have created and will continue to create new opportunities for investors to buy larger stakes in local banks as well as SOEs in key economic sectors.

The final macro-level development this past year involves key legal changes to the law. In the past, Vietnam's M&A landscape faced legal and administrative barriers, including a lack of transparency owing to insufficient disclosure of information from the target companies. Furthermore, a lack of clarity on the applicable laws unnecessarily prolonged transactions, as well as created a need for third-party intervention to reconcile differences caused by this lack of clarity. Foreign buyers also had to manage WTO restrictions and foreign ownership limitations when structuring deals.

Many of these issues have been addressed by the recently enacted changes to the Law on Investments and the Law on Enterprises on November 26, 2014. These changes will greatly contribute to the improvement of the investment environment in Vietnam. (See below for more details on these changes.) Additional amendments are due to be considered and passed in June 2015. Moreover, as of January 14, 2014, Vietnam must now fully comply with WTO requirements in almost every industry sector.

SIGNIFICANT TRANSACTIONS AND HIGHLIGHTS

In 2013 and 2014, Vietnam was graced with significant M&A transactions in a broad spectrum of sectors, particularly in banking, real estate and consumer products. A number of key transactions have been internationally recognized.

Banking Sector:

PVFC and WesternBank merged to create PVCombank with charter capital of US$ 430 mil. This was the first transaction between a bank and finance company. In addition, a number of other commercial banks and financial companies successfully closed M&A deals, including HDBank and DaiA Bank, MBS and VIT, VP Bank and TKV, and Sumitomo and Mobivi.

Real Estate Sector:

In this sector, most of the M&A transactions were completed by Vincom through property transfer schemes instead of project or capital transfers. In particular, Center A of VinGroup was sold to VIPD for US$ 470 mil. Gemadept Tower was purchased by CJ from Korea with the purchase price of US$ 45 mil. In addition, Mapletree purchased Center Point Tower for US$54 mil. EXS also became a new shareholder of Son Kim Land after paying US$ 37 mil to the sellers. A number of shares of the Sheraton Nha Trang project were transferred to an undisclosed buyer for US$ 42 mil.

Consumer Products and Distribution Sectors:

With the 14th largest population in the world, companies in the consumer sector in Vietnam have always been a top target for M&A. Family Mart, a chain of convenient stores and Metro Cash & Carry Vietnam, a leading company in the wholesale sector, was acquired by BJC from Thailand. Likewise, CDH Electric Bee Ltd acquired 20% of thegioididong.com, a famous electronics retailer in Vietnam, for an undisclosed price. In July 2014, thegioididong.com became a listed company on the Ho Chi Minh City Stock Exchange. Masan, a leading company in the consumer products sector, also acquired 75% of Vinh Hao, a mineral water company, after paying US$ 26 mil to the sellers. In addition, Kinh Do Corp., one of the leading food companies in Vietnam, engaged in a number of M&A transactions, buying and selling assets before it sold 80% of its confectionary business to Mondelez International Inc. for US$ 380 mil in December 2014.

Other Sectors:
Other notable transactions include: (1) UPS' 49% acquisition of VN Post's shares in a joint venture company, converting it into a 100% foreign owned entity; (2) en-Japan's acquisition of approximately 90% of the offshore parent of Vietnamworks.com, the biggest recruitment services company in Vietnam, for US$ 25 mil; (3) in early November 2014, GEM announced an investment of US$ 80 mil in HAGL, one of the biggest conglomerates with a wide range of business lines in Vietnam and the Indochina region; and (4) REE, a leading listed company in the electronics sector, also acquired a number of hydroelectricity projects and feed projects.

LEGAL DEVELOPMENTS IMPACTING THE M&A MARKET

This year there has been a number of legal developments that should generate many more opportunities for foreign investment into Vietnam's dynamic economy.

Under the WTO roadmap requiring equal treatment regardless of citizenship, Vietnam opened up many different sectors to 100% foreign ownership in January 2014. However, this does not apply to restaurant services until after 21 January 2015. This development would legally allow a number of foreign investors to join the Vietnam market or restructure their holdings to become 100% foreign owned in many different sectors which was previously restricted and/or allowed limited shareholdings.

The new Law on Enterprises and Law on Investment now allow investors to conduct all business activities which are not prohibited or subject to conditions under the law. The M&A procedure for foreign buyers were also clarified and the timeline shortened. With respect to joint stock companies, except for limited circumstances, many corporate matters can be passed with 51% of the voting capital instead of 65% as was the case under the previous version. The Law on Enterprises also allows third parties to request authorities to provide financial statements and information under certain conditions .The issuance of these new Laws will be a tremendous boost for M&A activities in Vietnam in the near future.

Foreign ownership of real estate in Vietnam has finally been approved and enacted into law under the new Law on Housing. Foreigners can legally lease and sublease real estate. The new Law also simplifies, shortens and makes more transparent the procedure to obtain approvals for real estate projects.

Corporate income tax will be reduced to 20% after January 1, 2016 and the new Law on CIT provides more favorable treatment and incentives for enterprises. Apart from this, the tax system has been simplified to facilitate the application of the International Financial Reporting Standards starting in 2020. Significantly, tax payers can now use the internet to submit and manage tax reports and filings.

However, among these many positive changes, M&A transactions in Vietnam still face difficulties.

According to a survey conducted in 2011, Government red tape, together with corruption, and infrastructural issues, the legal system in Vietnam was cited by 82% of respondents as one of the main factors constraining their investments. Because Vietnam follows a civil law system, the written laws must be updated and clearly defined to ensure consistent interpretation by relevant authorities. Inconsistent and even contradicting interpretations remain a substantial barrier to conducting business in Vietnam. It negatively impacts the appetite for M&A transactions as well as causes unnecessary delays and increases transaction costs.

While these amendments were a necessary step to improve business conditions in Vietnam, they are subject to further detailed implementing guidelines by Decrees and Circulars. Thus, if the law makers do not put adequate efforts to properly prepare these Decrees and Circulars to implement the intent of the new Laws, the current challenges will remain and the business environment will not improve even with the passage of these new Laws.

Another challenge remains limited access to certain economic sectors. Under the WTO, Vietnam reserves the right to restrict foreign ownership (entirely or majority control) in a number of services including road transportation, high school education, certain financial and securities services, leasing, film production, recording services and others. These sectors are subject to high scrutiny by relevant authorities and many transactions in these sectors remain uncompleted due to these ownership restrictions.

Majority control still remains a sticking point in certain industries. Under Decision 55/2009/QĐ-Ttg only 49% of shares/securities are available for foreign investors to buy when it relates to public companies, listed companies, investment funds and securities companies. A draft of new regulations to increase the cap for foreign ownership to 60% is under consideration, but, to date, these regulations have not been officially issued. According to a report from the State Security Commission, these new regulations are set to be issued in October 2015.

Finally, mergers and acquisitions may still be stalled when reviewing for antitrust issues. The basis for calculating the "market share" in relation to an "economic concentration" is not currently addressed clearly by the Law on Competition and corresponding regulations. Therefore, this may impact clearance reviews by the local competition authorities.

A NEW WAVE OF M&A TRANSACTIONS

Vietnam remains a challenging market to conduct business. The government, however, has made an earnest effort to engage the business and investment community to address their concerns. In 2014, after a number of open discussions and productive dialogue, Vietnam's legislature successfully passed into law a number of material changes reflecting feedback received from the commercial sector. Investors should be pleased to know that further positive reforms are underway.

These changes have galvanized the marketplace and many investors believe a new page of M&A transactions in Vietnam will emerge. In fact, as reported by the MAF Research Group, 72% of the surveyed investors believe that a new wave of M&A transactions in Vietnam would start in early 2015. We believe investors are justified in their optimism about entering Vietnam or expanding their presence in Vietnam. ■

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Ms. Hoang has been highly recommended by the Asia Law Profiles for having "all the important connections and experience" that corporate clients need. Ms. Hoang is also a regular columnist for the PhapLuat Newspaper, the Vietnam Investment Review and several other legal periodicals, providing updates on new legal and M&A trends.

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Q&A

REPORTER MARIA JACKSON PUTS THE QUESTIONS TO ASTREA

BELGIUM: TECHNOLOGY M&A FOCUS

Leading Belgium-based law firm Astrea summarizes the headlines driving deals in the technology space in Belgium

STEVEN DE SCHRIJVER
PARTNER
ASTREA

As global deal figures show, technology-related M&A is on the up. Steven De Schrijver, M&A and technology partner at Astrea, discusses the current pitfalls and windfalls awaiting investors into Belgium's technology space.

Astrea is a leading independent Belgian law firm, with offices in Antwerp and Brussels. The firm has a strong international outlook, and regularly advises national and multinational clients across a wide range of specialist areas including corporate law, banking & finance, tax law, labor law, real estate law, environmental law, IP law and IT law.

TO WHAT EXTENT WAS 2014 A BOUYANT YEAR FOR TECHNOLOGY M&A?

ASTREA: In the first quarter of 2014, technology M&A reached the highest value recorded in 14 years, driven largely by the social networking sector, cloud computing, smart mobility, big data analytics, security and future technology (i.e. omnipresent digital environments sensing and responding to human activities and interests). In the U.S., for example, Facebook contributed significantly to the value growth through a string of high-profile deals, such as its $19 billion acquisition of mobile-messaging service WhatsApp and its $2 billion acquisition of Oculus Rift. While some skeptics maintain that without these mega deals, M&A values for the first quarter of 2014 would have looked significantly less impressive, the figures are still based on a stable growth in the digitization process, making cloud and mobility applications gain in value and appeal. Also in the second quarter of 2014, the technology M&A figures remained strong.

It is important to note, however, that a technology M&A deal remains a challenging process. Issues such as the assessment of volatility for future revenue streams, the privacy during the M&A process, the valuation of the quality of earnings, the complex integration processes and convergence strategies, and the estimation of the market authority's response with respect to monopolies, can curb the success rate of these types of transactions.

HOW IS BELGIUM MAKING MOVES TO ESTABLISH ITSELF AS A LEADING TECHNOLOGY HUB?

ASTREA: Driven by innovation, creativity, technological expertise and entrepreneurship, technology companies in Belgium have acquired European as well as global leadership positions. In Belgium's open business culture, ICT companies can rely on a high-tech environment well-suited to the development of tomorrow's technologies. In particular, the high density of ICT businesses, research centers and knowledge clusters provides them with a stimulating technology community, which enables companies to nurture specific niches, for example in innovative banking products. An early innovator in broadband, wireless and satellite communication in the 1990s, Belgium was one of the first countries in Europe to install a broadband network infrastructure that could reach the entire population. Furthermore, the optimum connectivity offered by the country's fiber optic network convinced Google to install a data center here, not far from the Microsoft Innovation Centre.

The new government remains committed to focus on the competitiveness of Belgium as an international business hub. The interesting tax technique of notional interest deduction is still in force and the rules concerning company law will be simplified.

There are also a substantial number of tax incentives for research and development (R&D) activities in Belgium, which makes Belgium a particularly interesting jurisdiction for technology investment, including: patent income deduction ('patent box'), investment deductions for R&D-related investments and patents, R&D tax credits, partial wage tax exemptions for researchers employed in Belgium, expatriate tax status in R&D, tax allowance for additional employees, accelerated depreciation for R&D investments, tax exoneration for regional grants provided by the Flemish, Walloon or Brussels Region and favorable tax rulings.

WHAT ARE THE MAIN FEATURES OF BELGIUM'S LEGAL FRAMEWORK THAT APPLY TO TECHNOLOGY INVESTORS?

ASTREA: Belgian patent law provides for the exclusive right of exploitation, the right to transfer or license and the right to act against infringements, with a far-reaching authority granted to the judge to assess infringements. In addition to the high level of protection, there is also a guarantee on the income side. For example, 80 percent of the net income from patents is exempt from taxes, 15 to 80 percent of the accepted costs can be subsidized and the tax of €5 for the patent delivery is barred to make the Belgian patent system even more attractive, since the collection of this would significantly delay the patent application.

In terms of M&A deals generally, it is also important to mention competition regulations. Unless a transaction falls under the EU merger notification thresholds set out in EU Council Regulation 4064/89, a mandatory notification is required under the Belgian Act of 5 August 1991 on the Protection of Economic Competition if all parties concerned have an aggregate consolidated turnover in Belgium in excess of €100 million (approximately $123 million) and at least two of the parties each generate a turnover in Belgium of €40 million (approximately $49 million).

"In the first quarter of 2014, technology M&A reached the highest value recorded in 14 years, driven largely by the social networking sector, cloud computing, smart mobility, big data analytics, security and future technology."

In combination with the ability to control post-merger internal market disruptions, both the EU and Belgian market authorities have the power to stop or dissolve an M&A transaction.

Also, on the employment side there are a number of issues that tech companies wishing to acquire a company in Belgium should take into account. Companies in the technology sector often work with independent contractors or so-called freelancers. Often, however, these contractors work exclusively for one company, as a result of which their working conditions are very similar to those of employees performing their duties upon instruction and under the supervision of their employer. The acquiring company should therefore make a thorough assessment of the working situation of these freelancers and their relationship with the target company. It should also obtain appropriate warranties from the target company in case the independent contractors would be re-qualified as employees by tax and social security authorities, as such requalification gives rise to additional taxes and social security contributions. Possibly also their working situation will need to be reviewed post-closing. Finally, it is common practice in the technology sector to outsource employees to other companies to carry out specific assignments. Nevertheless, companies should be careful when doing this. The Belgian Act of July 24, 1987 on the Secondment of Employees for the Benefit of Users, prohibits placing employees at the disposal of third parties. Employers breaching this law can be held criminally and civilly responsible. Consequently, this liability risk needs to be well assessed and covered by adequate warranties from the target company.

WHAT ARE THE MOST IMPORTANT CONSIDERATIONS FOR CLIENTS ON THE IP AND IT DUE DILIGENCE SIDE?

ASTREA: In addition to confirming the legal ownership of the software, clients need to take the legal implications of cloud computing into account. When acquiring or merging with a provider of cloud applications, platforms or infrastructure in the cloud, attention should be paid to issues such as the ownership of the data or applications run in the cloud, compliance with mandatory rules with respect to international data transfers, exit possibilities, etc.

Since the target's technology and intellectual property are the most valuable assets to an acquiring tech company, a thorough and comprehensive due diligence of such assets is essential to ensure future revenue streams and restrict legal actions in the post-merger phase. An important feature of the review is analyzing the ownership of the intellectual property. You need to ask the questions: what is the duration of the protection against copies or infringements? Who is the legal owner and are there any contestations with regards to the creation? Under Belgian copyright law, software is protected for up to seventy years after the death of the author. However, only the form and expression of the idea is protected.

Anyone is allowed to write a program with the exact same functionality, provided that it is based on a self-developed source code. Just because the target company owns the intellectual property of a certain software, does not mean that it is protected against the copying of the idea. A solution could be found in patenting the software but that method is, in the European context, no guarantee, since there is great disagreement about the patentability of software.

Driven by innovation, creativity, technological expertise and entrepreneurship, technology companies in Belgium have acquired European as well as global leadership positions. In Belgium's open business culture, ICT companies can rely on a high-tech environment well suited to the development of tomorrow's technologies

The due diligence should not only focus on the ownership and value of the intellectual property rights, but also - and foremost - on their transferability. In respect of intellectual property that is not owned, but merely licensed by the target, it is crucial to examine whether the license agreements contain a change of control clause, prohibiting the target company transferring the licenses to the acquirer without the licensor's prior consent. Another potential pitfall in transferring IP consists of exclusive rights granted to local distributors in a specific region, which could be incompatible with the existing distribution network of the acquirer. Moreover, it should be verified whether the target's employees, who have contributed to the development of the company's software, have validly assigned all their intellectual property rights in relation to such software to the target. Belgian law provides that if an employee develops new software in the execution of his duties or upon the instructions of his employer, economic and IP rights in relation to such software are automatically assigned to the employer, unless otherwise provided by contract. Thus, the target company's employment contracts should be checked for clauses preventing the automatic assignment of the intellectual property rights to the employer. If software is developed by freelance contractors, there is no automatic assignment of IP rights, so it should be verified who holds the intellectual property rights under the contract. Another aspect that is often overlooked is the presence of open source code in the developed software. Such open source codes are available to everyone. Cisco experienced the consequences of the presence of open Source codes in the target's software when it acquired Linksys in March 2003 for $500 million. After the deal was closed Cisco was contacted by the Free Software Foundation, which determined that the Linksys software contained open source code. Since it would be very cost prohibitive to reengineer the software, Cisco had to release the source code, which then became available to anyone at no cost.

WHAT SKILLS AND EXPERIENCE MARKS ASTREA AS A KEY PARTNER FOR TECHNOLOGY M&A?

ASTREA: As shown above, an M&A deal on foreign ground requires a 360-degree approach. Not only is it necessary to have clear insight into the ruling market authorities, labor law formalities and company rules, a thorough understanding of the legal guarantees towards intellectual property rights and tax benefits are also needed to get the most out of the M&A process.

To ensure all the various obligations are met, it is important to partner with a firm that is specialized in all the requisite supplementary areas of law. In addition to its expertise in company law, IP and IT law, Astrea can provide strong experience in real estate, environmental, labor and tax law. This comprehensive offering equips the firm with all the necessary tools to effectively resource a complex technology M&A deal.

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Steven De Schrijver has 20 years' experience in advising Belgian and foreign companies on mergers and acquisitions, joint ventures, corporate restructurings, acquisition financing, private equity and venture capital, debt structuring and secured loans. He has been involved in many national and cross-border transactions mostly in the IT, media, energy and life sciences sectors.

Steven is also recognized as one of the leading commercial IT lawyers in Belgium specializing in new technologies (such as data protection, e-commerce, software licensing, website development and hosting, technology transfer, digital signature, IT-outsourcing, cloud computing, gaming and gambling etc.). In 2012 and 2014 Steven was elected by Who's Who Legal as Global Information Technology Lawyer of the Year.

Steven De Schrijver graduated as a Master in Law (magna cum laude) at the University of Antwerp in 1992. He obtained a LL.M. at the University of Virginia Law School in 1993, a diploma in Business Law (magna cum laude) at the University of Antwerp in 1995, as well as a diploma in Corporate Law (cum laude) at the EHSAL (Brussels) in 1997 and a post-graduate diploma in EC Competition Law at King's College London in 1999.