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Technology M&A 2022

Introduction

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INTRODUCTION

Contributed by: *George Casey,* ***Shearman & Sterling LLP***

Overview and Introduction to Chambers' First Technology M&A Guide

Welcome to the inaugural issue of Chambers' Technology M&A Guide.

The very fact that Chambers has launched this guide is an indication of how important technology M&A has become, and also how distinct transactions in this area are compared to any other industry. The unique aspects of technology deals are rooted in the life cycle of a typical technology company. It often begins with a dream that takes an entrepreneur on a journey from a start-up funded by friends and family that allows the founder to develop that first product in the proverbial "garage", to creating a business model, to then trying to convince professional sources of venture capital of the start-up's viability and prospects as a business, to several rounds of funding (for those lucky few who succeed), and to the ultimate goal of any entrepreneur – to turn the company into a "unicorn" (ie, to achieve valuation in excess of USD1 billion) and have it listed on a major stock exchange as a public company or sold at a high multiple.

Technology M&A is also unique because of its multidimensional nature: we witness a strong push for consolidation within the tech industry itself, but we also see how the fact that technology is disrupting every other industry has led to traditional companies investing in or buying technology companies. Automakers are looking at electric vehicle start-ups and software developers, industrial companies are exploring deals in automation or carbon recapture technologies, and financial institutions are looking at fintech companies. As an example, according to the recently published Lloyds Bank's sixth annual Financial Institutions Sentiment Survey, 77% of senior executives at UK financial institutions said technology, automation and digital investment are their top strategic priority for the year ahead.

The technology industry and COVID-19

The COVID-19 pandemic has disrupted our lives in many ways and made technology an even more important part of how we work, live and get educated and entertained. Technology start-ups we had not known before, like Zoom, have become household names, and well-established tech companies like Amazon and Netflix have benefited enormously from our reliance on them during lockdown.

As the US trends and developments section in this guide observes, there were several reasons for the technology boom over the last 18 months. The lockdown and remote working environment during the pandemic have pushed businesses to use technology for daily meetings, employee communication and collaboration, maintaining operations, using the cloud for collecting and sharing business information, and maintaining robust security protocols to protect the company from external threats. The importance of technology had been recognised for decades before the pandemic and the growth potential of tech companies was used to justify their valuation at a high multiple, but the pandemic has pushed valuations to levels never seen before.

Early access to funds

This recognition and the even bigger clout of tech companies is reflected in their ability to access capital. As reports from different jurisdictions in this guide highlight, start-ups with innovative ideas can find funds to enable them to start and grow. In many countries, an entrepreneur starts with money from "friends and family" and angel investors, but some countries have proactively set up structures to provide capital

to tech start-ups. For example, as our contributors from Sweden highlight, a state-owned venture capital firm, Almi, provides equity and debt capital to emerging growth companies across a variety of industries in Sweden. In South Korea, as described by our contributors in this guide, upon the adoption of the Act on Special Measures for the Promotion of Venture Businesses, a fund managed by the government-sponsored Korea Venture Investment Corporation has been actively providing financing and credit guarantees to promising start-ups and funds in the country. Of course, domestic and international VC funds are always looking for new opportunities to invest, as the venture capital market has become more and more global.

Record volume of M&A deals

For well-established technology companies, there often comes a point where the founders and the venture capitalists decide whether to pursue their growth strategy alone or sell to a larger and stronger player. As the overall M&A market during the early days of the pandemic was down by over 50%, technology M&A was booming and became one of the brightest spots in deal-making from late spring 2020 through to now. According to S&P Global, technology and telecoms saw USD1 trillion's worth of deals in nine months of this year, which will make 2021 a record year with close to double the prior year's value of deals (and 2020 was a record year in its own right). By the number of transactions, technology M&A stands at about 20% of total deal activity in the US this year.

Tech M&A has been multifaceted with very large transactions around the globe, such as Square's USD29 billion acquisition of Afterpay, Salesforce.com's USD27.7 billion acquisition of Slack and Hitachi's USD9.6 billion acquisition of GlobalLogic in the US; Delivery Hero's USD4 billion acquisition of Woowa Brothers in South Korea; and PayPal's USD2.2 billion acquisition of iZettle and Visa's USD1.8 billion acquisition of Tink in Sweden.

Staying independent

For those technology companies that decide to continue their journey as independent players, they could choose from a larger-than-ever menu of options: an IPO, a direct listing, or a de-SPAC transaction. All of these types of transactions have been actively pursued over the last 18 months, and we have also seen a number of spin-offs of tech companies by their parents.

IPOs

Companies that were ready for an IPO, had a readily accessible public market for capital. Both 2020 and 2021 saw record numbers of IPOs. As this guide highlights, many companies were choosing to do an IPO in their home markets and list on the home country stock exchange, whereas others were opting for a listing in the US, as one of the most liquid and largest capital markets in the world. Practitioners need to be careful, however, as in some jurisdictions a future M&A deal may be hampered by listing exclusively outside of the home market, as rules relating to public acquisitions may be part of the home country stock exchange regulator and may not be available for companies incorporated but not listed in the country. For example, a buyer of a company incorporated in France but with shares listed solely in the US, may find it difficult to do a squeeze-out after a tender offer. Many countries create incentives for a domestic listing and try to streamline securities regulations to encourage companies to list at home. For example, the Brazilian Securities and Exchange Commission (CVM) has launched a public hearing to revamp regulation of public offerings of securities to expand access to capital for domestic companies and streamline the registration process.

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Changes to US listing rules first proposed by the NYSE and approved by the SEC at the end of 2020 have facilitated direct listing of companies coupled with the ability to raise capital in the process without pursuing a traditional IPO. As a result, several companies have opted to pursue direct listing in the US in 2021. These companies included such significant names as Coinbase and Amplitude.

SPACs

During the pandemic, SPACs (special purpose acquisition companies) provided an alternative path for a company to go public. Although SPACs have existed in the US for many years, they became a hot trend during the pandemic. According to Statista, there was one US SPAC issuance in 2003, 20 in 2015, 59 in 2019 and 249 in 2020, with that number being outshone in 2021 with 498 SPAC deals through to October. SPACs are set up by raising money from public investors for the specific purpose of finding an acquisition opportunity. If a SPAC finds it, the private target is merged into the SPAC in a so-called de-SPAC transaction (yet another alternative to a traditional IPO), gets additional funding through a PIPE investment and becomes a publicly traded company at closing. As an alternative to an IPO, a de-SPAC transaction is more likely to be pursued by less established, younger companies. As the SEC tightened disclosure and accounting requirements for de-SPAC transactions, the SPAC market cooled down somewhat in the spring and summer of 2021, but rebounded in October of this year. According to CNBC, in March 2021, 109 SPACs began trading. That number dropped to 13 in April, 30 in August and 29 in September, but bounced back to 57 in October. Whether this is a sustainable upward trend or a rush to the market before the year-end, remains to be seen. Nevertheless, several hundred SPACs are currently trading and are yet to find acquisition opportunities. Prevalent in the US, SPACs have started pursuing cross-border deals and some countries are developing regulations to facilitate SPAC listings in their markets. For example, the UK Financial Conduct Authority (FCA) adopted changes to its listing rules in August 2021 to make the UK a more attractive jurisdiction for SPACs. Similarly, in November 2021, SIX Swiss Stock Exchange (SIX) announced that it had adopted regulations to allow listings of SPACs starting on 6 December, 2021.

Spin-offs

Spin-offs of subsidiaries by parent companies to achieve various corporate and financial purposes have also been explored by technology companies. Tech companies are not new to spin-offs, as many of them came into being as independent companies as a result of a spin-off. AT&T’s spin-off of Lucent and eBay’s separation of PayPal are just two of many examples from the past. The trend continues this year with Dell spinning off VMware, SAP similarly splitting with Qualtrics, and Telus launching an independent Telus International.

Regulatory tightening up

As deal-making in the technology industry has become more and more global, and with technology often being viewed as a strategic, defence and national security priority, regulators in different jurisdictions have been tightening requirements in their markets. Antitrust authorities have been challenging technology transactions more aggressively (or even perceived dominance of tech companies in a particular market), while foreign direct investment (FDI) regulations have been tightened in different parts of the world to protect nascent technologies from being acquired by foreign buyers. The US has recently strengthened its FDI regulations and introduced mandatory filings, with a specific focus on the technology industry. France, Germany and the UK have adopted stricter requirements for acquisitions of tech companies in their

jurisdictions, and the EU has adopted new co-ordination regulations across the region to share information and collaborate in FDI enforcement.

Using this guide

As cross-border technology deals are often very complex and involve different legal regimes and different cultures, we have organised this guide by country and asked each country contributor to address the same set of issues that a technology company going through its lifespan faces – from incorporation to early funding, to venture capital rounds, and to the ultimate goal of being a public company or being sold at a high premium. We hope that you find this guide useful as you consider global deals.

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Shearman & Sterling LLP advises leading corporations, major financial institutions, emerging growth companies, governments and state-owned enterprises on complex strategic and legal matters. The firm has over 850 lawyers in 25 offices around the world, speaking more than 60 languages and practising US, English, French, German, Italian, Hong Kong, OHADA and Saudi law. Its long-standing M&A practice regularly represents clients in their most important transactions. Shearman's lawyers focusing on the technology industry comprise several dozen practitioners based in the firm's San Francisco, Menlo Park, New York, Washington DC, Austin, Dallas, London, Paris, Munich, Abu Dhabi, Dubai, Riyadh, Hong Kong, Beijing, Tokyo and Singapore offices. The firm's clients include some of the world's largest technology and software companies, promising venture-backed and privately held companies, as well as investment banks and private equity funds that focus on technology. Partners and counsel in Shearman's technology group are thought leaders who frequently write and speak on technology industry specialisms to national and international technology development forums, financial institutions, academic and research facilities, and regulators.

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George Casey is the global managing partner of Shearman & Sterling LLP as well as head of M&A. He has broad experience in US and cross-border M&A transactions and regularly advises multinational clients on strategic transactions and corporate governance. He combines diverse transactional experience with a deep understanding of clients' businesses across several industry sectors, including technology. Recognised as a leading M&A lawyer by clients and legal directories, George was also named a "Dealmaker of the Year" and "Transatlantic Corporate Dealmaker" by The American Lawyer. George is also an adjunct professor at the University of Pennsylvania Law School and a regular lecturer at the Sorbonne in Paris.

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