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M&A 2023

Global interview panel led by Simpson Thacher & Bartlett LLP

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About the editor

Eric Swedenburg
Simpson Thacher & Bartlett LLP

Eric Swedenburg is a partner at Simpson Thacher & Bartlett LLP, where he is the global head of the firm's mergers and acquisitions practice and a member of the executive committee. Eric focuses on representing companies in a wide range of mergers, acquisitions and divestitures, spin-offs, joint ventures and other significant corporate transactions. He also regularly counsels clients on shareholder activism, corporate governance and general corporate and securities law matters. In addition to his work with public companies and special committees of boards of directors, Eric has extensive experience in advising non-public corporations, private equity firms and financial advisers in both US domestic and cross-border M&A transactions across a number of industry verticals. Some of his recent transactions have included representing SiriusXM in its US$3.5 billion acquisition of Pandora, Mars in its strategic partnership with KIND, Dover in the spin-off of Apergy, Genesee & Wyoming in its US$8.4 billion sale to affiliates of Brookfield Infrastructure and GIC, and The Mosaic Company in its US$2.5 billion acquisition of Vale Fertilizantes. Other clients of his have included Ingersoll Rand, La Quinta, McKesson and Vodafone Group. Among other recognitions of his work, in 2009, *The American Lawyer* named him 'Dealmaker of the Year.' He is a frequent commentator on M&A issues.

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Global overview

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Current overview

Following the record year of 2021, global M&A activity in 2022 fell back down to Earth and then in the first half of 2023, continued to fall. Transactions amounting to US$3.6 trillion were announced in 2022, a 37 per cent decline from the US$5.9 trillion of transactions announced in 2021. Nearly 55,000 deals were announced in 2022, down 17 per cent from the over 63,000 announced in 2021. The story of 2022, however, is not complete without noting the large shift in activity levels from the first half of 2022 as compared to the second half of the year. In the first two quarters of 2022, global M&A activity reached over US$1 trillion of transactions announced in each quarter – marking a new record of eight consecutive quarters with over US$1 trillion of transactions announced. This consecutive win streak then came to an abrupt end, as the second half of 2022 saw global M&A activity fall precipitously. From the first half of 2022 to the second half of 2022, global M&A activity fell from US$2.2 trillion to US$1.4 trillion of transactions announced, a decline of 33 per cent. This 33 per cent decline is the largest decline between the first and second half of a year since records began in 1980.

Unfortunately, the first half of 2023 did not see a rebound in global M&A activity and the softness in activity levels that began in the second half of 2022 continued into the first six months of 2023. Global M&A activity totalled US$1.3 trillion during the first half of 2023, a decrease of 37 per cent compared to the first half of 2022. This was the slowest first half of a year for global M&A activity since 2020, when the world was first grappling with the onset of the covid-19 pandemic. Excluding the pandemic year of 2020, the first half of 2023 was the slowest start to a year since 2013. Nearly 27,300 deals were announced during the first half of 2023, a decrease of 9 per cent compared to the first half of 2022 and a three-year low. There continues to be a host of factors contributing to the suppression of global M&A activity, including rising interest rates, persistent

Eric Swedenburg

inflation concerns, recessionary fears, volatility in the debt and equity markets, geopolitical uncertainty and a more challenging regulatory environment for deal making.

First half of 2023 – a closer look

The decline in global M&A activity was felt throughout the M&A ecosystem. Starting with private equity, an increasingly substantial driver of global M&A activity, the rising interest rate environment meaningfully impacted both the cost and availability of acquisition financing, and the result was that private equity M&A activity was down 49 per cent in the first half of 2023 as compared to 2022. Another example of the softness in the overall M&A market is the decline in blockbuster deals. The number of deals having a value over US$10 billion dropped to 14 in the first half of 2023, compared to 26 in the first half of 2022 and nine in the second half of 2022. Additionally,

the total value of deals over US$10 billion was US$259.2 billion in the first half of 2023, the lowest since 2017.

Viewing the first half of 2023 global M&A activity through regional, industry and other lenses by and large tells the same story of an overall reduction in activity year-over-year.

By region, the United States continued to lead the global M&A market in the first half of 2023 with US$566.4 billion in activity, a decline of 40 per cent from the first half of 2022. Despite this decline in activity, the United States accounted for 43 per cent of the global value, in line with 2022 levels, as other regions tended to see similar or even more substantial activity declines. The European M&A market hit a 10-year low in the first half of 2023, down 49 per cent from the first half of 2022, with a total deal value of US$262.8 billion. M&A activity in the Asia-Pacific region also declined in deal value by 35 per cent compared to the first half of 2022, falling to US$294.1 billion from US$488.3 billion. Overall cross-border M&A deals decreased by 25 per cent in the first half of 2023 with US$493.3 billion of total deal activity. This was the slowest first half for cross-border M&A since 2013.

By sector, healthcare, energy and power and technology evidenced the most activity, although with the exception of healthcare, these sectors showed similar year-over-year trends as noted above. Healthcare was a bright spot of sorts and had a relatively strong first half of 2023, up 43 per cent from the first half of 2022. Energy and power, while still a leading sector, was down 23 per cent from the first half of 2022. Technology, which had consistently been a growing share of global M&A activity, fell dramatically by 66 per cent in the first half of 2023 compared to the first half of 2022. This decline in technology volume, in part is explained by a lack of blockbuster deals in the sector that were present in the first half of 2022, for example, Microsoft's acquisition of Activision and Elon Musk's purchase of Twitter, as well as a tougher regulatory and financial environment as technology firms looked to rein in pandemic-era spending.

Looking forward

Looking at the entire year, 2022 in many ways was a return to normalcy in the context of overall deal volume after the record breaking year of 2021. However, the latter half of 2022 and into 2023 has seen a decline steeper than most market-watchers predicted, particularly in light of the lofty peaks of 2021. As discussed, the headwinds that were dampening activity at the end of 2022, continued and, in some cases, grew even stronger into 2023. The good news is that there are reasons to believe that activity will start to pick back up again later in 2023 and into 2024, absent a macro-level exogenous event. The market volatility has declined, fears of a recession have abated somewhat and valuation disconnects between potential buyers and sellers are narrowing. In addition there are reasons to believe we may be approaching the end of the cycle of the rapid interest hikes that were a large part of the pullback in M&A activity and, relatedly, there are indications that inflation pressures are starting to ease. These are the types of factors that should contribute to more confidence with companies and private equity sponsors, and more confidence should lead to a pick-up in M&A, as strategic buyers still see value in M&A to grow their business, and financial buyers are sitting on a record breaking US$2.5 trillion in dry powder, waiting for right market conditions and opportunities.

Eric Swedenburg
eswedenburg@stblaw.com

Simpson Thacher & Bartlett LLP
New York
www.stblaw.com

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Argentina

Fernando Zoppi of Martinez de Hoz & Rueda is a corporate and business law attorney with more than 20 years of experience representing clients in a variety of cross-border transactions in Argentina and Latin America. He is particularly versed in mergers and acquisitions, private equity and venture capital.

Educated and trained in Argentina and the USA, Fernando is praised for his practical approach in solving complex legal issues. He is fluent in Spanish and English.

Fernando is admitted to practise in Argentina. He is a member of the International Bar Association (IBA), the City of Buenos Aires Bar Association and the Columbia Alumni Association.

Key clients include ExxonMobil, Trafigura, Delta Patagonia (Gulf), Amancay Partners, Linzor Partners, DNS Capital, Cross Capital, Schlumberger, CAPEX (Grupo CAPSA), Interbarge, EVO Payments, Imagine Communications and Imerys.

Fernado is also a regular contributor to local and international legal publications, and makes regular media appearances.

1 What trends are you seeing in overall activity levels for mergers and acquisitions in your jurisdiction during the past year or so?

According to UN statistics, most countries in South America saw their foreign direct investment (FDI) flows rise in 2022, including Argentina. However, Argentina's current level of FDIs is modest compared to other countries in the region (such as Brazil, Mexico, Colombia or Chile) as a percentage of its GDP.

Consistently with the abovementioned, and despite the global and local challenges, M&A activity in Argentina increased in 2022. Interestingly, the evidence shows a slight decline in the total number of deals but an increase in deal volumes (matching the record reached in 2018). Overall, this M&A activity is still low as a percentage of Argentina's GDP.

The M&A activity in Argentina in the past 24 months is largely explained by mining-related deals such as the Jiangxi Ganfeng Lithium Industry's US$73.5 million investment in the province of Salta, Canada's Neo Lithium Corp's US$70.1 million plan to expand its lithium production plants in the province of Catamarca, Zijin Mining Group Co Ltd's US$380 million investment in the province of Catamarca, the Rio Tinto – Rincon Ltd's US$825 million deal, and the US$96 million acquisition by Gangfeng of a stake in Lithea, among others. In this respect, clean energy transition is driving a significant increase in the global demand for lithium (and also cobalt, nickel, copper and other rare earths). Nearly 80 per cent of the world's known lithium deposits are found in four countries: Argentina, Bolivia, Chile (the'South American lithium triangle') and Australia. Argentina alone accounts for over 20 per cent of the world's reserves, has the largest lithium project pipeline in the planet and offers certain competitive advantages from a cost perspective. Argentina's lithium production has increased dramatically, from less than 1 per

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cent of the global production in 1994 to 5 per cent in 2022. Further, Argentina's production will surpass Chile's production by 2026 and represent a 13 per cent of the world market share by 2030, according to JP Morgan.

The technology sector has also shown substantial M&A activity, particularly from a deal count perspective. Notably, SoFi Technologies Inc acquired the Argentine software developer Technisys for US$1.1 billion.

Presidential elections are scheduled for October 2023. The recent results in the primary elections (where the ruling party came in third place) seem to suggest a that a pro-market shift in policy is likely. Therefore, and without undervaluing the many challenges faced by the local economy, M&A activity may experience a moderate surge in 2024 and 2025.

"70 per cent of the M&A deals were focused on the technology and energy and natural resources sectors."

2 Which sectors have been particularly active or stagnant? What are the underlying reasons for these activity levels? What size are typical transactions?

As discussed above, mining and technology sectors have been particularly active in the past two years. Energy deals (particularly, oil and gas – both in the upstream and midstream sector) have also contributed to the increasing activity in the M&A market recent years totalling deals in excess of US$2 billion. It is worth mentioning that Argentina is a major player in the South American hydrocarbon market. Argentina has one of the largest volumes of shale gas reserves in the world although the country lacks the necessary infrastructure to transport and export the gas outputs (but there are several projects in the pipeline). More than 50 per cent of these unconventional resources are located in the Neuquén Basin, especially in the *Vaca Muerta* formation.

Further, several local and international companies have shown a particular interest in green hydrogen projects that may led to significant increase of M&A transactions. For instance, Fortescue Metals Group Ltd, which aims to become carbon-neutral by 2030, is a major backer of green hydrogen and they have announced that are looking at developing a multi-billion project in the province of Río Negro with a view to producing green hydrogen on an industrial scale.

Finally, according to several sources and based on public information, approximately 70 per cent of the M&A deals were focused on the technology and energy and natural resources sectors. Only 33 per cent of the deals exceed a consideration greater than US$100 million.

3 What were the recent keynote deals? What made them so significant?

See replies in 1 and 2 above.

4 In your experience, what consideration do shareholders in a target tend to prefer? Are mergers and acquisitions in your jurisdiction primarily cash or share transactions? Are shareholders generally willing to accept shares issued by a foreign acquirer?

Most transactions in Argentina usually involve cash considerations. Due to foreign exchange regulations enacted by the local Central Bank, a key aspect of every M&A transaction is the negotiation of contractual provisions regarding currency and place of payment (a buyer would typically prefer to be paid in US$ or euros in a bank account outside Argentina).

Only a modest portion of the M&A deals involve payments in shares or other types of securities issued by the acquirer or otherwise (including as a result of earn outs), and some transactions include some type of deferred or financed purchase price.

5 How has the legal and regulatory landscape for mergers and acquisitions changed during the past few years in your jurisdiction?

Recent changes include General Resolution IGJ No. 08/2021, which modified certain requirements and criteria for the registration of foreign companies that wish to establish a branch in the City of Buenos Aires or to hold shares of companies incorporated locally. The registration of sole proprietorships whose sole shareholder is a foreign sole proprietorship is no longer admitted.

Furthermore, the current administration (to be replaced in December 2023) introduced several amendments to the foreign exchange regime and reinstated foreign exchange restrictions to acquire foreign currency and to transfer of the proceeds outside Argentina (including in the form of corporate dividends).

In addition, there have been important changes in tax regulation with an impact on M&A transactions. Since January 2021, companies are now taxed on their worldwide income tax at a corporate level from 25 to 35 per cent of their corporate income tax rate. The taxable income is determined by deducting all allowable expenses from the entity's gross income (including interest and salaries). Expenses incurred abroad are also deductible, provided that the taxpayers can demonstrate that they were incurred for the purposes of generating taxable income. Exported goods have also suffered modifications in withholding taxes.

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Dividends distributed by Argentinian companies to their foreign shareholders continue to be subject to withholding tax depending on when the distributing company earned the profits out of which the dividends are paid.

- for income earned in fiscal years beginning on or before 31 December 2017, there is no withholding tax (provided the profits had been taxed at company level);
- for income earned in fiscal years beginning on or after 1 January 2018 and on or before 1 January 2021, dividends are subject to a 7 per cent withholding tax; and
- for fiscal years beginning after 1 January 2021, dividends are subject to a 13 per cent withholding tax.

Dividends are not deductible from income tax in any case. Gains arising from the sale or transfer of shares are:

- subject to corporate income tax at the same tax rate if made by a local entity;

"According to public data, during the first quarter of 2022, 74 per cent of the M&As deals involved non-Argentine buyers."

- subject to a special capital gain tax of 15 per cent if made by a resident individual; and
- subject to a capital gains tax of 15 per cent if made by a non-resident (non-residents may also opt to pay a 13.5 per cent on the sale price).

6 Describe recent developments in the commercial landscape. Are buyers from outside your jurisdiction common?

According to public data, during the first quarter of 2022, 74 per cent of the M&As deals involved non-Argentine buyers. This is certainly a change in the trend observed in 2020 and 2021 with the prominence of domestic buyers.

There are no specific approvals required for foreign investors to conduct business in Argentina other than some restrictions on acquiring certain types of real estate (rural lands or land adjacent to country borders). In some other sectors, foreign investments are also subject to specific red tape procedures.

In some regulated industries (such as financial services, insurance, telecommunications, aviation, oil and gas, mining and utilities), governmental approval is necessary to transfer either control of, or a relevant portion of the shares of, a company operating in those industries.

7 Are shareholder activists part of the corporate scene? How have they influenced M&A?

Shareholder activism is not part of the corporate scene in Argentina. The local capital market is rather small (even compared to other Latin American countries) and few companies are listed in the Buenos Aires stock exchange. Even for listed companies, shareholder activism is insignificant as these companies generally list a small portion of their capital stock (10 to 30 per cent). Public M&A deals represent a quite small portion of local M&A activity.

Argentinian capital markets are governed by the Securities Law No. 26,831, as amended and supplemented by the Productive Financing Law No. 27,440, and a set of rules issued by the National Securities Commission. These regulations include provisions regarding minority shareholders' rights and (mandatory and voluntary) tender offers, competing offers, squeeze-out tender offers and voluntary delisting, among other matters.

Generally, a mandatory tender offer at an equitable price must be made by a person who, acting individually or jointly with other persons, has effectively reached the control of a listed company. A person will have, individually or together with other persons, a controlling interest when they:

- directly or indirectly reach a percentage of voting rights equal to or greater than 50 per cent of the listed company, excluding from the calculation those shares that belong, directly or indirectly, to the affected company; or
- have obtained less than 50 per cent of the voting rights of a company but otherwise act as controlling shareholder.

The regulations now clarify that the tender offer must be launched upon acquisition of control.

8 Take us through the typical stages of a transaction in your jurisdiction.

The local steps in an M&A process follow the international market practices. Usually, M&A transactions start with the execution of a non-disclosure agreement (NDA) between the potential parties. Depending on the complexity of the transaction, the parties may negotiate and execute a memorandum of understanding or letter of intent (commonly non-binding for the parties) to establish the general framework of the potential transaction and its main terms and conditions.

Once the NDA is executed, the purchaser is expected to conduct a due diligence of the target to identify possible contingencies and make a valuation of the target company or assets to be transferred. Due diligence usually covers the legal, accounting, tax, financial and technical areas. The scope of the audit will depend on various factors, such as the time and cost assigned, and will, ultimately, be conditioned by the activity carried out by the target company.

Usually, the target's information is uploaded in a virtual data room, and in-person meetings are held with the key managers of the target to discuss the main issues that may arise from the due diligence.

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Once the due diligence is completed (or when it is already in an advanced stage), the parties start to negotiate the transaction documents.

As mentioned, most of the M&A activity is done through private deals. These may involve shares, assets or a combination thereof. Generally speaking, share deals are preferred over asset deals for tax considerations.

Share deals are undertaken through stock purchase agreements that generally follow international standards for private transactions. These agreements can be subject to foreign law and jurisdiction (including foreign arbitration tribunals). This is generally the case in transactions for high-end Argentinian companies. However, there are some aspects that will necessarily depend on and be governed by Argentinian laws (eg, matters relating to the consummation of transactions, certain matters covered by local securities regulations, labour laws and regulatory requirements).

9 Are there any legal or commercial changes anticipated in the near future that will materially affect practice or activity in your jurisdiction?

Since the current administration took place in December 2019, the local market conditions have deteriorated. The policies implemented by this administration are far from restoring confidence of the local and international business community. The foreign exchange controls, the high levels of inflation and the new corporate law requirements for foreign shareholders are affecting economic activity in general, and the M&A deal flow in particular.

In early 2022, the National Senate signed the agreement between Argentina and the International Monetary Fund (IMF) to refinance the foreign debt (US$45 billion). The Argentinian peso has devalued substantially since the beginning of 2022. In the coming months, the current FX regime is expected to remain unchanged, making it harder to mitigate the high levels of inflation, currently standing above 80 per cent. Recent economic measures taken by the Administration lack the necessary incentives and consistency required in regard to current economic and financial challenges, falling far short of what the stabilisation plan would require in the current macroeconomic situation.

Presidential elections are scheduled for October 2023. The recent results in the primary elections (where the ruling party came in third place) seem to suggest a that a pro-market shift in policy is likely. Thus, it is expected that a new government will introduce regulatory changes that impact the business environment.

10 What does the future hold? What activity levels do you expect for the next year? Which sectors will be the most active? Do you foresee any particular geopolitical or macroeconomic developments that will affect deal sizes and activity?

A likely change in government after holding the presidential elections in October 2023 could restore confidence among the local and international business community. Without undervaluing the many challenges faced by the local economy, M&A activity may experience a moderate surge in 2024 and 2025.

Argentina has attractive investment projects capturing the interest of local and foreign investors, especially in the sectors related to energy and natural resources, agribusiness and technology.

Fernando S Zoppi
fernando.zoppi@mhrlegal.com

Martinez de Hoz & Rueda
Buenos Aires
www.mhrlegal.com

QUESTIONS

The Inside Track

What factors make mergers and acquisitions practice in your jurisdiction unique?

The structure of the transaction plays a fundamental role, not only because of the potential tax efficiencies that can be achieved, but also because the structure can make a great difference from a foreign exchange standpoint (eg, payment of purchase price, future distribution of corporate profits). Structure can also mitigate regulatory risks (ie, avoid unnecessary governmental fillings or approvals) and reduce the impact of contingencies associated with the target company or assets (mainly of a labour or tax nature).

What three things should a client consider when choosing counsel for a complex transaction in your jurisdiction?

In our view, there are three fundamental pillars:

- high-quality teams across the different practice areas that may be relevant to the transaction;
- a deep understanding of business drivers, potential risks, and legal environment for the transaction; and
- counsel that can lead the transaction with a practical approach to add value in a cost-efficient fashion.

What is the most interesting or unusual matter you have recently worked on, and why?

In the past 24 months, our firm has been able to work on a wide array of M&A projects.

The largest deals were concentrated in the energy sector, where we represented clients such as Trafigura, Centaurus Energy, Wintershall Dea and ExxonMobil.

While traditional private equity (PE) funds' activity in Argentina has been very limited, we have represented local family offices and smaller PE firms, including the Pescarmona's family office, Megeve Investments (controlled by the Solari Donaggio family, owners of Falabella) and Cross Capital SA (PE arm of banking firm Puente Hnos) or Amancay.

The opening of our new office in Montevideo (Uruguay) has helped our M&A team to obtain regional M&A work, as we represented (1) Hynewgen in two M&A projects (Chile) (hydrogen and solar farm), (2) WonderBrands in the acquisition of an equity stake in Electroventas (Uruguay, Mexico and Chile), (3) Evo Payments in the acquisition of assets (Argentina, USA, Brazil and Peru), (4) Reciqlo (glass recycling solutions) in setting up subsidiaries and JVs (Argentina, Paraguay and Ecuador) and (5) Fibrazo LLC (internet solutions for underprivileged communities in Argentina and Colombia).

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Austria

Thomas Lettau is partner and co-head of the corporate/M&A practice group at bpv Huegel. He specialises in M&A transactions, joint ventures and cross-border reorganisations.

Selected mandates include Macquarie European Infrastructure Fund 4 on the sale of shares in Energie Steiermark to the Province of Styria for a purchase price of €525 million, Triton and management on the sale of the dogado group to Cinven and Ontario Teachers', WOJNAR on the sale of a majority stake to VIVATIS, HYPO NOE on the sale of real estate service companies in the CEE countries, the €760 million sale of Immofinanz's stake in listed CA Immo to Starwood Capital, BAWAG PSK on the acquisition of start:bausparkasse and IMMO-BANK.

Johannes Mitterecker is an attorney at bpv Huegel. He specialises in corporate law, M&A transactions and restructurings with an industry focus on private equity, venture capital and start-ups. He is admitted to practise law in both Austria and New York.

Selected mandates include Macquarie European Infrastructure Fund 4 on the sale of shares in Energie Steiermark to the Province of Styria for a purchase price of €525 million, Triton and management on the sale of the dogado group to Cinven and Ontario Teachers', Weilburg Family Office on the launch of a new private equity module and Immofinanz in a bidding contest between CPI and S Immo.

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1 What trends are you seeing in overall activity levels for mergers and acquisitions in your jurisdiction during the past year or so?

Austria has been affected by geopolitical tensions and the resulting market volatility. This is accompanied by high interest rates, inflation and high energy prices. While the Austrian M&A market remained stable in 2022, the market challenges appear to be having an impact on deal activity in Austria in 2023.

In line with the EMEA M&A market as a whole, the number of M&A transactions with Austrian participation declined compared to the previous year. The number of acquisitions with Austrian participation fell by 14 transactions in the first half of the year, from 146 to 132, according to the EY M&A Index. A similar picture emerges from the Merger Market Database. According to this database, the number of transactions fell by 34. The higher number in the Merger Market Database has to be reduced somewhat due to the time lag in incorporating data into its database.

However, there are good reasons to believe that the worst is behind us. Recent inflation data has been better than expected and most people believe that the current interest rate cycle is coming to an end. As a result, there is reason to hope that M&A activity in Austria will soon pick up again.

In addition to the development of transaction volume in Austria, a trend towards increasing internationalisation of the domestic economy can be observed. This is reflected in the fact that the number of inbound transactions (ie, transactions in which an Austrian acquirer acquires a foreign target) and the number of outbound transactions (ie, transactions in which a foreign acquirer acquires an Austrian target) are each higher than the number of domestic transactions involving an Austrian acquirer and an Austrian target.

So far this year foreign investors have acquired more Austrian companies than Austrian investors have acquired foreign targets.

As in previous years, most foreign investors came from Germany.

The majority of Austrian deals are strategic transactions. This may be one reason why the unfavourable macroeconomic factors are only now having an impact on the M&A market, as strategic investors stick to their strategies and acquisition targets longer than PE investors might.

Private venture capital still plays a minor role in Austria compared to the global M&A market. However, we see clear signs that this will change in the future.

QUESTIONS

"Austria has seen an increase in transactions in the energy sector in particular."

2 Which sectors have been particularly active or stagnant? What are the underlying reasons for these activity levels? What size are typical transactions?

The technology, media and telecommunications (TMT) and industrials and chemicals (I&C) sectors were the busiest for dealmaking in Austria in the first half of 2023, continuing the trend of recent years and confirming the importance of both industries to the regional economy.

According to the Merger Market Database and the EY M&A Index, both sectors together account for approximately half of the transactions in the first half of 2023.

Furthermore, Austria has seen an increase in transactions in the energy sector in particular. This is probably related to government incentives in the renewable energy sector.

In addition, a relatively large number of M&A transactions in Austria took place in the consumer goods, life sciences and real estate sectors.

As the deal value is only published for a very small number of transactions, it is not possible to say with certainty what the typical deal size in Austria is. According to the Merger Market Database, deal values were published for 17 transactions in the first half of 2023. Of these 17 transactions, the deal value of eight transactions exceeded €25 million.

3 What were the recent keynote deals? What made them so significant?

The largest was the acquisition of the Austrian logistics company Cargo-Partner GmbH by Nippon Express Holdings Inc for €1.4 billion. The €1.4 billion consists of an upfront payment of €845 million and an earn-out payment of €555 million, whereby the amount of the earn-out is quite significant by Austrian standards.

The next largest transaction was Intel Corporation agreeing to sell an approximately 20 per cent stake in IMS Nanofabrication GmbH to Bain Capital in a transaction that values IMS at approximately US$4.3 billion. Based in Austria, IMS is a high-tech company specialising in innovations in electron beam lithography.

In the third largest deal, Macquarie European Infrastructure Fund 4 sold its stake in Energie Steiermark to the Province of Styria for a purchase price of €525 million. Energie Steiermark is one of the largest energy supply and service companies in Austria. Until now, this was the key note deal in Austria in the energy sector in 2023. We are proud that our law firm bpv Huegel acted as legal adviser to Macquarie in this transaction.

The Energie Steiermark deal is followed by the acquisition by US private equity firm Rhone Group LLC of 29.99 per cent of RHI Magnesita NV, the Austrian supplier of high-quality refractory products, for €469 million.

Last but not least, German IT company Cancom SE has acquired K-Businesscom AG for €165 million. K-Businesscom – formerly Kapsch BusinessCom – is an Austrian provider of ICT solutions and services.

4 In your experience, what consideration do shareholders in a target tend to prefer? Are mergers and acquisitions in your jurisdiction primarily cash or share transactions? Are shareholders generally willing to accept shares issued by a foreign acquirer?

In the majority of M&A transactions in Austria, the consideration is cash. This is also true for transactions on the Austrian capital market.

However, there are also situations in which Austrian sellers often receive shares as consideration. This is the case, for example, in add-on transactions in the emerging start-up and venture capital industry, because it is a win-win situation for both buyer and seller. The buyer can make more acquisitions with the available liquidity and the seller receives more value for his or her shares because he or she participates in the synergy effects at the buyer.

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5 How has the legal and regulatory landscape for mergers and acquisitions changed during the past few years in your jurisdiction?

In general, Austria has a stable legal and regulatory environment for M&A transactions but significant changes can be observed because of legislation relating to FDI and ESG.

The new rules under the Investment Control Act have led to a massive increase in FDI procedures, according to the First Activity Report of the Austrian Investment Control Authority for the period 25 July 2020 to 24 July 2021 published in 2022. Since the entry into force until 24 July 20221, a total of 50 applications for approval and applications for the issuance of clearance certificates had been processed, another 20 procedures were pending. From 25 July 2020 to 24 July 2022, a total of 150 cases are said to have been handled or pending, according to unofficial statistics. For comparison: under the old law regulating

foreign direct investment, only 25 procedures have been carried out in the past eight years.

The high number of procedures shows the attractiveness of Austrian target companies also for foreign investors from outside the EU and the EEA. Pursuant to the First Activity Report of the Austrian Investment Control Authority, none of the approval procedures had been rejected so far.

According to the First Activity Report of the Austrian Investment Control Authority for the period 25 July 2020 to 24 July 2021, affected areas for the FDI procedures were, in particular, the health sector (14 proceedings), data processing and the IT sector (11 proceedings) and finance (four proceedings). Most of the countries of origin were the United States (31) and the United Kingdom (12).

FDI control is not the only regulatory framework to consider in M&A. Since entry into force of the Foreign Subsidies Regulation (FSR) (see below under question 9), M&A deals may be subject to a parallel review under the following three regulatory review standards: merger control, FDI control and control under the FSR.

In addition, ESG is playing an increasingly important role in M&A transactions due to existing, and in preparation for upcoming, EU legislation. For some time now, parties have been paying more and more attention to this area in their due diligence. In addition, we are seeing more and more transactions where ESG is one of the reasons for selling or buying a business, as this is also a way to achieve ESG goals. On the one hand, those who are not yet well positioned in terms of ESG can buy targets with better sustainability standards and thus enhance their image and economic success. On the other hand, companies are selling lines of business that do not conform to ESG.

Moreover, the legal form requirements for SPAs regarding Austrian GmbHs were recently improved. As private M&A dominates the Austrian M&A market and the vast majority of Austrian targets are

QUESTIONS

> "With the Austrian Virtual Shareholder Meetings Act, the option of holding shareholders' meetings without the physical presence of the shareholders has been implemented."

GmbHs whose shares can only be transferred by entering into a notarial deed, the introduction of electronic notarisation is a major step forward to simplify M&A transactions in Austria. Now the parties can conclude a notarial deed in a virtual meeting without the physical presence of a notary being required. Unfortunately, the Austrian Act on the Flexible Corporation (see below under question 9) did not overturn the notarial deed requirement for the transfer of shares in a (standard) GmbH. However, the new law will introduce a further corporation, the Flexible Corporation (FlexCo). Within this new legal framework, the transfer of certain shares in a FlexCo shall no longer require a notarial deed. The drawing up of a corresponding deed by a notary or an attorney at law is sufficient. This is a major step forward; however, it is to be hoped that the requirement of a notarial deed for the transfer of GmbH shares will be dropped altogether in the future.

Last, but not least, with the Austrian Virtual Shareholder Meetings Act entered into force on 14 July 2023 the option of holding shareholders' meetings without the physical presence of the shareholders, which had already been introduced temporarily during the covid-19

pandemic, has now been implemented in the law on a permanent basis. Therefore, virtual shareholders' meetings will be possible in the future – even without the consent of each shareholder – if this has been provided for in the articles of association. It is also expected that this will strengthen Austria as a business location and thus also have a positive side effect on the M&A market.

6 Describe recent developments in the commercial landscape. Are buyers from outside your jurisdiction common?

Foreign investors have recently become increasingly active in Austria. They are particularly active in the IT, the real estate and the pharmaceutical sector. This is also demonstrated by the keynote deal in 2022 – the purchase of the shares in Immofinanz by the Czech CPI Property Group. This trend continued to be seen in the first half of 2023. According to the EY M&A Index Austria for the first half of 2023, foreign investors' interest in Austrian companies remained exactly the same, with 56 deals. It should not go unmentioned, however, that more and more Austrian companies are also going on a 'shopping tour' abroad. Outbound transactions, therefore, also play an important role. This reflects the approach of many Austrian companies to expand their portfolio and grow. However, outbound transactions declined in H1 2023. According to the EY M&A Index mentioned above, Austrian investors announced only 45 such outbound transactions in H1 2023. This represents a year-on-year decline of 24 transactions (down 34.8 per cent). According to the EY M&A Index Austria for the first half of 2023, of the total 132 transactions in H1 2023, 56 fell into the inbound category (42.4 per cent), 45 into the outbound category (34.1 per cent) and 31 in the domestic category (target company and buyer are both Austrian entities) (23.5 per cent).

Moreover, the covid-19 pandemic has weighed heavily on many companies in recent years. In addition, many governmental funding

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measures have expired. This could still be reflected in distressed M&A movements. Construction companies and their suppliers in particular could be affected. Covid-19 has caused buyers also to seek protection via more elaborated MAC clauses.

Furthermore, the Austrian M&A market has become more buyer-friendly. This is also due to the covid-19 pandemic, as many companies are still feeling the economic consequences badly. Consequently, these companies are looking for new investors or buyers.

Increasingly, price negotiations are getting tougher. At the moment, the parties' ideas are drifting very strongly apart. While sellers enter negotiations with high price expectations (they are not (yet) willing to deviate from the previous peak prices), buyers are often already pricing in current economic problems, supply chain problems and higher financing costs. As a result, the parties are increasingly unable to agree on the purchase price. This has caused quite a few transactions to fail.

7 Are shareholder activists part of the corporate scene? How have they influenced M&A?

In Austria, activist shareholders traditionally do not play a major role. This is mainly due to the rather weak Austrian capital market and the comparatively small number of listed companies as well as the predominantly concentrated shareholder structure. In recent years, however, activist shareholders have also reached Austria, albeit to a limited extent compared to the market environment in the US or in other European countries. In Austria, for example, the hedge fund Elliott has tried to prevent a shareholder squeeze-out by acquiring a relevant stake or to obtain a higher payment in the event of a shareholder squeeze-out.

As is the case almost everywhere else in Europe, an increase in shareholder activities with regard to listed companies can be expected in Austria in the coming years. This is due to the Shareholders' Directive, which was implemented in 2019 in the Austrian Stock Corporation Act. The directive has provided shareholders of Austrian listed companies with new instruments (eg, provisions for say on pay) that could be used for activist activities in Austria.

ESG aspects are also becoming increasingly important in the context of shareholder activism, so that social and environmental aspects will also play a greater role in the future and could eventually lead to a 'social activism' in Austria. The storm of climate activists at the OMV Annual General Meeting 2023 could be the harbinger of such a trend.

"ESG aspects are also becoming increasingly important in the context of shareholder activism."

8 Take us through the typical stages of a transaction in your jurisdiction.

The course of the transaction depends on the individual case and in particular on the structure of the sales process as either a share deal or an asset deal. Share deals are more common in Austria.

Intermediaries are often involved in an M&A transaction. This particularly applies to auction processes, which are very common in Austria. In general, an auction process follows a strict structure and is more seller friendly. The competitive situation between the bidders normally lead to conditions that are more favourable for the seller, in particular a higher purchase price. Usually, investment banks and other M&A advisers accompany the auction process.

Although each transaction is unique, the process of a typical M&A transaction in Austria can be outlined as follows:

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In the preparation phase, the sales strategy (exclusive v bidding process) is defined, potential buyers are identified, the data room for the due diligence is organised and the bidding criteria are defined, etc.

After this preparatory phase, potential buyers are contacted and the sales process enters the offer phase. An external consultant usually initiates this contact. If bidders show interest in a purchase, they receive an information memorandum and sign a confidentiality agreement beforehand. Subsequently, interested buyers can submit indicative offers. The interested parties with the most favourable terms are then invited to conduct due diligence.

Within the scope of the due diligence, among others tax, legal, economic opportunities and risks, in particular, are to be uncovered through careful examination in a wide variety of factual areas. Management presentations and other Q&A sessions are usually also held during the due diligence phase.

After completion of the due diligence, interested parties can submit their binding offers. The seller then enters into contract negotiations with the interested parties. Negotiations are either conducted with several interested parties at the same time or only with the best bidder because the latter insisted on an exclusivity commitment.

After that, the transaction enters the signing phase (Signing). In a share deal, the most important document is the share purchase agreement. In an asset deal, the main document is the asset purchase agreement. It is generally customary for the seller to prepare the first draft. However, if add-on transactions are carried out, usually the buyer will be the larger and more experienced partner in the transaction, which often results in the buyer providing the first draft of the purchase agreement.

With the signing – if conditions precedent have been agreed – the process enters the closing phase (ie, the phase in which these conditions precedent must be fulfilled). Often, the fulfilment of all these conditions precedent is formally approved at a separate meeting and recorded in a closing protocol. With the closing, the transaction is formally concluded and the transfer of ownership takes place. The parties still have to meet any post-closing obligations thereafter.

9 Are there any legal or commercial changes anticipated in the near future that will materially affect practice or activity in your jurisdiction?

The continuing expansive monetary policy of the central banks ensured sufficient liquidity on the markets in 2021 and early 2022. This was strongly reflected in the increase in M&A transactions as well as in company valuations. Companies were also benefiting from the low interest rate environment and could borrow more easily to finance growth and acquisitions. Interest rate hikes by central banks are now clouding the positive outlook. In the fight against persistently high inflation, the US Federal Reserve System (Fed) has already raised

"Advancing digitalisation is creating more and more technology-based M&A solutions that simplify processes between investors and customers."

the interest rate several times since 2022. As of 27 July 2023, the Fed raised the interest rate to 5.5 per cent (federal funds rate range of 5.25 to 5.5 per cent). The European Central Bank's interest rate was also raised and has stayed at 4.5 per cent since September 2023. The future development of key interest rates is uncertain. This could have a negative impact on economic growth and thus affect the M&A market. Coupled with other economic challenges and macropolitical tensions, such as the war in Ukraine, a high inflation (inflation in the eurozone was 5.5 per cent in June 2023) as well as increasing energy prices and raw material prices, rising interest rates are creating a challenging environment for the M&A market.

In addition, the major development drivers of globalisation and digitalisation are also having an impact on the Austrian M&A market: advancing digitalisation is creating more and more technology-based M&A solutions that simplify processes between investors and customers. Digital tools for deal sourcing or for the automatic creation and readout of contracts as part of due diligence are among the most interesting innovations in this area. Further developments in the direction of a technologised M&A market can be expected.

Furthermore, in line with the global trend, we have also noticed a clear trend in Austria towards increased government regulation and more restrictive world trade policies: the reasons for this are the threat of migration and the sale of system-relevant know-how, which governments are trying to prevent through increased regulation. The various regulatory requirements are certainly to be regarded as increasingly challenging in the context of M&A deals. At the end of 2022, EU Regulation 2560/2022 on foreign subsidies distorting the internal market (Foreign Subsidies Regulation (FSR)) was announced. It applies from 12 July 2023 and aims to protect the internal market from distorting foreign subsidies. The FSR supplements the established system of EU state aid control of member state subsidies with a (limited) control of foreign (third-country) subsidies. In the M&A

context, the FSR adds to the existing regulatory control mechanisms of (national or EU) merger control and FDI control. Accordingly, mergers may be subject to a parallel review under the following three review standards: merger control, FDI control and control under the FSR.

In this light, the Austrian M&A market is also experiencing increasing localisation. This is reflected in the increase in domestic purchases by Austrian companies (Domestic M&A). M&A deals within Austria increased by 10 transactions in the first half of 2023 compared to the same period last year (an increase of 47.6 per cent), according to the EY M&A Index Austria for the first half of 2023.

As already mentioned, sustainability will play a central role on the M&A stage in Austria in the coming years, even more so than in the other countries, as Austria claims a leading role in this area.

Of course, the covid-19 pandemic has not left Austrian companies unscathed. Shortages of raw materials and higher energy prices are just two of the many problems that companies are currently facing because of the lockdowns caused by covid-19. In some cases, severe consequences have been mitigated by covid-19 relief measures. However, much of this funding has now expired. This, in turn, could boost the M&A market. For a company in crisis, an M&A transaction is often the solution. Possible solutions include the creation of new liquidity through partial sales or the addition of new investors. Moreover, distressed M&A could increase after all.

Last, on 2 November 2023, the Austrian Corporate Law Amendment Act 2023 and, in the course of this, the Federal Act on the Austrian Flexible Corporation are to enter into force. In the course of this law, a new form of corporation will be incorporated into Austrian law, namely the Flexible Corporation (FlexCo). FlexCo is intended to provide a new form of corporation for the establishment of start-ups and innovative companies, which offers greater freedom for individual structuring

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than the existing forms of corporation. The FlexCo is fundamentally based on the Austrian Act for Limited Liability Companies and adopts provisions from the Austrian Stock Corporation Act in some areas. In addition, the minimum share capital for the 'standard' company with limited liability (GmbH) is to be reduced to €10,000. These measures are intended to make Austria more attractive as a business location for startups, founders and investors. This could also boost the M&A sector, especially private equity and venture capital.

10 What does the future hold? What activity levels do you expect for the next year? Which sectors will be the most active? Do you foresee any particular geopolitical or macroeconomic developments that will affect deal sizes and activity?

The Austrian M&A market is comparatively resistant to both strong economic growth on the one hand as well as recessions (with the exception of external substantial shocks) on the other hand. However,

> "In the first half of 2023, the focus was primarily on the industrial sector, and, in particular, the transport and logistics sector."

the Russian invasion of Ukraine, high inflation, rising interest rates and more generally geopolitical uncertainties as well as a looming recession represent unknown variables in future market developments. Recently, there has been a lot of valuation uncertainty, and the ATX has fallen sharply since February 2022. Interest rates and the current economic outlook continue to weigh on company valuations.

In the first half of 2023, the focus was primarily on the industrial sector, and in particular the transport and logistics sector. The acquisition of cargo-partner GmbH by Nippon Express for €1.4 billion (including an earn-out component) is an example of this. Alongside the industrial sector, one of the most active sectors in the transaction market has been the TMT sector. A fair amount of activity was also seen in the energy sector and in the life sciences. The sale of 25.1 per cent of Energie Steiermark AG by the Federal State of Styria for €525 million is worth mentioning, which we were able to support legally on the seller's side. However, a really well founded forecast on the development of the M&A market is hardly possible due to the current geopolitical situation. The industrial sector, consumer goods sector and TMT will certainly be in focus again. In addition, there may also be M&A activity in the defence industry and in the energy utilities sector. In contrast, a downward trend is becoming apparent in the real estate sector.

Megatrends such as digital transformation and the energy transition, which go hand in hand with high investment demand, will be key drivers of takeover activities in the future.

Last, ESG will play an important role in the future in target selection, deal preparation, due diligence and contract drafting, among other things, and will become even more of an important deal driver.

QUESTIONS

Thomas Lettau
thomas.lettau@bpv-huegel.com

Johannes Mitterecker
johannes.mitterecker
@bpv-huegel.com

bpv Hügel Rechtsanwälte GmbH
Vienna
www.bpv-huegel.com

QUESTIONS

The Inside Track

What factors make mergers and acquisitions practice in your jurisdiction unique?

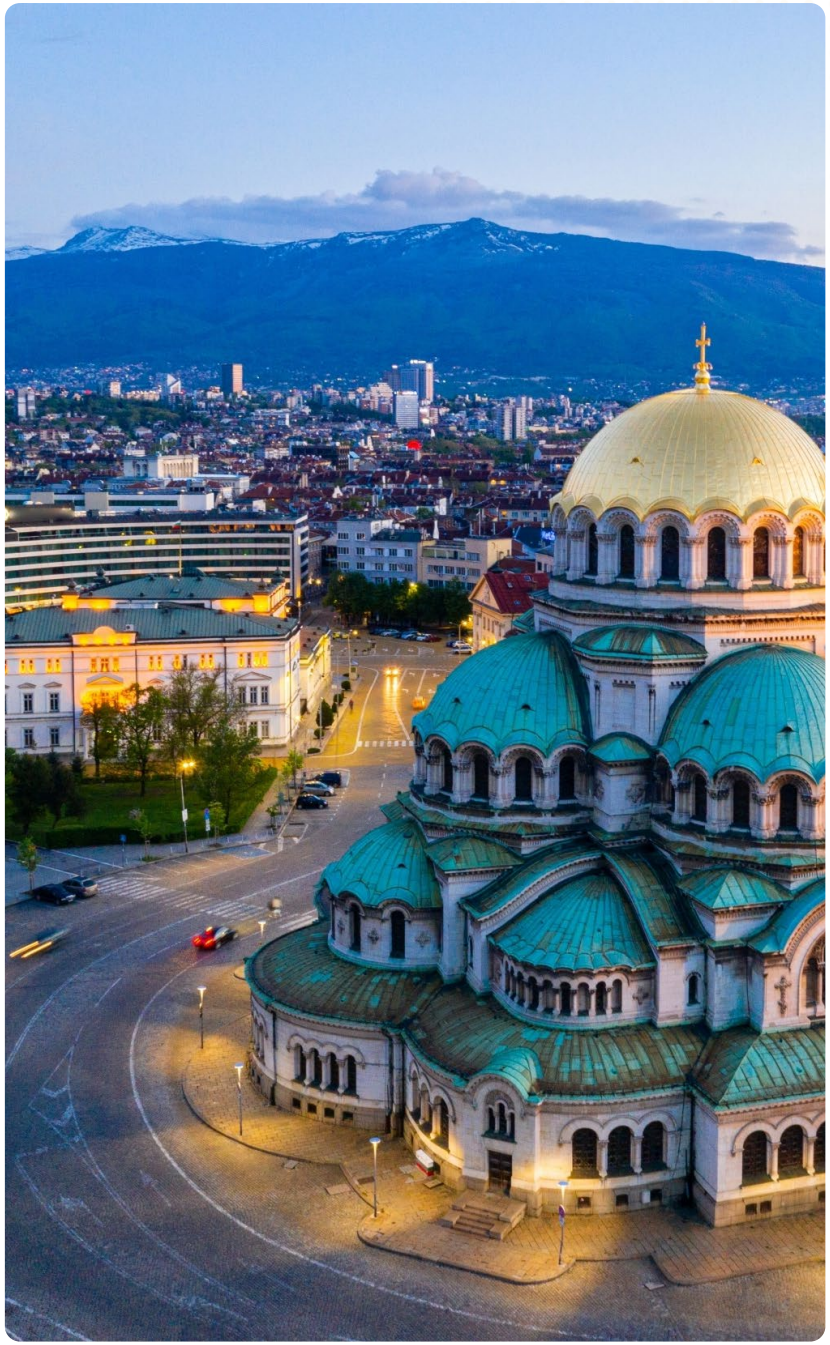
Austria is in the heart of Europe and the EU. It is a hub for the East and West, has a stable economy and well-trained and motivated skilled workers. Austria is one of the countries with the highest spending capacity and many attempts have been made in Austria in previous years to make the tax and subsidy framework more attractive for investors. Last but not least, the legal system is highly developed, Austria has a very well functioning judicial system and arbitration is also at a very high level in Austria. All these factors increase the attractiveness of Austrian target companies for foreign investors.

What three things should a client consider when choosing counsel for a complex transaction in your jurisdiction?

Your counsel's team should have excellent knowledge and deep insight into the legal issues of the target company's business and industry. The team must be able to handle all aspects of the transaction work (ie, combine corporate law know-how with expertise in the other areas of law relevant to the specific transaction). In many cases, this will be competition, tax and capital markets law and, if the target company is active in a regulated industry, the team must have a leading legal expert for this regulated area on board as well.

What is the most interesting or unusual matter you have recently worked on, and why?

We have a well-earned reputation for overcoming legal challenges and resolving complex legal issues to ensure that our clients always achieve their desired outcome. Accordingly, many of our matters are unique and require advanced and, in some cases, ground-breaking strategies. Moreover, we are often involved in transactions in industries that are undergoing transformation. It is extremely exciting to be able to support our clients in this transformation process.



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Bulgaria

Kinstellar's M&A, corporate & private equity practice covers a broad spectrum of industry sectors for some of the largest investors in the region. The team helps to successfully negotiate acquisitions, disposals, joint ventures, corporate reorganisations, restructurings, mergers, spin-offs, public takeovers and IPOs. Kinstellar has advised on both the buyer's and seller's side of M&A transactions for strategic and financial investors in Bulgaria and CEE.

Managing partner Diana Dimova is the co-head of M&A, corporate & private equity department in Sofia and the co-head of the firmwide financial institutions sector. She has advised numerous international companies and large foreign investors on their entry in the Bulgarian market and, subsequently, on the entire spectrum of ongoing corporate matters. She led the Sofia team advising on: KBC Bank's acquisitions in Bulgaria, some of the most significant M&A deals in the financial services sector, the largest public-private partnership deal in Bulgaria – the concession of Sofia Airport awarded to Meridiam – and the biggest Saudi Arabian investment in the country, the purchase of telecom tower assets by TAWAL.

QUESTIONS

1 What trends are you seeing in overall activity levels for mergers and acquisitions in your jurisdiction during the past year or so?

Looking at the past year or so, I would distinguish two distinct periods in terms of M&A activity. 2022 saw a noticeable decline in M&A due to the proximity of the war in Ukraine and its serious economic repercussions coupled with political instability in Bulgaria. While the number of deals was similar to the previous year, the transaction value was affected as investors became cautious in these tough economic and political conditions.

Since the start of 2023, however, a few large-scale transactions were announced and the overall activity seems to be strong, although it is unlikely to reach pre-covid-19 levels. The continuing war and rising interest rates have stalled economic recovery. Still, there are optimistic forecasts for stronger growth in 2024 and 2025, according to the Bulgarian National Bank's latest analysis. Further, the economy is expected to benefit from the improved political situation in the country, as a regular government has been finally formed: it has set the course for accession to the Shengen area, the OECD and the eurozone in the shortest term possible as a matter of priority.

We have started to see a greater variety of transaction structures due to the current challenging circumstances. In addition to straightforward share acquisitions, there are also more joint ventures/minority stakes, asset deals (or acquisition of teams) and acquisitions involving prior hive-downs, which probably reflects the greater caution of investors these days.

Diana Dimova

2 Which sectors have been particularly active or stagnant? What are the underlying reasons for these activity levels? What size are typical transactions?

The two mega-deals in Bulgaria that closed over the past year were in the financial and the telecommunications sectors, both worth over €1 billion. Just recently, another mega-deal in the telecoms sector spanning four countries, including Bulgaria, was announced.

Large deals (in the €50–100 million range) took place in the energy, infrastructure, manufacturing and technology sectors. The typical deal size for most deals, however, is about €30 million and below, mostly in the technology, IT services, energy/renewables and industrials sectors, as well as in real estate.

"As in other EMEA markets, Saudi Arabian investors got their foot in the door in Bulgaria too, with their biggest investment in the country to date."

The telecoms sector has been going through notable developments, driven by the acquisition of Bulgaria's leading pay-TV operator, Bulsatcom, by the entrepreneur Spas Rusev, followed by the acquisition of United Group's telecoms tower infrastructure assets by the Saudi Arabian state-owned telecom TAWAL. This trend is set to continue, as evidenced by the recently announced intention of UAE-based Etisalat to acquire a controlling stake in PPF's telecoms assets in Bulgaria and other countries. These dynamics in our region are driven by the desire of telecom companies to focus on their core business or to seek further growth through strong partnerships.

The financial services sector has also undergone significant consolidation in recent years, as banks set out to strengthen their positions in strategic markets and advance their digitalisation strategies. Great examples of that are the recent acquisitions of Raiffeisenbank Bulgaria by KBC Bank and Postbank's acquisition of BNP Paribas' personal finance branch.

The technology sector has been remarkably resilient and M&A activity has remained at a high level throughout the year. Typically, buyers are foreign companies interested in local talent or in Bulgarian companies with high growth potential. In particular, sector-specific technology/software solutions are in high demand, as businesses are always in search of improvements to their digital infrastructure and technological capabilities. However, Bulgaria's IT sector is stronger in the area of subcontracting and BPO services where the added value is not as high and, therefore, the deals are smaller in size.

Not surprisingly, investment in renewable energy, and in solar in particular, has been on the rise due to a combination of geopolitical, regulatory and commercial factors: Russia's invasion of Ukraine curtailing natural gas supplies in Bulgaria, the EU strategy on decarbonisation, and last but not least, the availability of funds for sustainable investment. Energy producers have benefited from high electricity prices, which has positioned them well for the pursuit of key acquisitions. In Bulgaria, foreign investors typically seek projects under development of significant capacity (over 50MW), while projects exceeding 100MW also attract strong interest.

3 What were the recent keynote deals? What made them so significant?

As in other EMEA markets, Saudi Arabian investors have their foot in the door in Bulgaria, with their biggest investment in the country to date – TAWAL's acquisition of the telecom towers infrastructure of United Group, the owner of Bulgarian Vivacom, for €1.2 billion (the price includes assets in Croatia and Slovenia as well). TAWAL acquired 100 per cent of the tower assets from the leading multi-play telecoms and media provider in Southeast Europe backed by private equity firm BC Partners. The assets being acquired consist of more than 4,800 towers across Bulgaria, Croatia and Slovenia. This marks

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TAWAL's first investment in Europe; its newly established European operations will serve as the telecom's platform for future expansion on the continent. As telecoms operators in Bulgaria have only recently started to carve out their infrastructure assets into separate companies, the acquisition of the target involved a number of complex legal issues related to tower infrastructure regulation as well as real estate and competition legislation.

Another noteworthy transaction that closed in 2022 was KBC Bank's acquisition of Raiffeisenbank Bulgaria from Raiffeisen Bank International for a record-breaking €1 billion. This is the largest bank acquisition in Bulgaria's history. Following the merger between KBC Bank Bulgaria and United Bulgarian Bank (a KBC entity), completed on 10 April 2023, the new, amalgamated bank United Bulgarian Bank becomes the largest bank in Bulgaria in terms of assets.

4 In your experience, what consideration do shareholders in a target tend to prefer? Are mergers and acquisitions in your jurisdiction primarily cash or share transactions? Are shareholders generally willing to accept shares issued by a foreign acquirer?

Most M&A transactions we advise on are cash based. If non-cash consideration is agreed upon, shareholders are generally willing to accept shares issued by a foreign listed acquirer, although this will be likely preceded by seeking expert advice on the matter.

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5 How has the legal and regulatory landscape for mergers and acquisitions changed during the past few years in your jurisdiction?

The general regulatory landscape for mergers and acquisitions in Bulgaria has been stable over the past few years, with no noteworthy changes that would affect the execution of transactions.

Bulgaria has yet to adopt local legislation implementing the foreign direct investment (FDI) screening mechanism under Regulation (EU) 2019/452. According to the draft legislative amendments to the Investment Promotion Act, direct investments by non-EU investors in sectors important for national security and public order would be subject to clearance by a newly established Inter-Ministerial Council chaired by the Minister of Innovation and Growth.

6 Describe recent developments in the commercial landscape. Are buyers from outside your jurisdiction common?

Many investors consider Bulgaria as an attractive low-cost investment destination, with government incentives for new investment. Combined with low and flat corporate and income taxes, the country offers some of the least expensive labour in the EU. However, recent developments have led to a surge in energy prices, real estate costs and wages, especially in the highly sought-after technology sector. While the war in Ukraine disrupted supply chains and contributed to domestic inflation, it also created opportunities to effectively consolidate supply chains in Bulgaria following the concept of nearshoring. Bulgaria has also been one of the preferred locations in Europe for the relocation of some Ukrainian IT companies.

Foreign buyers are mostly interested in energy, telecommunications, media and IT services as well as in real estate. We have also noticed interest from automotive suppliers. Investors in Bulgaria tend to come from the US and Western Europe, making the country dependent on the economic performance of these economies. We are also seeing buyers from China, Japan, Singapore, South Korea and Saudi Arabia who are active in the technology, media, and telecom and automotive sectors.

Local energy prices may have been unstable in the past year, but one positive trend is that the share of renewable energy in the overall power mix has doubled in less than 10 years and continues to grow, which is good news for companies seeking to reduce the environmental impact of their operations. Industrial zones and technological parks with the necessary technical infrastructure and the availability of renewable energy have been attracting foreign investors too, mostly in industrials and automotive.

“The share of renewable energy in the overall power mix has doubled in less than 10 years and is continuing to grow.”

The availability of venture capital has been increasing steadily. In fact, Bulgaria is the leader in Southeast Europe in terms of the number of locally based venture capital funds, according to the Bulgarian Private Equity and Venture Capital Association. Venture capital investments in Bulgarian start-ups amounted to US$244 million in 2022, which is the second highest after record-breaking 2021, when investments reached US$475 million. Bulgaria’s first unicorn was also born in 2022, when Payhawk, a payment and expense solution, raised an additional US$100 million to extend its Series B round, reaching a valuation of US$1 billion. In an effort to make Bulgaria an even more favourable place for start-ups, amendments to the Commercial Act were adopted, creating a new type of entity – a variable capital company that offers greater flexibility to founders and reduces administrative burdens associated with capital changes.

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7 Are shareholder activists part of the corporate scene? How have they influenced M&A?

Shareholder activism is not common in Bulgaria. In contrast to more mature Western European markets, we do not see specialised hedge funds as investors and activists in Bulgarian listed companies. While Bulgarian legislation on corporate governance and stock markets is largely harmonised with EU law, providing activists with the typical tools available to minority shareholders to influence a company's governance, there have been no notable battles for control over listed companies.

8 Take us through the typical stages of a transaction in your jurisdiction.

Typically, companies seek assistance from M&A advisers when they decide to engage in a competitive sale process or when they are in the search of an acquisition target. An investment bank or an M&A adviser will always be involved in large transactions.

In a typical auction process for a privately owned company, the M&A adviser would approach a number of potential buyers with a short description of the target (teaser). Upon execution of a non-disclosure agreement, the interested parties receive a detailed information memorandum and vendor due diligence reports (if available). Depending on the structure of the sale process, as a first step, interested parties may be invited to submit a non-binding offer. If, based on the offer, the bidder is invited to proceed to a due diligence process, legal, financial, tax and, sometimes, technical and commercial advisers are appointed. They are granted access to the data room upon execution of confidentiality agreements and due diligence rules. Commonly, most of the documentation is made available in virtual data rooms, while certain sensitive data may only be available for review on site (or in a restricted virtual space). The sell-side advisers would take measures to ensure the disclosure is compliant with data privacy laws and other applicable regulatory requirements (anti-trust, trade secrets, bank secrecy, etc).

Upon completion of the due diligence, bidders would submit their binding offers (along with a mark-up of the auction draft SPA). The process continues with negotiations between the seller and the successful bidder, which would aim to conclude with the signing of the SPA.

In many cases transactions are initiated and concluded on a bilateral basis, without the involvement of an M&A adviser. For instance,

companies that are already in commercial relations, may enter into M&A discussions directly. Parties engage respective advisers to assist with due diligence, valuation and negotiation of the transaction documents without the assistance of an intermediary.

Sale processes involving publicly listed companies are subject to strict regulations related to disclosure of information and inside trading as well as the specific and more complex rules and procedures regulating public company takeovers (set out in the Public Offering of Securities Act).

9 Are there any legal or commercial changes anticipated in the near future that will materially affect practice or activity in your jurisdiction?

First, ESG factors are expected to have an increasing role in M&A in Bulgaria. For several years now, the due diligence process has been gradually becoming more focused on ESG matters at the buyers' request. Taken together with the several draft laws related to ESG considerations, it is expected that the analysis of ESG factors will become one of the standard steps in the due diligence process rather than just a topic tailored for more sustainability-oriented buyers.

Second, a new regulatory approval is expected to be required for acquisitions in sectors of importance for national security. Bulgaria will soon become one of the last countries in the EU to adopt legislation on FDI screening of certain investments.

Third, venture capital investments would be facilitated through the adoption of the variable capital company – a novel corporate form that was recently introduced to Bulgaria's legal system.

10 What does the future hold? What activity levels do you expect for the next year? Which sectors will be the most active? Do you foresee any particular geopolitical or macroeconomic developments that will affect deal sizes and activity?

In spite of the challenging macroeconomic and geopolitical situation, Bulgaria's economy is forecast to grow more steadily in 2024, supported by public and private investments, most of which is stimulated by EU funds, such as those under the National Recovery and Resilience Plan. The Plan envisions 56 investments and 47 reforms aiming to help Bulgaria become more sustainable, resilient, and technologically advanced. In addition, Bulgaria is set to join the OECD and the eurozone in the next couple of years, which should make the country even more attractive for investments.

Globally, it is expected that well-capitalised and strategically positioned companies will continue to make deals that are important to their long-term business strategy, and this trend will not bypass Bulgaria. The green transition and digitalisation are long-term drivers of M&A, and they will continue to push deal activity in Bulgaria, especially in the energy and technology sectors.

Despite all this, it is unlikely that we will witness a booming M&A market, as investors are expected to remain cautious about the region as the war in Ukraine continues.

Diana Dimova
diana.dimova@kinstellar.com

Kinstellar
Sofia
www.kinstellar.com

QUESTIONS

The Inside Track

What factors make mergers and acquisitions practice in your jurisdiction unique?

As a firm operating in 11 different markets in CEE/SEE and Central Asia, we frequently advise on cross-border transactions and have good visibility of how deals are run across the region – Bulgarian M&A practice follows the same processes and principles as other European countries.

If I have to highlight one aspect of M&A that makes Bulgaria stand out in the region, it would be related to the technology ecosystem and the significant number of VC funds that support it. We already have our first unicorn and there are probably more to come.

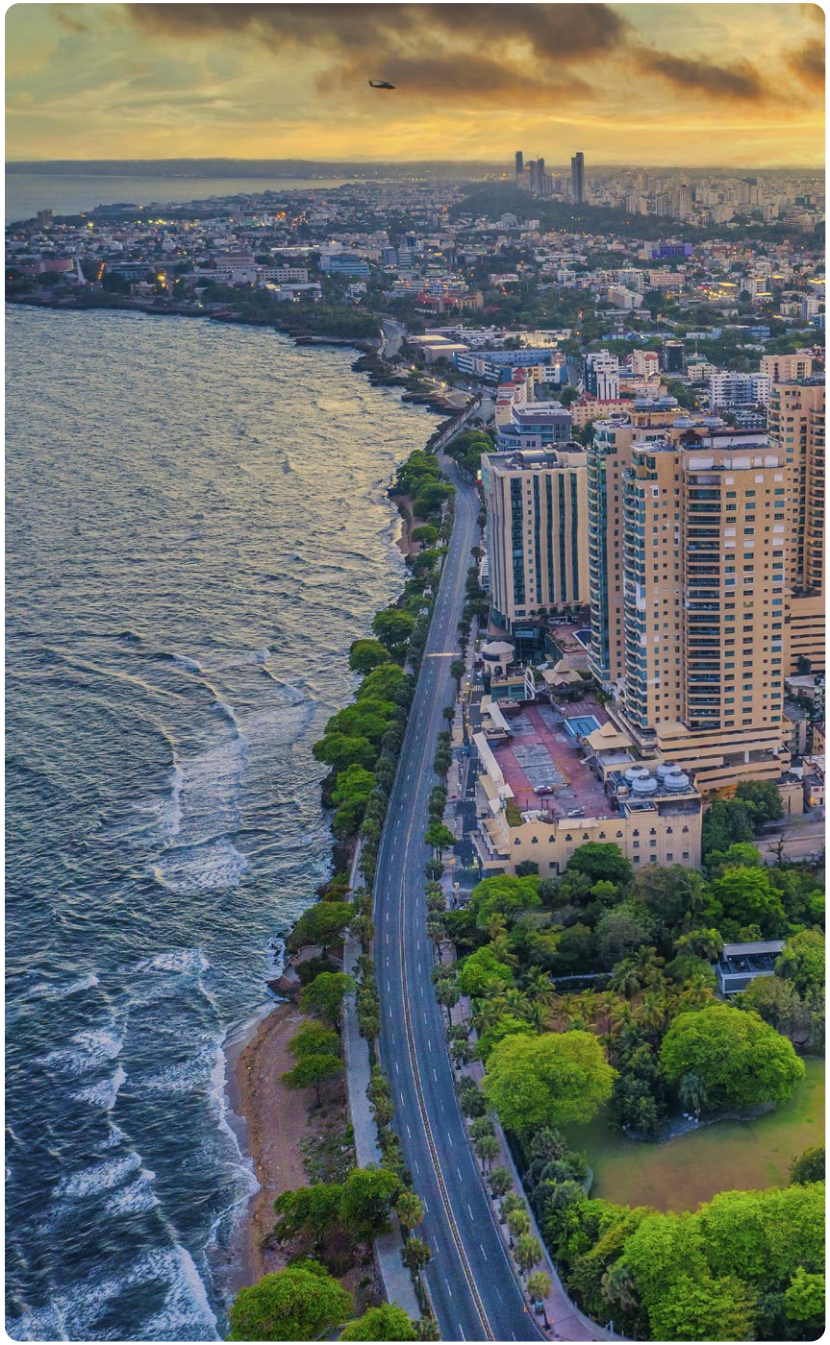
What three things should a client consider when choosing counsel for a complex transaction in your jurisdiction?

First, legal counsel should have insights into the relevant sector. While having solid M&A experience is a must, it is the specific sector insight that can greatly help clients navigate a complex deal successfully. Second, the breadth of expertise should be considered: a combination of subject matter specialists in all relevant legal areas with the ability to work smoothly with other specialist teams (technical, environmental, etc). This ensures a holistic approach to deal issues. Third, team spirit is key. Clients feel satisfied when the team works seamlessly and acts as an extension to their own deal team.

What is the most interesting or unusual matter you have recently worked on, and why?

I have had the privilege to work on two of the largest transactions in Bulgaria in the past couple of years – Kinstellar acted as lead counsel on the €1 billion acquisition of Raiffeisenbank Bulgaria by KBC Bank and as local counsel on TAWAL's €1.2 billion acquisition of United Group's towers business.

While the two deals were set in completely different regulatory domains, there were similarities. Both were of strategic importance for the clients, either to increase their existing presence to the top of the market (KBC), or to make a historic step by investing for the first time in Europe (TAWAL). Also, both deals had multiple work streams running simultaneously against demanding timelines.



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Dominican Republic

Marielle Garrigó at Pellerano Nadal is highly renowned for her pivotal role in significant transactions in the Dominican Republic. With over 25 years of experience, she specialises in banking, M&A, project finance, capital markets and infrastructure. Marielle's career includes leadership at distinguished law firms and public sector involvement as special counsel to the Superintendent of Banks. Her accomplishments range from advising on the pioneering leveraged buyout of international airports to Anheuser-Busch InBev's major acquisition of Cervecería Nacional Dominicana. She has also been instrumental in sovereign bond offerings, energy sector bonds, mining company financing and syndicated loans. Recognised by prominent legal associations, Marielle is lauded for her expertise in corporate and finance law and contributes to esteemed publications.

Eduardo Pellerano specialises in banking, project finance, M&A, capital markets and foreign investments. He aids clients across sectors like infrastructure, technology, tourism and energy. Eduardo's accomplishments range from structuring Dominican government bond issuances to aiding multiple banks and multilaterals execute project financings in the Dominican Republic. Notably, he has contributed articles on economic 'Uberization' and is a member of the New York Bar Association. His work extends to regulatory advice, and he has been involved in the development of renewable energy projects and government infrastructure.

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1 What trends are you seeing in overall activity levels for mergers and acquisitions in your jurisdiction during the past year or so?

Despite the beginning of the election cycle, both local and foreign investors have exhibited a sustained pace of transactions, defying the typical deceleration often witnessed during pre-electoral and electoral years. Consequently, after the covid-19 pandemic and the ramifications of the Ukraine conflict, the nation experienced a notable upsurge starting from the final quarter of 2022 and throughout 2023. In fact, the Dominican Republic stands out as the preferred foreign direct investment (FDI) destination not only within Central America but also across the Caribbean, attributed to the country's steady growth within the region over the past several years.

Traditionally, transactions have taken the form of direct acquisitions or mergers. Nonetheless, the market's trajectory is one of constant evolution, with the anticipation of the emergence of alternative deal structures in the near future.

2 Which sectors have been particularly active or stagnant? What are the underlying reasons for these activity levels? What size are typical transactions?

Over recent years, sectors such as fuel, telecommunications, hospitality and renewable energy have witnessed heightened activity, emerging as focal points within the Dominican Republic's M&A landscape. These sectors have hosted some of the most substantial M&A deals over the past year. Notably, the fuel sector has experienced a surge in activity, characterised by the acquisition of local operations by prominent global ones.


Marielle Garrigó

Eduardo Pellerano

The driving forces behind this surge in activity are manifold. A stable economic and political environment has played a pivotal role, while evolving regulations have fostered growth in the renewables sector. Furthermore, the escalating interest of investors from Central and South America in expanding their foothold within the region has further bolstered the momentum.

As for transaction sizes, they exhibit a degree of variability contingent upon the sector in question. Transaction magnitudes can span from modest figures of US$100 million or even less, reaching up to around US$750 million. Notably regulated industries, such as banking, financing and aviation, may witness transactions surpassing the US$900 million threshold.

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"Local sellers often entertain the notion of receiving shares from foreign investors as a strategic means of optimising tax advantages."

3 What were the recent keynote deals? What made them so significant?

While the landscape of 2023 has predominantly been marked by robust project development and financing activities, notable M&A deals have also emerged.

A milestone achievement unfolded as Cesar Iglesias, a Dominican consumer products company, accomplished a historic feat by becoming the inaugural Dominican entity to successfully execute an IPO within the nation. This transaction achieved remarkable triumph, involving the issuance and purchase of 38,721,220 shares, aggregating to an approximate value of US$87,677,363.53.

Grupo Punta Cana, historically specialised in the hospitality sector, has recently acquired *Diario Libre*, one of the top newspapers in the country.

Simultaneously, Barrick Gold embarked on an extensive expansion endeavour for the Pueblo Viejo Mine, investing a substantial US$3 billion. This expansion, coupled with the recent establishment of a tail dam, spurred a series of land acquisitions integral to their expansion strategy.

Furthermore, the renewable sector is witnessing ongoing deal activities, with several transactions currently underway and anticipated to conclude by year end. These developments are poised to contribute to the sector's evolution.

4 In your experience, what consideration do shareholders in a target tend to prefer? Are mergers and acquisitions in your jurisdiction primarily cash or share transactions? Are shareholders generally willing to accept shares issued by a foreign acquirer?

Shareholders exhibit a degree of flexibility in considering payment structures. While a preference for cash payments exists, it is not uncommon to observe the utilisation of share transactions or a combination of both cash and shares. Our experience underscores that local sellers often entertain the notion of receiving shares from foreign investors as a strategic means of optimising tax advantages.

Conversely, the uniform rights enjoyed by foreign investors, akin to Dominican nationals, establish a context where share transactions are infrequent among foreign investors. Nonetheless, there are isolated instances where foreign investors opt for share transactions to retain local partners as way to benefit from their insights into the intricacies of the local market dynamics.

5 How has the legal and regulatory landscape for mergers and acquisitions changed during the past few years in your jurisdiction?

Over the preceding year, the legal and regulatory framework governing mergers and acquisitions has remained predominantly stable, having minimal impact on the landscape.

However, the current legislative landscape is marked by the presence of multiple bills within the Congress. These pending bills, if ratified, bear the potential to exert future implications on M&A proceedings. Prominent among these are the proposed new Civil Code and the forthcoming Securities Law. The envisaged comprehensive amendment to the Securities Law carries the prospect of introducing significant alterations, particularly in relation to the diversification of investment within pension funds. Notably, this reform aims to expand investment options beyond the existing limitations, thereby potentially encompassing diverse assets including bonds and entities beyond the local spectrum.

While recent years have witnessed a status quo in the legal and regulatory front, these prospective legislative developments signify a plausible shift in the trajectory of mergers and acquisitions, as they bear the promise of reshaping the future landscape and parameters of these transactions.

6 Describe recent developments in the commercial landscape. Are buyers from outside your jurisdiction common?

The prevailing commercial landscape is prominently characterised by the notable presence of foreign buyers and investors, often constituting a significant majority. This assertion finds substantiation

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in the consistent upsurge of FDI, exemplified by the figures recorded in 2021. During this period, FDI reached a substantial sum of US$3.34 billion, marking a discernible increase on the previous year's US$2.92 billion.

7 Are shareholder activists part of the corporate scene? How have they influenced M&A?

Shareholder activism is increasing in the corporate scene, especially since the Corporations Law expressly addresses minority shareholders' rights. Nevertheless, this activism is frequently burdened with bureaucracy and the cost derived from what may become a judicial process.

8 Take us through the typical stages of a transaction in your jurisdiction.

Merger and acquisition transactions in the Dominican Republic closely adhere to the standard process observed in common law jurisdictions, such as the United States, encompassing recognisable phases. Frequently involving intermediaries such as investment bankers and legal professionals, these transactions usually commence through interactions among these experts.

The initial stride commonly involves the execution of a non-disclosure or confidentiality agreement, laying the groundwork for the exchange of sensitive information. If the transaction takes the form of a restricted bidding process, it initiates with the provision of an information memorandum to potential buyers.

Negotiations pertaining to pricing are often deferred until a comprehensive due diligence exercise is undertaken. Virtual data rooms often facilitate this process, enabling efficient scrutiny of pertinent documentation. This due diligence procedure often encompasses interactions with the target company's management and on-site assessments.

Following the completion of the due diligence, negotiations encompassing price, operational structure and the delineation of transactional documents transpire. An initial closure of the deal ensues between parties, typically within the subsequent month, contingent upon the satisfaction of conditions precedents that are usually defined by the parties. In some instances, a non-compete agreement will be among the transaction documents; while in others, the creation of a temporary advisory role for the seller to facilitate the transition process will be put in place. Tax implications, as well as clauses related to guarantees and indemnities, usually constitute pivotal facets of these discussions.

"Merger and acquisition transactions in the Dominican Republic closely adhere to the standard process observed in common law jurisdictions, such as the United States."

For target companies subject to special regulatory oversight, requiring governmental clearance or non-objection, parties generally formalise a memorandum of understanding (MOU), which outline a sequential timetable for ensuing stages. This step facilitates the navigation of regulatory procedures and approvals.

The distinct stages underscore the resemblance between M&A practices in the Dominican Republic and those used in well-established common law jurisdictions.

9 Are there any legal or commercial changes anticipated in the near future that will materially affect practice or activity in your jurisdiction?

The impending landscape harbors the potential for significant alterations as numerous proposed bills stand to impact the M&A realm. Among these, noteworthy mentions encompass the proposed new Civil Code, an envisioned amendment to the securities law, and

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refinements within the financial and monetary board's regulations. These anticipated modifications aim to fortify various facets, including the role of independent directors and the evolving fintech landscape, mirroring a commitment to enhanced regulatory frameworks. These developments, if realised, are poised to extend their influence across the spectrum of M&A practices and associated activities.

10 What does the future hold? What activity levels do you expect for the next year? Which sectors will be the most active? Do you foresee any particular geopolitical or macroeconomic developments that will affect deal sizes and activity?

Despite the upcoming year being an electoral one, foreign investors have demonstrated a notable degree of confidence in the Dominican Republic's enduring political, economic and societal stability. Consequently, we anticipate that M&A activity will remain relatively resilient, with a substantive reduction in activity being unlikely.

However, considering the inherent political dynamics associated with elections, it is foreseeable that any pending reforms or substantial legal amendments may experience a temporary pause until after the electoral process concludes. This precautionary measure aligns with the customary caution exercised during such periods.

This steadfast investor confidence and the underlying stability contribute to a positive outlook for the M&A landscape, suggesting that the prevailing activity momentum will persist across various sectors. While external geopolitical and macroeconomic factors may exert influence, the overall sentiment remains one of continuity and confidence.

QUESTIONS

Marielle Garrigó
mgarrigo@pellerano.com

Eduardo Pellerano
epellerano@pellerano.com

Pellerano Nadal
Santo Domingo
www.pellerano.com

QUESTIONS

The Inside Track

What factors make mergers and acquisitions practice in your jurisdiction unique?

In the Dominican Republic, M&A practice thrives due to the nation's receptivity to foreign investment, backed by minimal legislative constraints and a plethora of incentive laws. However, a distinctive challenge arises from the country's bureaucratic intricacies; expert local counsel must streamline procedures and anticipate contingencies. This demands a counsel with a keen understanding of both jurisdictional nuances and client objectives, ensuring the formulation of optimal transactional strategies. Navigating the labyrinthine administrative landscape requires proactive liaising with government bodies, guaranteeing timely execution and the identification of prime dispute resolution alternatives.

What three things should a client consider when choosing counsel for a complex transaction in your jurisdiction?

When selecting counsel for intricate transactions, three key considerations emerge. First, a robust track record in managing complex M&A undertakings, particularly those spanning multiple jurisdictions and disciplines, is pivotal. Expertise acquired through such experience is indispensable in preemptively addressing potential challenges and navigating unforeseen complexities. Second, the counsel's capacity to rapidly assimilate and align with the client's objectives, goals and imperatives underscores their potential to propose pertinent legal structures and augment transactional value. Last, the counsel's commitment to upholding rigorous quality standards, and their ability to meticulously adhere to predetermined timelines, signifies a level of dedication that can profoundly impact the transaction's outcome.

What is the most interesting or unusual matter you have recently worked on, and why?

We have been involved in the development of a mega project through a private-public partnership, holding immense significance for the nation. The project's expansive nature necessitates our coordination with a numerous of private and public stakeholders to ensure its resounding success. The project's scope spans key sectors, including real estate and the tourism industry, which holds paramount importance for the country. Additionally, the project encompasses environmental aspects, subjecting it to stringent international regulations due to the specific geographical area of its development.

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Egypt

Mohamed Hashish at Soliman, Hashish & Partners has over 19 years of experience in handling corporate, M&A, restructuring, banking and finance, energy and electricity, TMT, construction and public procurement matters.

Mohamed has received the following international recognition and awards: MENA Super 50 Lawyer (*Thomson Reuters* ALB, 2021); Highly-Regarded Leading Lawyer (*IFLR 1000* for Corporate, M&A and Project Development, 2015 to date); Elite Leading Individual (*The Legal 500* EMEA for Commercial, Corporate, M&A, 2020 to date); and Leading Lawyer (*Who's Who Legal* for TMT, 2014–2015).

Mohamed has advised over 700 multinational clients in his areas of practice, including, inter alia, starting up and operation of their businesses in Egypt.

Mohamed has been appointed to several leadership positions, including vice chair at the International Financial Products & Services Committee of the International Law Section at the American Bar Association for the ABA terms (2016–2021); and beachhead adviser for Egypt at the New Zealand Trade and Enterprise.

Farida Rezk has almost three years of experience handling corporate matters. Due to her active and notable progress, Farida was appointed as an International Student Ambassador for the University of Liverpool. Farida undertook work experience within the legal sector in Egypt. Farida was awarded a pro bono award for the most and best contributions to the law clinic cases of 2019/2020 at the University of Liverpool.

1 What trends are you seeing in overall activity levels for mergers and acquisitions in your jurisdiction during the past year or so?

Mergers and acquisitions remained active in Egypt compared with levels prior to the financial crisis. Overall patterns of activity have been consistent with no major change between 2020 and 2023. These levels of sustained activity are owing to a number of factors including, for example, the great efforts that Egypt's government has undertaken to attract foreign investments to the market and the large number of ongoing infrastructure projects available in Egypt, whereby it replaced South Africa as the second-highest ranked destination for projects covering the entire MENA region. For this reason, in 2020, Egypt led MENA countries in capital investment, according to fDi Intelligence's 2020 report. Egypt was also ranked third in the top 17 African Tech Ecosystems of the Future for 2021/2022, according to the 2021 fDi African Tech Ecosystems of the Future Report 2021/2022.

2 Which sectors have been particularly active or stagnant? What are the underlying reasons for these activity levels? What size are typical transactions?

The technology, media and telecoms (TMT), banking and finance, and healthcare sectors have been particularly active. There is no specific size of transactions, but the majority are large-sized deals.

3 What were the recent keynote deals? What made them so significant?

The following closed and ongoing transactions are, in our opinion, the most notable deals some of which were also part of international merger and acquisition transactions:

- the acquisition of Arab Investment Bank by both the Sovereign Fund of Egypt and EFG Hermes Holding SAE;
- the acquisition of BLOM Bank Egypt by Arab Banking Corporation;
- the acquisition of Careem by Uber;
- the acquisition of Eventtus by Bevy;
- the acquisition of SODIC by Aldar;
- the acquisition of Vodafone Group's shares in Vodafone Egypt by Vodacom;

- the EMPG/OLX merger;
- the Wabtec/General Electric spin-off and merger;
- the sale of a 9.5 per cent stake in state-controlled Telecom Egypt; and
- the merger of First Abu Dhabi Bank and Bank Audi Egypt in June 2022.

The majority of the aforementioned deals, if not all of them, involve key players in their relevant sectors.

In addition to these deals, Egypt's market also saw a number of major transactions that were not successfully closed, such as the admission made by Saudi Telecom Company to acquire the entire stake of Vodafone Group in Vodafone Egypt, as well as the rejected merger between Cleopatra and Alameda.

4 In your experience, what consideration do shareholders in a target tend to prefer? Are mergers and acquisitions in your jurisdiction primarily cash or share transactions? Are shareholders generally willing to accept shares issued by a foreign acquirer?

The primary consideration for the majority of mergers and acquisitions deals is cash. However, in some transactions, shareholders may be willing to accept a shares swap.

5 How has the legal and regulatory landscape for mergers and acquisitions changed during the past few years in your jurisdiction?

The most significant changes made to the legal and regulatory landscape for mergers and acquisitions include the following:

The concept of having a shareholders' agreement (SHA) for a company, other than its articles of incorporation was not recognised under the Egyptian Companies Law until 2018, where entering into an SHA was not effective in regard to this company nor any shareholder who is not party to the said SHA nor third parties (including the company's creditors). However, as a result of the major changes introduced by the Egyptian Companies Law in 2018, it is now possible to have an SHA, provided that several conditions are satisfied.

The amendment made to the Egyptian Companies Law also introduced spin-offs, called 'horizontal spin-offs', and split-offs, called 'vertical split-offs'. Prior to this amendment, it was common practice before the General Authority for Investment and Free Zones (GAFI) that the split-off of a company was implemented by virtue of a resolution issued by an Extraordinary General Shareholders Meeting, as well as a split-off contract. However, the said amendment imposes several requirements for the implementation of both horizontal spin-offs and vertical split-offs. The introduction of the said requirements is vital to the regulation and protection of the interests of shareholders during spin-offs or split-offs, as well as the creditors of the company subject to the said spin-offs or split-offs.

Change-of-control restrictions were imposed or increased for specific sectors such as education and healthcare, whereby certain regulatory approvals or non-objections are required to be obtained prior to closing the relevant transaction.

In accordance with one of the key changes made under Egyptian law in 2020, any person, whether a natural or juristic person, registered with the Commercial Registry in Egypt, is required to create a special register for the 'beneficial owners' (the beneficial owners register) and annotate in this beneficial owners register specific data including, inter alia, beneficial owners' data regarding who actually owns or controls the said person, whether the beneficial owner is a juristic person or legal interest. This data must be updated once any

> "It is very common for non-Egyptian buyers to engage intermediaries to locate potential local sellers and targets."

change is made to the said ownership or control, and subsequently provided to the competent Commercial Registry immediately upon the occurrence thereof.

As part of the state's efforts to stimulate the Egyptian economy, the President issued Law No. 152 of 2020 on the Development of Small, Medium-sized and Micro-enterprises (the SMEs Law). The SMEs Law aims to attract the projects developed in the informal economy and to legitimise their status in accordance with the applicable laws. The SMEs Law has developed new mechanisms to facilitate ease of access for SMEs using financial institutions and to support those institutions, in turn, in their fund recovery.

The Egyptian Financial Regulatory Authority has recently agreed to allow the incorporation of special purpose acquisition companies in Egypt within the activities of venture capital companies.

One of the major changes which have taken place over the last year with respect to mergers and acquisitions is the recent amendments made to the Anti-Trust Law No. 5 of 2003 in December 2022, whereby the post-notification requirement for a transaction has been replaced with the newly introduced pre-notification requirement to the Egyptian Competition Authority for any transaction that constitutes 'economic concentration'. Under the new amendments, 'economic concentration' is defined as any change of control or material influence as a result of a merger or acquisition or establishment of a joint venture. However, the Executive Regulations for the new amendments have not been issued yet and therefore the applicability of this regime is still subject to the issuance of the said Executive Regulation.

6 Describe recent developments in the commercial landscape. Are buyers from outside your jurisdiction common?

Egypt's innovative companies have, despite the global challenges associated with, and brought about by the covid-19 pandemic, attracted both international and local buyers.

Furthermore, Egypt-based companies also began to expand outside Egypt by acquiring key players in other jurisdictions, such as the multiple acquisition transactions made by Swvl abroad and the acquisition of Gulf CX by Raya Contact Center Services Company.

7 Are shareholder activists part of the corporate scene? How have they influenced M&A?

Shareholder activists constitute part of the corporate scene. Sometimes, key shareholders attract other non-shareholders to look into the said shareholders' portfolios and follow their approach.

8 Take us through the typical stages of a transaction in your jurisdiction.

There are no typical stages for transactions in Egypt. However, it is very common for non-Egyptian buyers to engage intermediaries to locate potential local sellers and targets, but this is not the common approach for local buyers as they typically rely on their own connections to establish initial contact.

If contact is made and acceptable in general, a formal non-binding offer may be made to agree on the following steps. Parties are, in general, liable for binding provisions under any pre-contractual document where they are, in all cases, also liable for any misleading statements.

As a general rule under the Civil Code, the seller is not answerable for any defects of which the purchaser was aware at the time of the sale or any defects that could be discovered by the purchaser upon examining the subject of the sale with the care of a reasonable person, unless the purchaser proves that the seller confirmed the absence of these defects.

There is no typical scope of due diligence in Egypt as it depends on the level of due diligence that the buyer is willing to conduct; however, full due diligence is usually recommended to be in line with the aforementioned general rule. Buyers may also rely on due diligence reports produced by the sellers if the sellers conduct the due diligence with the care of a reasonable person. Other special requirements apply to listed companies and specific industries.

9 Are there any legal or commercial changes anticipated in the near future that will materially affect practice or activity in your jurisdiction?

There are several changes contemplated and rapid changes anticipated to occur within the overall legal framework in Egypt including laws and regulations governing mergers and acquisitions, especially with regards to specific sectors. However, determining whether these changes will materially affect practice or activity in Egypt can only be made at the time of the relevant transaction.

10 What does the future hold? What activity levels do you expect for the next year? Which sectors will be the most active? Do you foresee any particular geopolitical or macroeconomic developments that will affect deal sizes and activity?

We anticipate that the most active sectors are highly likely to be TMT, banking and finance, real estate, agriculture, greenfield and healthcare.

Mohamed Hashish
m.hashish@shandpartners.com

Farida Rezk
f.rezk@shandpartners.com

Soliman, Hashish & Partners
Cairo
www.shandpartners.com

QUESTIONS

The Inside Track

What factors make mergers and acquisitions practice in your jurisdiction unique?

Egypt has successfully placed at the top of all ranked countries in the Middle East and Africa by capital investment in 2019 by acquiring 12 per cent of capital investment with a total value of US$13.7 billion. The majority of this investment occurred in the energy, construction and transportation sectors.

The Egyptian government is in the process of completing a number of 'mega projects', including, inter alia:

- the new Administrative Capital, of which the first phase's total space is approximately 44.1 square kilometres with a total construction value of 20 billion Egyptian pounds, equivalent to approximately US$1.2 billion;
- a new 4.4 billion Egyptian pound line for the third phase of the metro, the fourth phase of which has a total value of US$1.2 billion and the first sky train with a total value of US$1.5 billion;
- Zohr gas field, which is the largest ever natural gas field in the Mediterranean Sea;
- Benban Solar Park, which is a photovoltaic power station under construction with a planned total capacity of 1650MWp and will be the largest solar installation in the world; and
- El Dabaa Nuclear Power Plant, which is the first nuclear power plant planned for Egypt.

The Egyptian government has introduced recent amendments to the Investment Law No. 72 of 2017 in the hopes of attracting foreign investment, including, inter alia, lifting some of the requirements for establishing projects in the Private Free Zones. Foreign investors also have the right to apply for a single licence, known as the 'Golden Licence', subject to satisfying certain conditions. This licence allows for the establishment, operation, and management of a project without the need for additional licences or approvals.

What three things should a client consider when choosing counsel for a complex transaction in your jurisdiction?

Experience, professionalism and ethics are, in our opinion, the primary characteristics that should be considered when engaging counsel for a complex transaction.

What is the most interesting or unusual matter you have recently worked on, and why?

The Wabtec/General Electric merger is one of the most interesting matters that we, Soliman, Hashish & Partners, have recently worked on. Our firm represented Alstom as local legal counsel in Egypt for the acquisition made by General Electric of Alstom's grid and power sectors and was recognised by General Electric for our performance. General Electric then engaged us to support locally in the merger with Wabtec, who also decided to hire our firm after the merger. These multiple aforementioned representations confirm the degree of trust our clients place in our firm, even for the most complex and cross-border transactions.

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Germany

Thomas Lappe is a corporate/M&A partner in the Berlin office of K&L Gates LLP. He has 25 years of experience in advising corporate clients and private equity firms on international M&A transactions, including carve-outs, buyouts, joint ventures and corporate reorganisation. Thomas focuses on the technology and automotive sectors. He is one of the firm's global leaders for the corporate practice area.

Wilhelm Hartung is a corporate/M&A partner in the Berlin office of K&L Gates LLP. He advises clients on national and cross-border M&A and commercial transactions, particularly in regulated industries such as transportation, life sciences, healthcare and telecommunications. He also counsels German and international blue-chip clients on high-profile, confidential internal investigations.

Judy Witten is an associate in the Munich office of K&L Gates LLP and is part of the corporate and transactional practice group. She advises national and international clients on (cross-border) corporate restructurings, M&A transactions, formation of joint ventures and general corporate matters, in particular in relation to public listed companies.

Read this article on Lexology

1 What trends are you seeing in overall activity levels for mergers and acquisitions in your jurisdiction during the past year or so?

While the first half of 2022 saw exceptionally brisk activity in the M&A market, the pace of transactions slowed significantly in the second half of 2022, mainly due to rising energy and commodity prices combined with further increasing inflationary pressure and steadily rising interest rates.

The M&A market entered 2023 with this burden, and we note that overall consolidation occurred at yet another lower level in the first half of 2023. In terms of value, the M&A market slumped by another third in the first half of 2023 compared to the first half of 2022, having already fallen by around 20 per cent last year compared to the peak year of 2021.

Notably, in the German M&A market, the second quarter of this year was again weaker than the first, despite the €12 billion sale of the Viessmann Group's heat pump business to US building automation specialist Carrier Global Corporation announced on 25 April 2023. By contrast, there was a clear recovery trend on the foreign market in both German purchases and German sales in the second quarter, albeit still at a low level overall.

The main driver of M&A activity continues to be the ongoing trend toward digital and technical transformation, which has been accelerated by the pandemic. Technology companies offering solutions such as software, cloud computing and e-commerce platforms all remain attractive targets to fill any technology or skills gaps that buyers may not be able to fill with their current resources. In addition, the shift towards e-mobility in the German automotive industry continues to be a driving force for acquisitions and supply chain adjustments. There is also the transformation in the energy


Thomas Lappe


Wilhelm Hartung


Judy Witten

"The M&A market slumped by another third in the first half of 2023."

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sector and related infrastructure, which has been accelerated by the impact of the Ukraine war.

Furthermore, growing importance of ESG issues continues to be key drivers of M&A activity in 2023. Complying with environmental guidelines, fostering diversity and exemplary business practices are becoming increasingly important in acquisition and divestment decisions. In addition, a company's sustainability performance is becoming an ever more important factor in determining shareholder value, and more and more companies are repositioning themselves, streamlining their portfolios by divesting 'non-green' businesses, or making acquisitions to improve their sustainability performance.

2 Which sectors have been particularly active or stagnant? What are the underlying reasons for these activity levels? What size are typical transactions?

As in previous years, the technology, media, and telecoms sector remains a prominent driver of M&A activity in Germany. The ongoing digitisation trend continues to fuel transactions in areas such as software development, cloud computing and digital media. The need for innovative solutions and technology-driven business models keeps this sector highly active. Transaction sizes vary, with both smaller tech startups and larger, strategic acquisitions in play.

Also, M&A activity in the healthcare sector remain buoyant, with a focus on both pharma and life sciences as well as digital healthcare services. Investors are interested in innovative healthcare solutions and companies that can contribute to advances in healthcare delivery. Large pharmaceutical companies continue to optimise their portfolios through divestitures and acquisitions to support innovation. Transaction sizes can vary widely, from smaller biotech startups to multi-billion dollar pharmaceutical deals.

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The automotive sector continues to see significant deal flow, primarily due to transformative investments in electric powertrains, autonomous driving, and battery technology. Both original equipment manufacturers (OEMs) and suppliers are actively seeking acquisitions to position themselves for the future of mobility. While transaction sizes may vary, many deals in this sector tend to be in the mid to large range, given the capital-intensive nature of automotive technology investments.

Likewise, the German aerospace and defence sector remained relatively stable in the first half of 2023, with a 25 per cent increase in the number of deals compared to the same period in 2022. Deal activity was dominated by financial investors, mainly from Germany. However, last year's decision to increase the defence budget by €10 billion by 2024 and the commitment to comply with NATO's 2 per cent of GDP defence spending guideline have not yet had a significant impact on M&A activity. This is likely due to the long-term nature of defence contracts and the time it takes for funds to flow from governments to contractors.

> "In terms of transaction sizes in the German M&A market in recent months, there have been fewer mega-deals."

Traditional energy sectors, such as fossil fuels, on the other hand, are facing challenges amid global pressure for renewable energy sources. This change has led to a slowdown in M&A activity in traditional energy sectors as companies re-evaluate their strategies and portfolios.

In terms of transaction sizes in the German M&A market in recent months, there have been fewer mega-deals (over €1 billion), but there continue to be many mid-sized transactions in the €50 to €250 million range. In addition, smaller transactions involving start-ups and technology-oriented companies are common in sectors such as TMT.

3 What were the recent keynote deals? What made them so significant?

In April, German heating manufacturer Viessmann sold its air conditioning division to US air conditioning specialist Carrier Global for €12 billion. The air-conditioning division includes heaters and air conditioners as well as heat pumps, which are regarded as an important component of the energy turnaround currently under discussion in Germany. At Viessmann, the sale was presumably motivated by fears that the company was too small by international standards when it came to converting gas and oil heating systems to heat pumps. The takeover had triggered a political debate about whether the German government's 'heat turnaround' was overburdening German manufacturers. There were also warnings that after the decline of the solar industry, Germany was now in danger of losing the next technology of the future. The owners will receive most of the purchase price in cash, with the remaining €2.4 billion in Carrier shares.

The second largest M&A deal with German participation is Deutsche Börse AG's takeover offer to the shareholders of Danish financial software company SimCorp A/S with a total consideration of almost €4 billion. The offer is subject to a minimum take-up rate of 50 per cent plus one share of all SimCorp shares. It was expected to be settled no later than 29 September 2023, and will thus be completed.

Also, the third-largest M&A deal in recent months was a strategic deal between two companies: Bertelsmann sold its stake in the call center Majorel to the market leader Teleperformance from France. The previous shareholders will receive a total of €2 billion in cash and €1 billion in Teleperformance shares. Bertelsmann had most recently held 39.5 per cent of the shares, generating proceeds of around €1.2 billion.

Among the billion-euro deals in recent months in which German companies have been sold to international PE investors is the takeover of Darmstadt-based Software AG by US technology investor Silver Lake. Since the end of the second acceptance period at the end of July, Silver Lake has held 84.29 per cent of the shares in the Darmstadt-based software house. Provided the relevant authorities do not intervene, the takeover of the software company, founded in

1969, is expected to be completed this year – for more than €3 billion including debt.

Another example of a transaction to a foreign PE investor is the €2 billion sale of a minority stake in Griesheim-based gases company Messer SE & Co. KG, formerly known as Messer Griesheim, to the Singapore state fund GIC Capital. The proceeds will enable Messer's founding family to secure control of the core business and buy out financial investor CVC from a joint venture.

Only a few major transactions have taken place in the domestic market (German target companies and German buyers) in recent months. Strategic buyers from Germany in particular have been very cautious. However, the largest domestic M&A deal with a purchase price of €440 million (transaction value €480 million) was the acquisition of BBS Automation GmbH by Dürr AG from EQT Private Equity of Sweden, strategic for the buyer and a successful exit from a solid investment for the seller.

In our view, SPAC (Special Purpose Acquisition Company) transactions are of little significance in Germany at present. However, a major de-SPAC transaction worth mentioning in the German market was the acquisition of Gebrüder Schmidt GmbH & Co KG, a manufacturer of printed circuit boards, by an American SPAC investor. De-SPAC transactions represent the reverse takeover process of an operating company by a capitalised acquiring company, which has more of a financing character for the acquired company than a classic takeover.

4 In your experience, what consideration do shareholders in a target tend to prefer? Are mergers and acquisitions in your jurisdiction primarily cash or share transactions? Are shareholders generally willing to accept shares issued by a foreign acquirer?

In German private M&A, we rarely see sellers accept anything other than cash consideration. While the total cash payment is occasionally paid in full on closing, deferred payment schemes including escrows and holdbacks are more common. There is also a renaissance of earn-out structures in an effort to align incentives and bridge valuation gaps caused by various global crises and market uncertainties. If shares form part of the consideration, we find that this is driven by unique circumstances, such as the desire to put in place a joint venture type structure or strategic partnership.

From time to time, we come across stock-for-stock transactions in the public M&A arena. An exchange of shares in public companies is generally more attractive than an exchange of shares in closely held private companies. In Germany, the shares offered as consideration in a public takeover offer must be liquid securities admitted to trade on a regulated market in any EEA member state. While offering shares issued by a foreign bidder can help navigate the risks of shareholder challenges under German stock corporation law, this raises rather complex issues of legal equivalence between the foreign offer shares and the German target shares. A significant limiting factor for public share exchange offers is a revised policy adopted by the German securities regulator (BaFin) in 2021, which was subsequently confirmed by the courts. Pursuant to the revised policy, the offered shares need to comprise a free float of at least €500 million with an average daily trading volume of at least €2 million in order to be considered equivalent consideration. Fewer than 100 German issuers currently meet these requirements, and after only two bidders (both

foreign) made public share exchange offers in 2021, no such offers have been made in Germany since 2022.

5 How has the legal and regulatory landscape for mergers and acquisitions changed during the past few years in your jurisdiction?

Regulatory tightening and political uncertainty have continued to have negative impacts on German in-bound and out-bound M&A transactions throughout 2023.

The newly tightened German FDI control regime has shown its effects. Given the broad scope of industry sectors captured, the number of German FDI cases has risen from 78 cases in 2018 to 306 in 2022, with US and China among the top three origin countries of investors. Driven by the publicly declared political goal that Germany and Europe maintain economic and technological sovereignty in critical industry sectors, recent examples of FDI prohibitions include:

- the partial prohibition of the participation of a Chinese state-owned shipping company in a container terminal in Hamburg. Despite considerable concerns from multiple government branches, the BMWK ultimately permitted only a minority shareholding of 24.9 per cent, below the 25 per cent stake that would potentially give a shareholder a blocking minority, instead of the originally sought 35 per cent interest;
- the envisaged acquisition of the wafer production of the semiconductor manufacturer Elmos Semiconductor SE by the Chinese state owned investor SAI Micro-Electronics through its Swedish subsidiary Silex AB; and
- the envisaged 2022 acquisition of German semiconductor manufacturer Siltronic AG by Taiwanese GlobalWafers, which was

"The newly tightened German FDI control regime has shown its effects. Given the broad scope of industry sectors captured, the number of German FDI cases has risen from 78 cases in 2018 to 306 in 2022, with US and China among the top three origin countries of investors."

de-facto prohibited because the longstop date expired during the BMWK's review.

The 11th German Act Against Restraints of Competition amendment (GWB), enacted in July 2023, further strengthens the FCO's merger enforcement powers and expands its powers following sector inquiries. After completion of a sector inquiry, the FCO now has the power to require companies to notify certain transactions, even if the specific turnover thresholds set out in the GWB are not met, provided there are indications that future mergers in the investigated sector could significantly restrict competition. With these legislative changes, merger control in Germany will become yet more interventionist. Where the FCO anticipates potential competition concerns, parties to M&A transactions must beware of FCO intervention making use of its new broader powers.

Finally, ESG aspects are increasingly considered in M&A transactions. For example, the German Act on Corporate Due Diligence Obligations in Supply Chains (LkSG), which came into force in January 2023, requires new and increased attention in due diligence, along with ESG topics more generally. Whether the target's business model ensures sustainability and what risks and costs exist in relation to compliance with ESG criteria in the future will have a direct impact on company valuation, purchase price and deal documents.

6 Describe recent developments in the commercial landscape. Are buyers from outside your jurisdiction common?

Germany is traditionally considered an attractive jurisdiction for foreign direct investment. The country's strengths comprise a powerful and diversified industrial network, a highly skilled workforce with a good command of English, reliable infrastructure, a favourable social climate, a strategic location at the heart of Europe and a stable

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legal framework. As a result, German companies in cross-border acquisitions have a long history of being favoured targets for investors across the globe, both on the strategic and the financial sponsor front. That said, the commercial landscape in Germany has recently been marked by ongoing changes and challenges, including the transition to cleaner energy sources, technological innovation and digitalisation, an enormous evolution in and challenges to the automotive industry and a focus on sustainability. Foreign buyers continue to play a significant role in the German market, attracted by the country's strong economic fundamentals and opportunities arising from these developments. However, geopolitical tensions and regulatory changes have necessitated careful consideration and compliance efforts in cross-border transactions.

7 Are shareholder activists part of the corporate scene? How have they influenced M&A?

In recent years, there have been many high-profile cases of shareholder activism in Germany, including thyssenkrupp AG divesting its elevator business upon initiatives taken by the hedge funds Cevian Capital and Elliott Management Corporation, and Active Ownership Capital initiating the restructuring of Stada Arzneimittel Aktiengesellschaft. As in many other jurisdictions, shareholder activism currently plays an increasing role in Germany's corporate scene, even though German-listed companies are traditionally more immune to shareholder activism than international companies by often having substantial anchor shareholders and relatively low free float. A report on shareholder activism in the DACH (Germany, Austria and Switzerland) region by Boston Consulting Group identified 160 companies exposed to an extremely high or very high risk of an activist campaign. Activists exert influence with regard to M&A matters in several respects, such as in connection with public takeovers when the activists buy shares to force the bidder to raise the offer price, a method used by Elliott in the context of Vodafone's public takeover offer for the shares in Kabel Deutschland AG. In other cases, the activist investors push for specific acquisitions or divestitures of business lines by the listed companies in which they hold stakes. Also, Environmental, Social, and Governance (ESG) activism has gained prominence. Activists may push for ESG-related changes within companies, including divestment from businesses with poor ESG profiles or a shift toward sustainable practices. For example, activist shareholder Enkraft Capital demanded that RWE AG divest of its brown coal business and focus solely on its renewable energies business.

8 Take us through the typical stages of a transaction in your jurisdiction.

The phases of an M&A transaction in Germany largely conform to Anglo-American standards. Generally, everyone on the ground in Germany is comfortable with negotiating and documenting cross-border deals in English. In a bilateral deal, the parties frequently communicate with each other directly. Depending on the deal volume and company size, this can happen at all levels, including board level or the level of the internal business development teams. Financial advisers sometimes facilitate the initial contact and the overall process, especially when it comes to upper mid-cap or large M&A transactions. As a first legal document, the parties typically execute a non-disclosure agreement. Where parties are competitors, it may be necessary to put in place clean team arrangements early on.

While the parties frequently prefer to initially summarise key terms of the envisaged transaction in heads of terms, others jump into the due diligence exercise and the negotiations of definitive agreements. By way of exception, we have also seen sales processes without any diligence review at all. This must be justified by the buyer's board on a case-by-case basis and include measuring any advantages and disadvantages by applying the business judgement rule. Due diligence is now, in most cases, managed through virtual data rooms, and in larger international transactions with thousands of contracts, buyers increasingly apply legal technology tools to review the data efficiently.

The negotiation of the sale and purchase agreement often takes two to four rounds; however, we have also seen fast track negotiations and negotiations that have dragged on for several months. In Germany, the first sell-side draft of the sale and purchase agreement tends to be a little less 'middle of the road' than you would usually expect from a US or UK perspective. Before a deal can be signed, it is the seller's job to

"The practical significance of any foreign direct investment control clearance should, in these days of rising national protectionism, not be underestimated by investors from outside the European Union."

prepare the disclosure schedules against the warranties – Germany's answer to England's disclosure letter. Originally used predominantly by private equity sellers, now more than 70 per cent of the strategic deals use warranty and indemnity (W&I) insurance. One German peculiarity is that the sale and purchase agreement must often be notarised, notably if the transaction involves the sale of shares in a limited liability company. Occasionally, foreign investors find it surprising that, in a notarisation, the documents must be entirely read by the notary in the presence of all the parties' representatives. This exercise may take several hours or, at times, may be an 'overnighter' if the deal has not been finalised in all respects prior to the notarial session. Immediately after signing, the parties will focus on all regulatory clearances, which must be obtained prior to closing. Similar to other jurisdictions, the German foreign direct investment control regulations have recently been enhanced. The practical significance of any foreign direct investment control clearance should, in these days of rising national protectionism, not be underestimated by investors from outside the European Union.

In an auction, a process letter will be provided with procedural guidance to all bidders. In preparation for auctions, German sellers often conduct a vendor due diligence review to provide all bidders up front with at least basic legal, tax and financial information on the target. Following the due diligence review – and sometimes subject to confirmatory due diligence – the bidders are asked to submit final bids, including a statement of the value they place on the equity and a mark-up of the sale and purchase agreement. Additionally, in German auctions, we frequently see 'seller-buyer flip' W&I insurance, where the seller begins to arrange for insurance with the preferred buyer, at some point in the process, then stepping into the shoes of the seller to finalise the underwriting.

9 Are there any legal or commercial changes anticipated in the near future that will materially affect practice or activity in your jurisdiction?

From July 2023, the EU's new Foreign Subsidies Regulation (FSR) applies, giving the European Commission the power to take action against subsidies granted by non-EU countries to companies active in the EU that can be considered distortive. Large M&A transactions can be investigated if certain thresholds are met, as well as, upon the discretionary initiative of the Commission, any situation potentially involving foreign subsidies.

M&A transactions that meet the FSR's thresholds must be notified starting from October 2023. Then, parties to a transaction will need to assess not only filing obligations and substantive risk under merger control and foreign direct investment/national security rules, but also under the FSR.

The German government is expected to adopt a 'China strategy paper' in the second half of 2023. A first draft provides for further amendments to German foreign trade laws. It can be anticipated that in future, investment control will not only cover direct or indirect acquisitions of shares in existing German companies, but potentially also investments in Germany from foreign (non-EU) investors though incorporating a company or venture capital financing. Closer cooperation between G7 member states is on the agenda to identify and coordinate the handling of (direct) Chinese investments in any G7 member state. Critical infrastructures, such as transport and smart city infrastructure, data networks and electronic payments, as well as electricity, water utilities and hospitals will continue to be the focus of such scrutiny, with a view to prevent future dependencies or threats relevant for public security.

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Based on the draft of the European Corporate Sustainability Due Diligence Directive, existing supply chain due diligence obligations can be expected to be further tightened to apply also to indirect suppliers and increased liability for failure to take preventive and remedial action.

10 What does the future hold? What activity levels do you expect for the next year? Which sectors will be the most active? Do you foresee any particular geopolitical or macroeconomic developments that will affect deal sizes and activity?

How the German M&A market will develop in 2024 is indeed an intriguing question to which hardly anyone can give an answer on a sound basis at the moment.

On the one hand, we see that companies are still struggling with the effects of various crises: rapidly rising commodity and energy prices, changing regulatory requirements leading to changes in

business models, skills shortages and uncertain customer demand, along with interest rates that continue to rise as inflation has proven more stubborn than expected. Although in June economic institutes already predicted a growth rate of 1.3 per cent for Germany in 2024, these positive forecasts have already been revised downwards again in the meantime. All these factors add up to an overall situation that continues to be characterised by great uncertainty and does not provide any good conditions for M&A activities.

On the other hand, we see a number of drivers that are likely to keep the M&A market active in the coming period: many companies are still under high pressure to innovate and transform and will, therefore, continue to rely on acquisitions and carve-out activities in the future. Also, private equity investors still have considerable capital to invest, and the current crisis offers interesting opportunities in the M&A market that market participants can exploit, for example, by acquiring companies that have run into financial difficulties as a result of the current turmoil, but otherwise have a solid business case and are well positioned for the long term.

We expect to see further expansion in the TMT sector in particular, as a number of industries continue to focus on digital transformation (including artificial intelligence, cloud computing and cybersecurity). A vivid example of this trend was Deutsche Börse's aforementioned acquisition of Danish data provider SimCorp for €4 billion this year. Deutsche Börse used this acquisition to strengthen its competencies in the area of data analysis for its newly established investment management solutions business.

We also expect ESG and sustainability issues to continue to be a driver for M&A transactions in the coming months, as the pressure on companies to demonstrate good ESG performance continues to increase. Likewise, we believe that the transition to renewable energy sources and efforts to reduce dependence on fossil fuels to continue to drive M&A activity in the renewable energy sector.

Finally, we expect to see transaction activity in the defence sector in the coming months. The ongoing Russia-Ukraine conflict has prompted the German government to invest €100 billion in expanding the country's armed forces. This was followed by a €10 billion increase in the defence budget by 2024 and a commitment to comply with NATO's defence spending guideline of 2 per cent of GDP. We assume that rising orders and production rates to replenish depleted ammunition, missiles and weapons inventories are likely to create opportunities for M&A as companies seek to build capacity or resolve supply chain issues. Given the high cost of development programmes and the stability of the long-term defence budgets, we also expect to see further cooperation between European countries in the form of partnerships and joint ventures, similar to the joint venture between Rheinmetall and Ukraine's Ukroboronprom to build and repair tanks in Ukraine.

Thomas Lappe
thomas.lappe@klgates.com

K&L Gates
Berlin and Munich
www.klgates.com

Wilhelm Hartung
wilhelm.hartung@klgates.com

Judy Witten
judy.witten@klgates.com

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QUESTIONS

The Inside Track

What factors make mergers and acquisitions practice in your jurisdiction unique?

The formalities of German corporate law give rise to a number of practical restrictions, which are not experienced in Anglo-Saxon jurisdictions. For example, it is sometimes required to use 'limitation language' to fit upstream loans into the requirements of German capital maintenance rules. Legal features integral to group structures, such as domination and profit pooling agreements, demand special provisions in sale and purchase agreements. In a nutshell, Germany has established a practice over the past decades to combine Anglo-Saxon legal concepts with mandatory German corporate law.

What three things should a client consider when choosing counsel for a complex transaction in your jurisdiction?

When facing a complex M&A transaction, a client should initially look for a truly cohesive external legal team with an experienced team lead who understands the commercial aims of the transaction and focuses on the key points. Second, the team should include expert lawyers with proven track records in the functional focus areas of the deal. Third, the client should bear in mind that one important task for counsel will be to stay on top of the international aspects of the deal.

What is the most interesting or unusual matter you have recently worked on, and why?

Acting for an international consortium of bidders in an auction for a private company held by a governmental entity under the rules and regulations of European public procurement law. Combining traditional corporate and M&A issues with issues of large government contracts, public concessions and public procurement presented a unique set of challenges for the large cross-practice team in the auction process and the negotiations.

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Japan

Jason Jiao is a partner at Oh-Ebashi LPC & Partners (Oh-Ebashi) with considerable experience in advising clients on a wide range of corporate and commercial matters throughout Asia and the Pacific region. He has designed investment structures for multinational companies investing in both Japan and abroad, and has negotiated and advised clients on numerous transactions, including multibillion-dollar mergers and acquisitions. He is admitted in the Philippines and New York, and is a registered foreign lawyer in Japan.

Kochi Hashimoto is an associate at Oh-Ebashi specialising in M&A, having successfully facilitated a considerable number of transactions for clients. Her main focus is supporting startups, assisting them with fundraising and preparing them for public listing. Healthcare and IT are her areas of expertise. With her experience in working at one of the leading law firms in Germany, she is actively involved in international transactions. She is qualified in Japan, and speaks Japanese and English.

Takuya Uehara is an associate at Oh-Ebashi working mainly in the fields of data protection and cybersecurity laws, commercial disputes and venture capital investments. With his deep knowledge and experience covering a broad area of industries, Takuya has dealt with a large number of domestic and cross-border M&A transactions in which he played significant roles. He is qualified in Japan and New York, and speaks Japanese and English.

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1 What trends are you seeing in overall activity levels for mergers and acquisitions in your jurisdiction during the past year or so?

The overall Japanese M&A market saw the highest level of activity in 2022. According to RECOF DATA, which is one of the most reliable statistical data sources for M&A transactions in Japan, the number of announced deals that were completed by Japanese companies in 2022 was more than 4,300, slightly higher than that of the previous year (2021), which had marked the largest number of deals at the time. Since the number of M&A deals closed by Japanese companies in 2019 had been slightly more than 4,000, which in 2020 dropped sharply to approximately 3,700, at least from a numerical perspective, the activity levels in 2022 can be said to have returned to, and even exceeded, the levels prior to the covid-19 pandemic.

In terms of deal size, however, the total amount paid by buyers in all the announced deals in 2022, which was around US$78 billion, dropped by 31.6 per cent in comparison to the previous year. Since the amount in 2019 was around US$124 billion, the average size of each transaction in 2022 is much smaller compared to that of the pre-pandemic era.

Cross-border deals in 2022 were particularly characterised by their small size. The total amount paid by Japanese buyers in all outbound deals was approximately US$23 billion, which had dropped by 51.7 per cent in comparison to the previous year. This scale down may have been affected by the travel restrictions imposed in the previous years as infection prevention measures. Moreover, the heightening international tensions may also have been another factor for this downward trend.

In a similar manner, the total amount paid by foreign buyers in all inbound deals in 2022 was approximately US$27 billion, which was lower by 37.5 per cent in comparison to the previous year. Private


Jason Jiao


Kochi Hashimoto


Takuya Uehara

"Cross-border deals in 2022 were characterised by their small size."

QUESTIONS

equity (PE) firms were the main buyers in such inbound deals, with the amount paid by PE firms constituting 76.4 per cent of the total amount paid.

This trend of shrinking deal sizes is not expected to last long. In fact, in the domestic and outbound deals completed from January to August this year, the total amount paid by buyers has already amounted to approximately US$56 billion, which has exceeded the amount for the same segment for the whole of 2022. Although the size of inbound deals which were completed from January to August in 2023 remains relatively small, M&A transactions including cross-border ones closed by Japanese companies are expected to keep a stable level of activity in the near future.

2 Which sectors have been particularly active or stagnant? What are the underlying reasons for these activity levels? What size are typical transactions?

M&A transactions in the IT and system development industries have continued to show an increase in activities in recent years. According to RECOF DATA, the number of deals in 2022 where the targets were software or IT companies was more than 1,600, which increased from the 1,525 deals in the previous year (2021). This may partly be attributable to the recent trend of digital transformation in Japan.

For example, in 2022, Sony Group, an electronics manufacturer in Japan, acquired or made additional investments through its US subsidiaries in two gaming companies, Bungie and Epic Games. Sony acquired Bungie for a total consideration of US$3.7 billion, while Sony invested US$1 billion in capital in Epic Games. These deals have been perceived as illustrating Sony's strategy of focusing on the metaverse market.

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Another example is DeNA's US$200 million acquisition of Allm, a Japanese medical ICT developer. DeNA is a major Japanese IT company and develops Big Data strategy for healthcare. DeNA announced that the acquisition of Allm will create synergies with DeNA's business. This deal illustrates the recent increase in investments in start-ups in Japan. Omron, a Japanese healthcare manufacturer, also develops healthcare Big Data strategy and has recently announced its approximately US$580 million acquisition of JMDC, a Japanese healthcare Big Data company.

Another trend in Japan, which has been spanning multiple sectors, is carve-out deals. Major Japanese manufacturing or IT companies, such as Hitachi and Fujitsu, have sold their businesses or subsidiaries in recent years to various buyers, including to global-based PE firms such as KKR, Bain Capital and Apollo Global Management. For instance, Hitachi sold its shares in its logistics subsidiary, Hitachi Transport System, to KKR for a consideration of US$4.5 billion, which was the highest price paid in M&A transactions closed by Japanese companies in 2022. Fujitsu also sold its shares for a consideration

of US$573 million in its scanner manufacturing subsidiary, PFU, to Ricoh, a major Japanese electronics manufacturer. One of the driving forces behind this trend of carve-out deals might be the Practical Guidelines for Business Restructuring issued by the Ministry of Economy, Trade and Industry of Japan (METI) in July 2020, which strongly encouraged listed companies to review their business portfolios.

3 What were the recent keynote deals? What made them so significant?

The deals mentioned in question 2 above (the Sony Group transactions, DeNA's acquisition of Allm, Omron's acquisition of JMDC, etc) were significant not only because of their deal sizes, but also because they clearly illustrate the recent trend in the Japanese M&A market of an increased activity in the IT and system development industries.

Another recent keynote deal in Japan is the acquisition of the Japanese mega-manufacturer, Toshiba, by a Japanese PE firm, Japan Industrial Partners (JIP). The US$14 billion tender offer launched in August 2023 is currently the highest among the amounts paid in all M&A transactions closed by Japanese companies in 2023. It is more than twice the second highest price paid in the acquisition of a Japanese semiconductor material company, JSR, by a public-private investment fund, Japan Investment Corporation (JIC). But the deal size was not the only factor that made the Toshiba deal so significant. It is also attracting attention because it will be a major turning point in the recent restructuring history of Toshiba, which has been negatively impacted by an accounting scandal revealed in 2015 and the confusion in its governance that followed.

"A recent keynote deal in Japan is the acquisition of the Japanese mega-manufacturer, Toshiba, by a Japanese PE firm, Japan Industrial Partners."

Another deal that can be considered significant, although from a different point of view, is Nidec's US$110 million tender offer proposal to TAKISAWA, a Japanese machine manufacturer. This deal was proposed and announced by Nidec without the consent of TAKISAWA's management. Since the issuance of such an acquisitional proposal without the consent of the target's management is rare in Japan, the progress of the deal, including the communications between Nidec and TAKISAWA, is garnering a lot of attention from stakeholders and M&A specialists alike. In addition, since METI just published its new Guidelines for Corporate Takeovers in August 2023, which discourage Japanese companies from rejecting buyout offers without reasonable cause, Nidec's proposal has been deemed a good case study to illustrate how the reasonableness of corporate takeovers in Japan will be assessed under the new guidelines. This deal may also have some impact on the corporate value of machine manufacturers evaluated under the Japanese M&A market, and accelerate the transactions they are involved in.

4 In your experience, what consideration do shareholders in a target tend to prefer? Are mergers and acquisitions in your jurisdiction primarily cash or share transactions? Are shareholders generally willing to accept shares issued by a foreign acquirer?

In Japan, M&A transactions can be broadly classified as either (1) statutory corporate reorganisations, which are specified in the Companies Act of Japan, such as mergers and stock exchanges; or (2) other transactions such as share transfer deals and business transfer deals. While shares are generally used as consideration in the former cases (ie, item (1)), partly because there are tax benefits under such transactions, cash is more frequently used in the latter cases (ie, item (2)). Since the number of the latter transactions are greater than that of the former due to the simplicity of the process, cash deals are generally more common.

There are most likely multiple factors that make Japanese companies choose cash transactions in the latter cases (ie, item (2)). As one of these factors, it is often said that the sellers of target companies tend to steer clear of the downward risks associated with the buyers' shares. In addition, from the buyers' perspective, if they choose a share transaction, they must comply with the disclosure requirements under the securities regulations, which can be a significant burden for them. The burden of undergoing complex procedures to receive the other companies' shares, such as the opening of brokerage accounts, can also discourage sellers from choosing a share transaction. Such burden will be greater if the shares in question are issued by foreign buyers, which might be one of the reasons why the shareholders of Japanese target companies tend to prefer cash deals in cross-border transactions.

Recently, the Companies Act of Japan was amended and a Japanese company is now able to acquire a part of the target company's shares by delivering its shares to the target company's shareholders in order to make such target company its subsidiary. This is another option for statutory corporate reorganisations (ie, cases under item (1) above), but this can only be used in transactions between Japanese companies.

5 How has the legal and regulatory landscape for mergers and acquisitions changed during the past few years in your jurisdiction?

While the introduction of the new type of corporate reorganisations mentioned under question 4 above was a big change, there was another and more significant change in 2020 that affects

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foreign investors in the context of economic security, which is described below.

Under the Foreign Exchange and Foreign Trade Act of Japan (FEFTA), if a foreign investor carries out a foreign direct investment (FDI) in a Japanese target company that is conducting certain businesses that may have an impact on the national security of Japan, the foreign investor must file a prior notification with the Japanese government via the Bank of Japan. The FDI will then be examined after the notification during a statutory waiting period of 30 days, which can be extended for up to five months if the FDI elicits strong national security concerns.

The FEFTA was amended in 2020 and the businesses that are subject to the prior notification requirement are classified into two categories, namely, 'core industries' and 'other industries' (ie, non-core industries). The conditions for exemption from the requirement of prior notification are stricter if the target company is involved in a core industry. Core industries include semiconductor manufacturers, certain cybersecurity service providers, etc. An FDI in an unlisted Japanese company, which is involved in a core industry, will always require a prior notification with no exceptions. In addition, the appointment of directors in the target companies was added to the list of FDIs subject to notification; thus, foreign investors may need to continuously comply with the notification requirements even after the closing of the M&A transaction.

6 Describe recent developments in the commercial landscape. Are buyers from outside your jurisdiction common?

In 2020, as the covid-19 pandemic spread, the number of M&As in the country decreased. However, in the subsequent years of 2021 and 2022, M&A activity surpassed previous records, with approximately 4,300 deals reported in 2022. This increase can be attributed to the increased acquisitions of Japanese companies by domestic and international investment firms, as well as an increase in business succession cases. In addition, while the number of M&A deals for the first half of 2023 decreased slightly compared with the same period last year, the monetary value of these deals has grown.

A notable trend in recent M&A deals in Japan is the focus on start-ups, which account for approximately 40 per cent of all deals. In particular, there has been a growing trend of M&A activity and investment in startups by corporations and corporate venture capital. Traditionally, initial public offerings have been the primary exit strategy for startups in Japan, but in recent years, M&A exits have also been on the rise.

In addition, M&A transactions by investment firms that target Japanese companies have increased. As mentioned above, in the first half of 2023, while the number of transactions decreased compared to the previous year, the total transaction value increased. The largest

transaction in terms of value in the first half of this year was the acquisition of Toshiba by a consortium, which included JIP, valued at approximately US$14 billion. The second largest transaction was the purchase of JSR Corporation by JIC, valued at approximately US$6.2 billion. Although acquisitions by investment firms stood out in terms of monetary value, there was also an increase in M&A activity relating to business successions and 'carve-out' transactions, in which listed companies divested their subsidiaries or business units.

M&A activity by non-Japanese buyers targeting Japanese companies has been increasing every year, although it still accounts for less than 10 per cent of the total number of annual deals. In 2022, the number of M&A activities conducted by non-Japanese buyers reached its highest level, surpassing the previous year's high level.

7 Are shareholder activists part of the corporate scene? How have they influenced M&A?

In recent years, the presence and influence of shareholder activists have grown rapidly in Japan. These shareholder activists acquire shares in publicly traded Japanese companies and use their position as shareholders to advocate for changes in corporate strategy and governance. Generally, they would demand governance reforms through the exercise of their right to make shareholder proposals, but in recent years, their demands have become more aggressive, for example, by pushing for business reforms through takeover bids and other methods. In fact, there have been cases of public companies being sold off as a result of shareholder activist proposals.

Several factors have contributed to the surge in shareholder activism. Domestically, one major factor is considered to be the introduction of the Corporate Governance Code by the Tokyo Stock Exchange in 2015. This code was formulated against the backdrop that Return On

"In recent years, the presence and influence of shareholder activists have grown rapidly in Japan."

Equity and stock prices of Japanese companies were low compared to international standards, so it aimed to improve these ratios and make Japanese companies more attractive to investors in Japan and abroad. Since the establishment of the Code, dialogue with shareholders of Japanese companies has become more active.

Increased investments in Japanese companies by foreign shareholder activist funds and the increased activity of activists worldwide have also contributed to this trend of shareholder activism in Japan. The low price-to-book value ratios and low total shareholder returns of Japanese companies compared to their US and European counterparts, as well as the small average market capitalisation of listed companies, have also created an environment conducive to investments by shareholder activists.

Traditionally, Japanese society has tended to dislike these activists, but in recent years, this view has gradually changed and there are more and more cases where the actions of activists are favourably received. The increase in the number of shareholder activists is

expected to continue for some time, and this may bring about changes in the M&A activities of Japanese companies.

8 Take us through the typical stages of a transaction in your jurisdiction.

The typical M&A process in Japan is as follows: first, when a decision to conduct a sale or acquisition is made, preliminary preparations are made as necessary, and a potential counterparty is selected. Generally, the potential counterparty is selected through an M&A broker (often an M&A specialist or the M&A department of a bank or securities company), but it is also possible for the CEO or management of the company to contact their acquaintances or business partners. If a brokerage firm is used, an agreement is made with the brokerage firm in the initial stage before the selection of the counterparty. Seller due diligence may also be conducted around the time of selecting the counterparty, but this is not necessarily common in Japanese practice.

Once a potential counterparty is selected, a meeting with the potential counterparty is held and a confidentiality agreement is concluded. Alternatively, once a counterparty company contacts the seller expressing interest in the M&A based on a no-name sheet and company profile, the next step is to have a meeting between the top management of the two companies. After the top management meeting, the general terms of the M&A are negotiated, and the terms of the sale, such as the sale price and scheduled sale date, are agreed.

In recent years, it appears that sellers are increasingly conducting M&A using a bidding format to improve the terms of the sale as much as possible. In the case of a bidding process, a process letter describing the bidding procedure is distributed to potential buyers, who have signed confidentiality agreements, along with an information memorandum containing basic information about the target company. From this group of bidders, one potential buyer is selected to proceed with the M&A transaction and negotiations.

When both the seller and the counterparty agree to proceed with the M&A after the top management interviews and negotiations are conducted, a basic agreement, such as a letter of intent, is signed. The letter of intent is not a final agreement, but rather a provisional agreement that confirms both parties' intentions regarding the M&A. The letter of intent is an instrument that is generally used to ensure the parties' compliance with the initial M&A agreement.

The letter of intent normally includes an outline or scheme of the transaction, the expected sale price, the expected sale date, the method of conducting the due diligence, the treatment of directors and officers, and whether exclusive negotiating rights will be granted.

Once this basic agreement is executed, due diligence is conducted, final terms are negotiated considering the results of the due diligence, and a definitive contract is signed before closing.

9 Are there any legal or commercial changes anticipated in the near future that will materially affect practice or activity in your jurisdiction?

In March 2023, for the first time in 17 years since the 2006 amendment of the law, the Financial Services Agency initiated a review of the takeover bid system, large shareholding reporting system, and other systems for corporate acquisitions. In recent years, various issues have been raised on the transparency of the tender offer systems, large shareholding reporting systems, and substantial shareholders, due to changes in the capital market environment, such as an increase in cases of unfriendly takeovers through intra-market

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transactions, etc, diversification of M&A, and the growing importance of constructive dialogue between companies and investors. In light of these, it was decided that it would be necessary to examine the current takeover bid system, large shareholding reporting system, etc. from the perspective of ensuring transparency and fairness in the market and promoting constructive dialogue between companies and investors.

Under Japan's current tender offer system: (1) a takeover bid is mandatory for any purchase of shares off-market from a large number of persons (more than 10 persons in 60 days), which would result in a shareholding ratio of more than 5 per cent; (2) a takeover bid is mandatory for any purchase of shares off-market, which would result in a shareholding ratio of more than one-third; and (3) in the case of a takeover bid that would result in a shareholding ratio of shares, etc, exceeding two-thirds, it is prohibited to set a maximum limit on the shares to be purchased during a tender offer. Despite these rules, recently, there have been cases where hostile takeover bids were launched using intra-market transactions to avoid violating the takeover bid regulations, and there have been concerns that the minority shareholders may not be getting sufficient information and time to make appropriate investment decisions. Therefore, the possibility of requiring takeover bids even in the case of intra-market transactions, and even in new share issuances, is being discussed. There are also discussions on whether the current thresholds of one-third and two-thirds, referred to above, should be lowered. There is also a debate as to whether the Japanese takeover bid system, which requires that purchases that would result in the acquisition of voting rights in excess of the threshold be made through a tender offer, should be changed to an ex post facto regulation like the takeover bid systems in the UK and other European countries.

The large shareholding reporting system in Japan is a system that requires reporting when a person becomes a large shareholder (shareholding ratio of more than 5 per cent) or there is a material change, such as an increase or decrease of more than 1 per cent, in the shareholding ratio. Problems have been pointed out regarding the clarity of the scope and effectiveness of this system, and a review of this system is also currently being considered.

10 What does the future hold? What activity levels do you expect for the next year? Which sectors will be the most active? Do you foresee any particular geopolitical or macroeconomic developments that will affect deal sizes and activity?

In Japan, many companies, especially small and medium-sized enterprises, are suffering from a lack of successors and human resources. According to the Small and Medium Enterprise Agency's 'Current Status and Issues of M&A in Small and Medium Enterprises and Small Businesses,' the number of business owners aged 70 or older is expected to reach 2.45 million by 2025, of which about half will have no successors. As a result of this, the number of business

succession M&As has been increasing in recent years, and this trend is expected to continue.

As mentioned above, M&As involving startup companies have also been a trend in recent years. According to an announcement by the Japan Venture Capital Association, the amount of funding raised by start-ups was about ¥80 billion in 2013, but in 2021, it reached around ¥800 billion, a tenfold increase. It is expected that more and more start-ups that have received investments will choose M&A as their exit strategy, and, in fact, they have already been making their presence felt in the area of M&A transactions as of last year as well as this year. In Japan, as in the US, it is expected that the number of start-ups choosing M&A for further growth will increase.

One industry that has been particularly active in M&A activities recently is the dispensing pharmacy business. Dispensing pharmacies are stores that dispense and provide pharmaceuticals to fill the prescriptions issued by doctors. There are more than 60,000 dispensing pharmacies throughout Japan, and the market size is estimated to be around ¥8 trillion. M&As are increasing against the backdrop of the growing number of dispensing pharmacies, declining revenues due to the recent revision of dispensing fees, and a shortage of pharmacists. In addition to this, M&As in the medical and nursing care industry are increasing due to the aging population in the country. Moreover, as the covid-19 pandemic is finally coming to an end, the hotel industry, which saw a dramatic increase in the number of hotels before the pandemic, and which was severely affected by the pandemic, is also attracting attention. Against the backdrop of an increase in the number of foreign visitors to Japan post-pandemic, M&As in the tourism industry are gradually increasing and are expected to expand in the future.

Another recent trend gaining attention is M&A activities that are promoting SDGs and ESG initiatives to achieve sustainability management. M&As undertaken for the purpose of sustainability management, such as 'carbon neutrality,' are becoming more and more popular, especially among large companies. According to some statistics, the total number of these M&As is close to 10 per cent of overall M&A activities in Japan. This trend is particularly prevalent in the electric and gas industries, where companies are enhancing and expanding their renewable energy businesses, and reconfiguring their asset portfolios for decarbonisation.

QUESTIONS

Jason Jiao
jason.jiao@ohebashi.com

Kochi Hashimoto
kochi.hashimoto@ohebashi.com

Takuya Uehara
takuya.uehara@ohebashi.com

Oh-Ebashi LPC & Partners
Tokyo
www.ohebashi.com

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QUESTIONS

The Inside Track

What factors make mergers and acquisitions practice in your jurisdiction unique?

If a buyer is intending to acquire a controlling stake in a public company in Japan, it will be required to commence a tender offer procedure that is peculiar to the Japanese legal system. Acquiring more than one-third of the total voting rights of a listed company would be sufficient to trigger the tender offer requirement. However, the current tender offer system is expected to be fundamentally amended in the coming years. From a cultural perspective, a seller in Japan often strongly desires to maintain all of its current employees in the target company even after the sale. As such, in the definitive agreement, it is common for the seller to require as one of the buyer's post-closing covenants that, for several years after closing, the target company's workers should continue to be employed by the company and their working conditions should remain unchanged.

What three things should a client consider when choosing counsel for a complex transaction in your jurisdiction?

Since a complicated deal often requires expertise in various legal fields, it is advisable for a client to seek the assistance of a law firm that can provide a one-stop service covering all such various legal fields. Experience in these kinds of transactions is also desirable. To control costs, it is also a good idea to consider law firm options other than large or international law firms.

What is the most interesting or unusual matter you have recently worked on, and why?

In a diligence process of a family-owned business, a substantial amount of off-the-books inventory was found, for which the relevant tax risk turned out to be significant. In our jurisdiction, this kind of risk would usually be dealt with through special indemnity clauses in the definitive agreement. However, in this transaction, because of the magnitude of the risk, the parties agreed that the target company should file an amended tax return before the signing of the definitive agreement. Despite this, and even after such filing, another off-the-books inventory risk was discovered, so the buyer proposed a substantial discount on the purchase price. This eventually resulted in the seller abandoning the deal.

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Norway

Ole K Aabø-Evensen is one of the founding partners of Aabø-Evensen & Co, a Norwegian boutique M&A law firm, and the head of its M&A team. Ole assists industrial investors, financial advisers, private equity funds and other corporations in friendly and hostile takeovers, public and private mergers and acquisitions, corporate finance and other corporate matters. He has extensive experience from all relevant aspects of transactions, nationally and internationally, and is widely used as a legal and strategic adviser in connection with follow-up of his clients' investments. Ole is also the author of a 1,500-page Norwegian textbook on M&A. He is recognised by international rating agencies, such as *The Legal 500* (rated a leading individual in M&A), *Chambers* and *European Legal Experts*, and during the past 16 years he has been rated among the top three M&A lawyers in Norway by his peers in the annual surveys conducted by the *Norwegian Financial Daily* (*Finansavisen*). In the 2012, 2013, 2017, 2018, 2019 and 2021 editions of this survey, the *Norwegian Financial Daily* named Ole Norway's No. 1 M&A lawyer. He is also the former head of M&A and corporate legal services of KPMG Norway.

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1 What trends are you seeing in overall activity levels for mergers and acquisitions in your jurisdiction during the past year or so?

Entering 2023, the Norwegian M&A market has had a decrease of 6.3 per cent in the first quarter of 2023, compared with the first quarter of 2022. The deal-count in 1H 2023 further shows a 9 per cent decrease compared to the same period in 2022. However, this adverse trend is especially visible when considering the deal values for the same period is down 57.5 per cent. Adding to this, where only three deals represented half the deal value for 1H 2023.

The market statistics for the past 12-month period ending 30 June 2023, showed 639 deals per end of June 2023, compared with 704 deals for the past 12 months' period ended 30 June 2022. Looking at the aggregate reported value of the Norway M&A market for this 12-month period you'll find €18 billion in value per 30 June 2023, which is a significant decrease compared with the €44.7 billion for the preceding 12 month-period. These market reports also show a clear decrease in the average reported deal sizes, being decreased from €218.9 million for LTM Q2 2022 to €109.6 million for LTM Q2 2023, and with a decrease from €189.5 million for 2H 2022 to €100.7 million for 1H 2023.

Due to macroeconomic turmoil following the war in Ukraine, increasing inflation and hiking interest rates, the Norwegian M&A market experiences uncertainty. Another contributing factor to this uncertainty is the Norwegian political landscape by imposing new taxes on natural resources (such as salmon farming, wind energy and hydroelectric power). Further, the visible drop in average reported deal sizes for 1H 2023 is a clear signal that those seeking leverage for mega deals in 2023 may struggle to find debt providers for larger M&A transactions also in the Norwegian market. The outlook for the Norwegian economy has become more clouded with the prospect


Ole K Aabø-Evensen

of a potential global recession lurking ahead. Additionally, we have observed a significant drop in global deal values, which we both have experienced and anticipate is likely to also influence Norwegian M&A activity. Still, I continue to be moderately optimistic due to an expected pipeline of new deals coming to market, which is supported by relatively strong interest from private equity funds that continues to be well capitalised, as well as from other investors.

2 Which sectors have been particularly active or stagnant? What are the underlying reasons for these activity levels? What size are typical transactions?

Sectors with the highest level of activity in 1H 2023 were TMT, services, industrial, energy (including oil and gas) and the construction sector. These five sectors together represented 71.3 per

cent of the deal volume in this period. The consumer/retail sector also evidenced strong activity, during the same period.

The TMT sector has emerged as the most popular sector for M&A over the past six years. This can be explained by Norway's highly developed infrastructure (energy, technology and transport), and by digital disruption continuing to put pressure on technology players to acquire new technology for seizing new routes to growth. Within this sector there seems to be an increasing drive towards creating larger global footprints to maintain margins. Equivalent trends may to a large extent also explain the continuing high activity within the services sector.

For the energy sector, increased energy prices resulting from the Russia's invasion of Ukraine as well as continuing availability of financing and increased dry powder among investors can explain the increasing deal activity.

In terms of deal size, the Norwegian M&A market is dominated by small- and medium-sized transactions. For the first half of 2023, 73.4 per cent of the deals did not disclose the deal size. Of the deals with reported deal value (93 in total), 66.7 per cent of the deals had a reported deal value of less than €20 million, 24.7 per cent of the deals had a reported value of between €20 million and €199 million while only 6.5 per cent of the deals had a reported value of between €200 million and2.2 per cent of the deals had a reported value exceeding €1 billion.

3 What were the recent keynote deals? What made them so significant?

The most notable deal announced in the Norwegian market so far in 2023 is Var Energi AS', €2.08 billion acquisition of Neptune's Norway

"The Norwegian M&A market is dominated by small- and medium-sized transactions."

business from Neptune Energy Group Midco Ltd, the United Kingdom based oil and gas exploration and production company.

Another keynote deal was Nordea's €1.56 billion acquisition of Danske Bank A/S' Norwegian personal customer business. Worth mentioning is also Goldman Sachs asset management's €900 million acquisition of a 72.11 per cent stake of Frøy ASA, the Norway based provider of salmon farming service, from NTS ASA. This acquisition will result in Goldman Sachs making an unconditional mandatory cash offer to acquire all other shares in Frøy. All of these deals were, of course, significant due to the size of the purchase price.

4 In your experience, what consideration do shareholders in a target tend to prefer? Are mergers and acquisitions in your jurisdiction primarily cash or share transactions? Are shareholders generally willing to accept shares issued by a foreign acquirer?

The answer to that question is very simple: shareholders prefer cash. If you look at MergerMarket's figures for first half of 2023, you will find that approximately 76 per cent of the deals did not disclose what type of settlement the parties had agreed, but for 21.4 per cent it was cash, while only 0.7 per cent of the deals offered equity as settlement,1 per cent offered cash and equity as settlement and 1.2 per cent offered cash and other as settlement.

The reason that sellers normally prefer cash over shares is because of the difficulties with evaluating the future value of such consideration in a volatile macroeconomic landscape compared with the certainty of cash. In my view, this does not entail Norwegian shareholders are not willing to accept shares issued by a foreign acquirer as consideration in an M&A transaction, rather, the acquirer may find it challenging to obtain approval from the seller or sellers

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for their shares as consideration, especially if the shares are not publicly traded on a stock exchange or any other regulated market. If a buyer persuades a seller to accept shares in a non-listed company as consideration, the buyer will usually require the seller to be part of the acquiring group's management team post-closing. Alternatively, the buyer can provide the seller with a realistic exit plan (typically an IPO or a trade sale) within a foreseeable period.

5 How has the legal and regulatory landscape for mergers and acquisitions changed during the past few years in your jurisdiction?

The most noteworthy development during the past few years has been the implementation of the new competition filing thresholds, which have substantially increased the thresholds before having to notify the Norwegian competition authorities of any M&A transaction. In many ways, this has contributed to making it easier and faster to

execute and complete M&A transactions under Norwegian law, as the great majority of Norwegian M&A transactions normally fall below the increased thresholds. It is also worth mentioning that in 2016, the Norwegian parliament resolved to abolish the former Norwegian substantive test, which was based on a substantial lessening of competition test. Instead, the parliament resolved to align the Norwegian test with the same significant impediment of effective competition test as applicable under the EU rules. This means that Norway now applies the same consumer welfare standard as applied by the EU Commission, instead of the total welfare standard previously applied under the Norwegian merger control regime. The previous power held by the King Council to intervene in merger control cases is further abolished, and these powers have instead been transferred to an independent appeal board for handling merger control cases.

The parliament has also adopted a new National Security Act, which grants the government powers to intervene and stop acquisitions of shares in a company holding investments in sectors considered vital from a Norwegian national security perspective. This was the case in 2021 with the acquisition of the Norwegian company Bergen Engines AS, a manufacturer and supplier of engines and generators for both civil and the military purposes, by a Russian controlled company. It is safe to say that considerations of national security have been heightened when taking into account Russia's ongoing war in Ukraine as well as the increase in (attempted) cyber-attacks against Norwegian business.

With effect from 1 January 2019, the Norwegian interest limitation regime has now been amended, so that interest payable on bank facilities and other external debt within consolidated group companies has become subject to the same interest deduction limitation regime as interest paid to 'related parties'. This rule only applies if the annual net interest expenses exceed 25 million kroner in total for all companies domiciled in Norway within the same group. Further, two revised 'escape rules' aiming to ensure that interest payments on loans from third parties not forming part of any tax evasion scheme still should be tax deductible has been implemented. The previous interest deduction limitation rules continue to co-exist with the new rules, but so that the scope of the old rules only apply to interest paid by Norwegian enterprises to a related lender outside of the consolidated group (typically where the related lender is an individual).

In 2021, Norway introduced withholding tax on interest, royalties and certain rental payments to related parties in low tax jurisdictions. Taxable payments are taxed at 15 per cent (gross) unless a reduced rate follows from a tax treaty. Further, there are also several general exemptions (ie, for payments to companies that are genuinely established and conduct real economic activity in the EEA) to a Norwegian branch of a foreign company taxable in Norway and for interest taxable under the Norwegian petroleum tax act.

Further, the Act on Alternative Investment Fund Managers (AIFM) should also be mentioned. The Act, incorporated as Norwegian law based on the equivalent EU directive, imposes a set of disclosure obligations for sponsors acquiring control over a Norwegian target company if this target's shares are listed on a stock exchange or for non-listed target companies that fulfil certain criteria with regard to number of employees, turnovers or assets. Subject to these criteria being fulfilled, it will also be necessary to issue a special notification to the Norwegian Financial Supervisory Authority if an alternative investment fund's portion of shares reaches, exceeds or falls below certain thresholds. These funds and their sponsors will also, for a period of 24 months post-closing, be caught by anti-asset stripping rules aimed at limiting certain distributions of assets, funds and so on, from the target to its new owner, which would typically be carried out for the purpose of repaying the new owner's acquisition financing. New as of 1 June 2023 is the levy of supervisory fees by the Norwegian

regulator. These fees relate to both an ongoing annual fee for the maintenance of the national register of funds registered for marketing and a one-off fee for application for authorisation to market AIFs (the latter enters into effect on 1 January 2024).

From 1 January 2020, an exemption from the dividend limitation rule was implemented. Provided that the target company is a Norwegian private limited liability company, the exemption allows these companies to grant financial assistance to a bidder exceeding the target company's funds available for distribution of dividend. From the same date, the former requirement for the buyer (as borrower) to provide 'adequate security' for its repayment obligation will no longer be an absolute condition for obtaining financial assistance from a private limited liability target company. This significantly eases a target company's ability to take part in financing an acquisition of shares by a buyer in such target company itself.

With effect from March 2021, the Market Abuse Regulation entered into force under Norwegian law. Thus, a listed target company's decision to delay disclosure of inside information has now been amended, so that the issuer only has to notify the stock exchange about a delay after the relevant information has been disclosed. As of 1 September 2022, amendments to the Norwegian Securities Trading Act relating to new disclosure requirements for derivatives with shares as underlying instruments were also implemented. According to these rules, the materiality thresholds and disclosure requirements that apply for acquisition of shares in listed companies shall now also apply for derivatives with shares as an underlying instrument, irrespective of such equity derivatives being cash-settled or settled by physical delivery of the underlying securities. Additionally, borrowing and lending of shares shall become subject to the same notification regime for both the lender and the borrower.

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6 Describe recent developments in the commercial landscape. Are buyers from outside your jurisdiction common?

The prospects of a potential recession have resulted in volatile equity markets. Despite this, the OSEBX is experiencing, on average, a steady growth showing that investors still are wanting and willing to invest in Norway. When assessing the M&A volumes in Norway, it is, in accordance with the latest years' trend, visible that the majority of the deals consisted of a Norwegian buyer (ie, for 1H 2023 Norwegian buyers represented 55 per cent of the deals). Still, foreign investors continue to be active on the Norwegian deal arena. This is especially evident as foreign investors are involved in 60 per cent of the Norwegian deal values.

Moreover, private equity firms continue to be active, due to high levels of dry powder. Simultaneously, technological changes continue to contribute to companies selling non-core and slow growth businesses to fund investments in their core portfolios. Technological changes

that reduce the competitiveness of an asset under one owner could be of value to another.

Continuing the trend from 2022, the 2023 Norwegian bond market is turbulent, with hiking interest rates and credit spreads rising sharply. Nevertheless, from January to June 2023 the Nordic High Yield Bond market regained momentum despite the continued volatile market backdrop. The primary volume in the Nordic Bond segment recorded an increase of 37 per cent compared to the same period in 2022. Up to and including July, primary volumes in 2023 are already roughly on a par with the full year 2022 at €6 billion. Still, many borrowers have started to feel a strain on their business and financial outlook Supply chain risks continues to be concern for lenders, and inflation and interest rate rises have all started to influence new M&A deals. However, the trend with alternative lenders and funds offering to replace or supplement traditional senior secured loans by B-term loan facilities – unitranche loans, etc – seems to continue. As a result, bidders doing deals in the Norwegian market continue to have a wide variety of financing combinations available, in particular on larger transactions – even if mega deals in the current environment have become more challenging to finance. It is, nevertheless, fair to say that lenders are retreating, trying to reduce their commitment and pushing for higher pricing and stricter terms. Thus, borrowers should expect substantially longer lead times to negotiate amendments, refinancing and new deals.

Another notable commercial development is that the use of warranty and indemnity insurance as a tool for bridging the liability gap between sellers and buyers in connection with M&A transactions, or to provide the sellers with an opportunity for a clean exit, continues to rise. Buyers may also propose this insurance to gain a potential competitive advantage in bidding processes.

"Continuing the trend from 2022, the 2023 Norwegian bond market is turbulent, with hiking interest rates and credit spreads rising sharply."

7 Are shareholder activists part of the corporate scene? How have they influenced M&A?

So far, shareholder activists have not played any major part on the corporate scene in Norway. However, 'operational activism', as a reaction from shareholders against the management's method of running of listed and unlisted company, does occur, but not as frequently as in many other jurisdictions.

A few examples of hedge funds trying to intervene against the management of Norwegian companies exists, but these funds have not particularly managed to influence the M&A scene. It is also not common for activists to seek to interfere with the completion of announced transactions in Norway. One example to the contrary is the DNO Initiative, which consisted of 450 minority shareholders who tried to stop the acquisition and subsequent merger by RAK with DNO unless RAK accepted certain compromises that they proposed. These

shareholders actually succeeded in the way that RAK had to agree to these compromises in exchange for their support.

The trend of increased activism that many other jurisdictions are experiencing could become more prevalent in the Norwegian market during the next decade. This is because business is steadily becoming more global and because people in general have a tendency to try and copy some of the methods for earning money that are used in other larger jurisdictions. Shareholder activism is actually just a way of trying to earn money. However, to what extent my prediction will materialise will most likely depend on how good the Norwegian companies' managements are at maintaining the profitability of the companies they're managing. The best protection against these campaigns will be good corporate governance and making sure that the business is creating returns for its shareholders that are above the relevant industry benchmark. Poor governance, a high number of related-party transactions at questionable values, too lucrative remuneration packages for poor performances and an unwillingness among the management to conduct necessary turnarounds of the businesses to increase profitability will, on the other hand, increase the chances for activists' interference being successful.

8 Take us through the typical stages of a transaction in your jurisdiction.

Norwegian M&A transactions have tended to follow the structures used elsewhere, with intermediaries playing a key role in particular for medium-sized and large transactions. Intermediaries could include members of the acquirer's board, or its outside legal counsel, accounting firm, investment banker, broker or finder. Private equity sponsors may often also approach the target owners directly. Between smaller corporations, contact often starts from one CEO or one controlling shareholder to another.

Small- to medium-sized deals involving non-listed companies, and where the contact is initiated by a potential buyer, will often follow a traditional pattern in which the buyer, after initial discussions to establish the owner's interest, starts by proposing a term sheet or letter of intent. These documents are typically aimed at creating a consensus on the main terms of the deal and to grant the potential buyer due diligence access to the target's books and records, and potentially also grant the buyer exclusivity for a limited time period to negotiate a final sale and purchase agreement (SPA). During the due diligence, the buyer will normally want to take control of the drafting process and will produce a draft SPA for the seller to review. After the due diligence, which in theory could last from one to six weeks depending on the complexity of the target's operations, the parties will seek to finally negotiate the SPA, and, if the parties reach an agreement, the document will be signed. After this, the parties must, depending on the deal size, notify the relevant competition authorities, and ensure that any other conditions to closing that the parties have agreed to are fulfilled prior to completion. Sometimes, the parties may want to negotiate slight variations and introduce various other heads of terms, process agreements, etc, before reaching a final agreement. Typically, the seller's counsel could also insist that the parties sign a conditional purchase agreement before the buyer is granted due diligence access. These conditional purchase agreements will typically have the aim of limiting or qualifying the buyer's ability to withdraw from the transaction owing to findings in the due diligence. The seller may also insist on taking control of the drafting, even if this is still less common for this type of smaller deal.

Medium-sized to large transactions involving non-listed companies are very often conducted as a structure sales process and, for these type of transactions, the sellers and their advisers tend to take more control of the process, preparing draft sales documents, etc. These processes seem to follow a similar route as in most other jurisdictions, with indicative offers from various bidders that have

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been invited by the seller's advisers, followed by due diligence and mark-up of the sale and purchase agreement and final bids. Thereafter, negotiation of legal documentation will take place, and sometimes a confirmatory due diligence and then completion.

If the prospective target is a listed company, the takeover processes will take a completely different form. If a listed target is controlled by certain key shareholders, the bidder may, however, very often approach them via intermediaries and seek to enter into an irrevocable undertaking under which the shareholders agree to accept a public tender offer launched by the prospective bidder. Alternatively, the parties may enter into a conditional SPA. Examples of these conditions could be that the buyer achieves control over more than 90 per cent of the target's issued shares in a subsequent public tender offer process, and that the target grants the buyer due diligence access prior to issuing a public takeover offer to acquire all of the target's issued shares.

In most cases, a prospective bidder will also seek to enter into an agreement with the listed target's board that allows the bidder due diligence access or additional information about the target. In such an agreement, the bidder will also want to obtain the target's board support for a proposed voluntary tender offer. These support agreements, typically called transaction agreements, will contain provisions on how to conduct the due diligence process and the timetable for issuing a public bid to acquire all of the target's issued shares, and this agreement will also document the terms of the tender offer in detail. If the bidder is able to enter into such a transaction agreement with the target's board, the bidder will normally, following its due diligence review, issue a voluntary, but sometimes also a mandatory, tender offer to the target's shareholders, in which the shareholders are asked to accept the offer being made to them by the bidder. A voluntary tender offer gives the bidder more flexibility than a mandatory offer, since the voluntary offer can be made subject to the satisfaction of preconditions, while under Norwegian law, a mandatory offer cannot be made subject to any conditions. However, if a bidder acquires more than one-third of the votes in a Norwegian listed target, then the bidder must make a mandatory offer for the outstanding shares. The bidder's obligation to issue a mandatory offer is, with certain exceptions, also repeated when the bidder passes 40 per cent and then 50 per cent of the voting rights. As a result, a bidder will generally start by issuing a voluntary tender offer that will be subject to the bidder being able to achieve acceptance from more than 90 per cent of the shares and voting rights in the target. The reason for this is that the bidder will then be able to squeeze out the remaining minority shareholders by a forced purchase at a redemption price.

When going after a publicly listed company, a bidder can never be sure if the target will grant due diligence access. As a result, it is also quite normal that the bidder's legal and financial advisers will be engaged to conduct some type of pre-bid due diligence of publicly available

"The most imminent change expected is certain amendments to the Norwegian takeover rules proposed by a government-appointed committee."

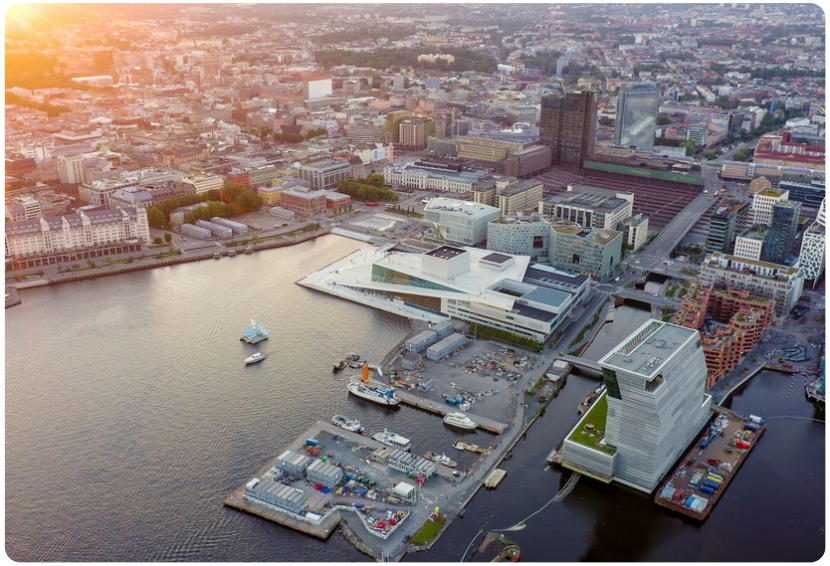
information. If the target's board is not willing to recommend that the shareholders accept a bid from the bidder, or if the bidder assumes that the target will not grant this access, a prospective bidder may sometimes decide to go hostile and issue a voluntary offer without at first having obtained any support from the target.

To increase its chances of success, a bidder can also seek to gradually build a stake in the target through off or on market share purchases outside the offer process. Lately we have also seen an increasing number of takeovers of publicly listed companies being conducted as a partly structured sales process, organised by the target's board, or a controlling majority shareholder. In these partly structured processes, prospective bidders are invited to provide indicative offers, before the target's board select a limited number of bidders that are granted due diligence access.

A takeover of a publicly listed company under Norwegian law is more regulated. The prospective buyer of listed targets and the targets' boards will have to observe detailed rules comprising, among other things: insider dealings rules; mandatory offer thresholds; disclosure obligations with regard to ownership of shares and other financial instruments; limitations on the content of the offer documents; filing and regulatory approval of the offer documents; the length of the offer periods; employee consultations and limitations on type of consideration offered.

9 Are there any legal or commercial changes anticipated in the near future that will materially affect practice or activity in your jurisdiction?

The most imminent change expected is certain amendments to the Norwegian takeover rules proposed by a government-appointed committee in a report issued in early 2019 concerning the rules governing voluntary and mandatory offers, with particular focus on the current securities trading acts limited regulation of the pre-offer phase. In its report, the Committee proposes, inter alia, a new requirement that a bidder must carry out certain preparations before it announces that it will launch an offer to acquire a listed company. The committee also proposes new content requirements for the notification that a voluntary offer will be made, including information on matters of importance for the market's assessment of the offer and for the formation of the price. It is proposed to clarify that the Norwegian Takeover Supervisory Authority (now Oslo Stock Exchange) shall publish this notification immediately. Furthermore, a new requirement is proposed that the bidder must present a voluntary offer no later than four weeks from the publication of the notice announcing that an offer would be issued. At the same time, it is proposed that the Takeover Supervisory Authority may grant an exemption from this deadline in special cases. The Committee proposes that the minimum length of the offer period in voluntary offers be extended from at least two to at least four



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weeks. It is unclear when parliament can be expected to adopt these amendments into Norwegian legislation; we expect it to be 1 January 2024 at the earliest. However, in April 2020, parliament adopted a rule under which a regulation can be issued setting out rules for calculating the offer price in cases where there is a need for an exception from the above main rule or where it is not possible or reasonable to use the main rule for calculating the offer price. At the same time, it resolved to repeal the 'market-pricing' alternative with a more balanced rule set out in a separate regulation. However, the repeal of the market-pricing alternative has not yet entered into force. Owing to the covid-19 pandemic, a temporary regulation for calculating the offer price was implemented with effect from 20 May 2020. This temporary regulation has been prolonged until 1 January 2024.

In recent years, several new directives, regulations and clarifications have been proposed and adopted within the European Union. Some of these may eventually influence the regulatory framework for public takeovers in Norway. Following a solution in June 2016 of certain constitutional obstacles under Norwegian law that prevented the implementation of certain EU rules relating to the capital markets, considerable effort has been made to work on the implementation, and currently there is a pipeline of new legislation that either has been adopted or currently is waiting to be adopted by the parliament. Consequently, most of these EU initiatives will come into effect during the next year(s), following which the regulatory framework in Norway that relates to the capital markets will again be aligned with what applies within the EU.

At the beginning of 2021, the Norwegian government-appointed committee submitted its final interim report to the Ministry of Finance proposing amendments to the existing Norwegian securities trading legislation. The report contains proposals for certain amendments to the rules on supervisory authority, sanction competence and appeal schemes. The report proposes, inter alia, that the task as offering authority be transferred from the Oslo Stock Exchange to the Norwegian Financial Supervisory Authority and that the delegation of the supervision with the ongoing duty to provide information and deferred publication cease. The committee proposes that the Stock Exchange Appeals Board be closed down and that an appeals board be established under the Ministry of Finance for cases in the securities market area. We expect that the proposed amendments will be implemented into Norwegian law in 2023 at the earliest. In addition, amendments to the MiFIR and MiFID II are being proposed for implementation into Norwegian law.

As from 12 January 2023, the EU Foreign Subsidies Regulation (FSR) entered into force. This regulation introduces a filing requirement that is separate from and comes in addition to EU and national merger control/anti-trust filing regimes and will have significant impact on large M&A transactions also going forward in the Norwegian market. The regulation aims to address distortion caused by subsidies from third countries outside the EU to companies or groups of companies

operating within the EU and to level the playing field for all companies operating within the EU market. A transaction will become subject to a filing obligation, when: (1) at least one of the merging entities, acquired companies or joint ventures established in the EU generates turnover exceeding €500 million; and (2) the entities involved have been granted a combined financial contribution of more than €50 million from third countries outside the EU in the past three years. The filing obligation is imposed on a buyer and will be triggered by transactions involving a change in control.

10 What does the future hold? What activity levels do you expect for the next year? Which sectors will be the most active? Do you foresee any particular geopolitical or macroeconomic developments that will affect deal sizes and activity?

Rising inflation and interest rates, and the prospects of a potential upcoming global recession, will, normally speaking, contribute to dampen buyers' appetite for new M&A deals, as well as reduce the exit multiples that sellers can expect to obtain for their companies. Internationally, we have started to experience this with global deal values significantly decreasing in 2023. In addition, the cost of borrowing is increasing, thus making investors recalibrate their required rate of return on investments. However, the corporate balance sheets seem to remain relatively strong for the moment, and PE-sponsors still have record amounts of dry powder at times when valuation multiples are expected to come down, which could be considered a compelling opportunity for financial sponsors. At the same time, growth opportunities continue to be the focus of companies and investors. These are all factors expected to contribute to a continuation of a relatively high deal activity in the Norwegian market.

On this basis, I continue to be cautiously optimistic about the Norwegian M&A market on a medium to long-term basis – regardless of expecting to possibly experience a decrease in the activity during the next six to 12 months, at least for larger transactions as increasing interest rates is expected to continue having a negative effect on exit-multiples. However, for small to mid-market deals the activity is expected to remain steady, with an increasing number of respondents planning divesting parts of their business operations in the next couple of years.

QUESTIONS

Ole K Aabø-Evensen
oka@aaboevensen.com

Aabø-Evensen & Co
Oslo
www.aaboevensen.com

QUESTIONS

The Inside Track

What factors make mergers and acquisitions practice in your jurisdiction unique?

A foreign buyer may find that Norwegians often seem to be much more pragmatic and will often take a relaxed approach to the legal documentation, compared with sellers or buyers in our neighbouring countries. The reason for this approach is that Norwegian courts have traditionally used principles of reasonableness, good faith or fair dealing in their interpretation of contracts, to avoid unjust solutions based on a literal interpretation of a contract. A Norwegian party will often feel no need to cover all possible scenarios in the contract, and a foreign buyer would often experience tension between what it felt was needed to be covered in the acquisition agreement, compared with what the seller is willing to accept, or think is necessary to include. However, for the past 10 to 20 years the Norwegian Supreme Court has taken a more literal appr,oach, particularly when interpreting contracts between professional parties. As a result, the documentation that is used for these type of deals today very often resembles what is used in Anglo-Saxon jurisdictions, despite the fact that they are usually not as detailed.

What three things should a client consider when choosing counsel for a complex transaction in your jurisdiction?

- Don't look at the size of the firm. Instead, consider if the counsel involved on your project are skilled negotiators with the necessary experience and industry insight from previous complex M&A transactions, and that the law firm has shown that it is able to handle such transactions.
- Ensure that the law firm is able to provide you, as a client, with sufficient senior attention from an experienced partner to help you through the pitfalls of such transactions. The counsel's job is to not only provide what you as a client is asking for, but also provide what you as client did not know was needed in the relevant transaction.
- Ensure that the counsel involved are able to show a mix of sound commercial acumen and in-depth knowledge of the legal and regulatory framework for such transactions, including the project management side of such transactions.

What is the most interesting or unusual matter you have recently worked on, and why?

The transactions that I was involved in during the credit freeze back in 2008–2009, because they involved acquiring assets in distress, which in general makes it a bit more exciting. Gjensidige's acquisition of Citibank's consumer bank business in Norway, mainly because it involved a carveout of an existing business from a large global banking conglomerate and involved some fairly complex transitional issues. Further, in 2016, I assisted Aker ASA and Solstad Offshore ASA in what was considered by most to be a high-profile hostile takeover/merger of Rem Offshore ASA. The 2019 structured sales process of The Scottish Salmon Company, a Jersey domiciled company listed on the Oslo Stock Exchange. Finally, the partial sale of Timex Group to Baupost Group in Boston in 2020, which turned out to be a truly global M&A process in which we acted as project managers and lead counsel to the sellers and the target group.

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Switzerland

Christoph Neeracher at Bär & Karrer has over 20 years of experience in international and domestic M&A transactions, focusing on private M&A and private equity transactions, including secondary buyouts, public-to-private transactions and distressed equity, as well as transaction finance, corporate restructurings, relocations, corporate law, general contract matters (eg, joint ventures, partnerships and shareholders' agreements) and all directly related areas.

Philippe Seiler focuses on private M&A and private equity transactions in various industries with a special focus on the healthcare and life science industries. In addition to large-scale transactions, he focuses on small and medium-sized M&A transactions, private equity transactions, management buyouts and outsourcing projects. Furthermore, he specialises in regulatory matters in the fields of life sciences and healthcare.

Raphael Annasohn focuses on international and domestic M&A transactions in various industries specialising in private M&A and private equity, corporate reorganisations and restructurings, as well as corporate law and general contractual matters, particularly shareholders' agreements. He specialises in the fields of venture capital and start-ups.

Read this article on Lexology

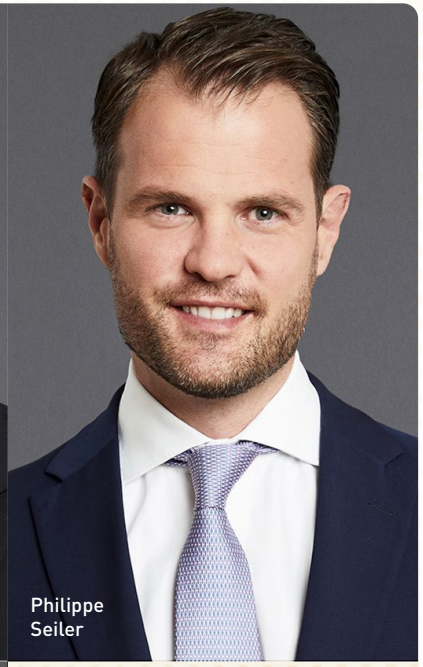
1 What trends are you seeing in overall activity levels for mergers and acquisitions in your jurisdiction during the past year or so?

The productivity of 2021 laid the foundation for an optimistic start to 2022. However, this optimism was tempered by the war in the Ukraine in February 2022 and continued pandemic-related challenges. The year was characterised by significant economic events, including supply chain disruptions, global inflation, and overall macroeconomic uncertainty. Despite the challenging economic climate, the Swiss M&A market had another remarkably productive year in 2022, with a total of 647 deals involving Swiss entities, amounting to a combined deal size of US$138.5 billion. This marks the second consecutive year of record-breaking deal activity. In comparison, there were 604 deals with a combined deal size of US$169.6 billion in 2021 and 363 deals with a combined deal size of US$63.1 billion in 2020. Due to the Swiss National Bank's interventions against inflation and the respective increases of the key interest rate we expect the total M&A deal activity in 2023 to be lower than it was in 2022 – in particular, we expect a slightly weaker H2 compared to last year's second half.

2 Which sectors have been particularly active or stagnant? What are the underlying reasons for these activity levels? What size are typical transactions?

In 2022, the technology, media & telecommunications sector led the way with 124 deals, followed by industrial markets with 89 deals, and pharmaceuticals and life sciences with 82 deals, representing the most active sectors in descending order. Private equity investors played a significant role, being involved in 194 deals in Switzerland during 2022, showcasing their continued strong influence on the Swiss M&A market. Notably, Swiss purchasers acquired 283 foreign


Christoph Neeracher


Philippe Seiler


Raphael Annasohn

"Despite the challenging economic climate, the Swiss M&A market had another remarkably productive year in 2022."

QUESTIONS

> "Generally, consideration may either consist of cash, shares, securities or a combination thereof."

companies, while foreign acquirers bought 152 Swiss companies. Additionally, there were 127 domestic transactions (Switzerland/Switzerland) in the same period. In our view, key factors for a generally positive situation in Switzerland's M&A activity include, in particular, Switzerland's stable political and regulatory environment, with barely any investment restrictions in combination with a high number of potential investment opportunities, as well as the remaining relatively low and favourable interest rates and borrowing conditions facilitating the funding of acquisitions.

3 What were the recent keynote deals? What made them so significant?

The acquisition of Credit Suisse by UBS, two of Switzerland's largest banks, made headlines for its global reach and widespread impact across sectors. In early 2023, UBS agreed to purchase Credit Suisse in an all-stock deal valued at US$3.2 billion, with the involvement of the Swiss government and FINMA. Also, in May 2022, DSM and Firmenich announced a significant cross-border merger-of-equals, uniting the two iconic companies, with a deal value of 20.722 billion Swiss francs. Another major deal occurred when Partners Group, a Switzerland-based firm, increased its stake in Swiss luxury watchmaker Breitling, significantly boosting the company's valuation to over US$4.5 billion, from around US$800 million in 2017.

4 In your experience, what consideration do shareholders in a target tend to prefer? Are mergers and acquisitions in your jurisdiction primarily cash or share transactions? Are shareholders generally willing to accept shares issued by a foreign acquirer?

Generally, consideration may either consist of cash, shares, securities or a combination thereof. Cash settlements tend to be more frequent as share deals are usually only accepted by the seller if the shares given as consideration are readily marketable, as is the case especially for listed companies. Tax considerations also play an important role in, determining the type of consideration that is eventually agreed upon. The type of consideration accepted will, in each case, largely depend on the shareholders involved and their intentions, as well as on the specific transaction type and process.

5 How has the legal and regulatory landscape for mergers and acquisitions changed during the past few years in your jurisdiction?

Switzerland's regulatory landscape continues to provide a favourable environment for investors, underpinned by three compelling factors:

- Limited investment restrictions: investors face minimal hurdles when exploring various investment opportunities, benefiting from a welcoming and open market.
- Flexible asset or share purchase agreements: the parties engaged in transactions enjoy significant leeway in structuring deals, with ample room for negotiation on critical aspects such as representations and warranties, indemnities, disclosure concepts and caps.
- Low bureaucracy: Switzerland's regulatory processes are designed to be efficient and streamlined, reducing administrative burdens and allowing investors to navigate the market with ease.

A significant milestone in 2022/2023 was the implementation of the new Swiss corporate law, which officially took effect on 1 January 2023. While it is still early to fully assess the impact of these changes on the M&A market, we anticipate that the new corporate law will likely have a positive overall effect. Some key changes introduced by the law include the following.

Share capital

Under the new Swiss corporate law (article 621 of the Swiss Code of Obligations (CO)), Swiss stock corporations are no longer required to denominate their share capital solely in Swiss francs. Instead, they now have the flexibility to choose from other major currencies such as €, US$, GB£ or ¥, provided that the selected currency aligns with the business's functional currency and is used in the financial statements. While the option to prepare financial statements in a currency other than francs has been available before, the amount of distributable equity still needed to be determined in francs, leading to potential foreign exchange (FX) discrepancies. With the new provisions, aligning the share capital with the reporting currency helps avoid these FX-related issues. Furthermore, companies have the freedom to change the share capital currency at the beginning of a financial year by amending their articles of association. This change grants businesses greater flexibility in managing their capital structure according to currency preferences and business needs.

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Incorporation and capital increases

Under the previous law, companies had the option of establishing authorised capital, granting their board of directors the authority to issue shares from this pool over a maximum period of two years. However, this approach has now been replaced by a new concept known as the 'capital band' (article 653s et seq CO). With the capital band, the shareholders' meeting can, through amendments to the articles of association, authorise the board to increase or reduce the share capital within a predefined range, allowing for fluctuations of up to 50 per cent of the share capital in either direction. This authorisation is valid for a maximum period of five years. The introduction of the capital band is beneficial for companies, not only due to the extended time frame but also because it maintains the essential principles of the previous authorised capital system. Additionally, contingent capital can still be established for the

> "Even under the previous law, legal doctrine recognised the permissibility of a company disbursing interim dividends."

issuance of shares upon the exercise of stock options and convertible bonds. From a tax perspective, the capital band has the benefit that the 1 per cent Swiss stamp duty payable on capital contributions is only due on the net increased amount at the expiry of the capital band. Under the old law, if a company was incorporated or increased its capital and it was intended that the company will acquire assets from a shareholder or a close person, the intended acquisition, including the purchase price, had to be disclosed in the articles and an auditor had to confirm that the price was justifiable. These rules regarding the intended acquisition in kind have been abolished, making incorporations and capital increases faster and more cost-efficient.

Interim dividends

Even under the previous law, legal doctrine recognised the permissibility of a company disbursing interim dividends, which are dividends paid from the earnings of the current financial year, based on an interim balance sheet. However, audit firms often hesitated to provide the necessary certificate for these interim dividends. However, the new article 675a CO explicitly confirms the allowance of these interim dividends, providing a clear and positive affirmation of their permissibility.

Shareholders' resolutions

While shareholders' meetings have always had to be held as physical meetings (absent covid-19-relief), the reform introduces flexibility by offering a number of additional ways to hold such shareholders' meetings (article 701 et seq CO) (ie, normal physical meeting (unchanged), physical meeting concurrently at several locations with electronic transmission between these locations, physical meeting with remote participants exercising their (voting) rights electronically, entirely virtual meeting, circular (ie, written) resolution in wet ink or electronic form).

Board resolutions

The reform eliminates uncertainties around the question if/how electronic board resolutions are permitted, by clearly listing the options to hold board meetings and pass resolutions (article 713 CO) (ie, normal physical meetings (unchanged), physical meetings with remote members exercising their (voting) rights electronically, entirely virtual meetings, circular (ie, written) resolutions in wet ink or electronic form (email etc), unless a board member requests oral discussion.

Rights of minority shareholders

Shareholders of non-listed companies representing 10 per cent of the capital or votes are entitled to receive requested information in writing from the board (article 697 paragraph 2 CO). Shareholders representing 5 per cent of the capital or votes have the right to inspect the books and records of the company (article 697a CO; previously, this was only possible with the permission of the shareholders' meeting or the board). This information and inspection rights only

extend to the information necessary for the exercise of shareholders' rights and are subject to trade secrets and legitimate interests of the company not to disclose certain information. If shareholders of a non-listed company represent 10 per cent of the capital or the votes (5 per cent of the capital or the votes in the case of listed companies), they can request the calling of a shareholders' meeting (article 699 paragraph 3 CO). Shareholders of non-listed companies who represent 5 per cent of the capital or the votes (0.5 per cent of the capital or the votes in case of listed companies) are allowed to request the inclusion of agenda items and motions regarding a scheduled shareholders' meeting (article 699b CO).

Transparency rules

Under the revised law, several new transparency rules come into effect. First, companies engaged in the exploitation of certain commodities and subject to ordinary audit are required to prepare a report on payments made to governmental bodies (article 964d et seq. CO; applicable from FY 2022). Secondly, larger companies with at least 500 full-time employees and meeting specific financial thresholds, such as a balance sheet exceeding 20 million francs or revenues exceeding 40 million francs, must prepare an ESG report, which must be approved by both the board and shareholders' meeting (article 964a et seq CO; applicable from FY 2023). Lastly, companies involved in either importing or processing commodities from conflict regions, or offering products or services with suspected ties to child labor, must establish a management system for their supply chain, conduct risk assessments, and have their compliance with duty of care obligations reviewed by an external expert (article 964j et seq CO; applicable from FY 2023).

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6 Describe recent developments in the commercial landscape. Are buyers from outside your jurisdiction common?

Switzerland remains highly attractive for inbound investment with plenty of opportunities. SMEs in particular, which will need to deal with succession planning over the coming years (estimated to be approximately 90,000), serve as particularly attractive targets for investors. The most active foreign investors for inbound transactions are from the UK, France and Germany, followed by the rest of Europe. Specific restrictions that apply to foreign buyers are limited.

One example is the Federal Law on Acquisition of Real Estate in Switzerland by Non-Residents (Lex Koller), which restricts the acquisition by foreigners of real estate properties that are not used for the permanent establishment of a trade, production or other businesses run in a commercial way, a craftsman's establishment or a free profession (non-commercial properties). In particular, residential properties and unbuilt land, and general properties not

used for commercial purposes, are subject to the Lex Koller. Another restriction could result from restrictions on foreign direct investments (FDI) (see question 9).

7 Are shareholder activists part of the corporate scene? How have they influenced M&A?

Traditionally, shareholder activism has not been a part of Switzerland's corporate scene due to the rights of minority shareholders being quite limited. However, in recent years, there has been a significant trend of growing shareholder activism in Switzerland, as reflected globally and, especially more recently, in Europe. Compared with other jurisdictions, particularly the United States, the number of activist campaigns involving Swiss companies is still moderate. However, reports show that since 2012, shareholder actions in Switzerland have more than doubled, and Switzerland is becoming a key European target for activist shareholders. This trend can be expected to advance as activist shareholders are becoming more sophisticated and better funded. Even though shareholder activism is still a rather new phenomenon, Swiss companies have been affected by this trend, whereas primarily listed companies are being targeted. Companies at risk of becoming a target may nevertheless be well advised to implement a number of structural defences, as the adopted corporate law may further increase shareholder activism due to enhanced (minority) shareholders' rights.

8 Take us through the typical stages of a transaction in your jurisdiction.

The general procedure and different stages of a transaction vary substantially from one case to another, depending on, among other things, the seller, the purchaser, the target and the legal form of the transaction envisaged (eg, share deal, asset deal, mixed share and asset deal or statutory merger). Generally, however, a typical Swiss M&A transaction consists of the following stages. In the preparation phase, the seller and its advisers prepare the sale documentation and marketing materials. This is followed by a marketing phase in which the seller's financial adviser – or, less often, the target's executive management – initiates first contact with potential bidders. The latter are then required to execute a non-disclosure agreement to receive further information in the form of an information memorandum. Thereupon, bidders may decide to make a non-binding offer, which is followed by the due diligence phase for selected bidders. In this stage, in addition to document review, management presentations usually take place and expert sessions are set up. In the negotiation, signing and closing phase, the parties negotiate and finalise the transaction agreement, which is usually drafted according to international standards. Upon completion of this process, the parties will sign the transaction agreement. As the closing of a Swiss transaction

> "There has been a significant trend of growing shareholder activism in Switzerland."

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agreement depends on, among other things, the presence of the necessary governmental approvals and third-party consents, a certain amount of time will normally pass between signing and closing, during which the parties have to fulfil certain obligations and follow specific rules of conduct as set out in the transaction agreement. Of course, the drawdown by the buyer of the necessary funding of the purchase price is also often a reason for a staggered signing and closing. The form of the closing itself varies depending on the legal form of the target business and the structure of the respective transaction. During the last phase – the post-closing phase – a non-compete clause binding the seller in relation to the target group often becomes relevant, such as certain other obligations of the parties (eg, certain post-closing integration work or the continuation of the business by the purchaser).

9 Are there any legal or commercial changes anticipated in the near future that will materially affect practice or activity in your jurisdiction?

A current notable legislative project is the potential implementation of an investment control regime. To date, except for certain sector-specific limitations and requirements (eg, in real estate (see question 6), telecommunications, radio and TV broadcasting, nuclear energy and aviation, as well as the financial sector) there is no general investment control for FDI in Switzerland. A parliamentary motion submitted in 2018 aims at creating a legal basis for investment control of FDI in Swiss companies by, among other things, establishing an approval authority for the transactions subject to investment control. In the meantime, this motion has been approved by both the Council of States and the National Council. Last year the Swiss Federal Council initiated a consultation process to develop new legislation concerning the review of foreign investments. In May 2023, the results of the consultation on the proposed investment control law were considered, revealing a prevailing sense of scepticism towards the draft. The majority of participants expressed concerns that the proposed law might diminish Switzerland's appeal as a business hub. However, a significant minority acknowledged the necessity for action and supported the idea of implementing foreign investment screening measures in the country. Consequently, the Swiss Federal Council has directed the Federal Department of Economic Affairs, Education, and Research (EAER) to prepare a substantially revised draft by the end of 2023. This revised version will focus exclusively on screening investments made by foreign state-controlled investors seeking to acquire Swiss companies operating in particularly critical sectors, such as defence equipment, electricity transmission and production, and health and telecom infrastructures. However, it remains still open whether or when such legislation will be implemented and how it would look.

> "These challenging times can also present unique opportunities for investors."

10 What does the future hold? What activity levels do you expect for the next year? Which sectors will be the most active? Do you foresee any particular geopolitical or macroeconomic developments that will affect deal sizes and activity?

During periods of uncertainty or market volatility, companies and investors often become more cautious and risk averse. This cautious sentiment can result in a slowdown in M&A activity. Companies may hesitate to make significant strategic decisions, including acquisitions, due to the unpredictable business environment and potential risks associated with such transactions.

However, these challenging times can also present unique opportunities for investors. When the market experiences volatility, valuations of target companies may decline, making them more attractive for potential acquirers. Lower valuations mean that buyers can acquire assets at potentially more favourable prices, leading to greater returns on investment when the market stabilises.

In recent years, there has been a significant surge in M&A deals and transaction volume, particularly in the technology, media and telecommunications (TMT), industrial and pharmaceuticals and life sciences sectors. Looking ahead, we anticipate a sustained interest in transactions within the TMT, consumer goods and healthcare sectors. The current economic situation is likely to drive companies towards divesting certain assets, divisions or subsidiaries through spin-offs, split-offs and carve-outs. As a result, we anticipate a trend of more specialised companies being traded on the M&A market.

Christoph Neeracher
christoph.neeracher@baerkarrer.ch

Philippe Seiler
philippe.seiler@baerkarrer.ch

Raphael Annasohn
raphael.annasohn@baerkarrer.ch

Bär & Karrer
Zurich
www.baerkarrer.ch

QUESTIONS

The Inside Track

What factors make mergers and acquisitions practice in your jurisdiction unique?

Switzerland's stable political system, globally oriented and liberal economy, highly skilled workforce and efficient legal environment, as well as a traditionally mild tax regime and relatively low bureaucracy, create an excellent environment not only for M&A but for business in general.

What three things should a client consider when choosing counsel for a complex transaction in your jurisdiction?

Competence, deal experience, availability and pragmatism are the most crucial factors for successfully completing complex M&A transactions.

What is the most interesting or unusual matter you have recently worked on, and why?

Every deal raises interesting and unique questions. We recently handled a cross-border M&A deal involving a target company with complex regulatory requirements and a unique ownership structure. Navigating through intricate legal and compliance issues while managing diverse stakeholders made it an intriguing and intellectually stimulating project.

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Turkey

Benan Ilhanli is the head of the M&A and corporate practices and head of the Italian desk at ILHANLI/BASER. Benan specialises in cross-border M&A and investment projects, commercial contracts, customs law and IP and IT law, and assists investment funds, start-ups and multinational companies for their M&A projects and general corporate issues. He also teaches a course on the internet and law to graduate students at MEF University law faculty, where he is part of the academic staff as a part-time lecturer. He also regularly gives lectures at universities and start-up incubation programmes. Benan has been selected to write about M&A and data protection in various publications.

QUESTIONS

1 What trends are you seeing in overall activity levels for mergers and acquisitions in your jurisdiction during the past year or so?

The activity levels of mergers and acquisitions in Turkey returned to their normal levels in 2021 following the pandemic and post-pandemic periods, and especially after the historic dip in 2019. Owing to the number of the deals whose details are not disclosed to the public, we do not have a confirmed volume number, but it is estimated that the deal volume exceeded the US$10 billion barrier (estimated US$10.2 billion by Deloitte and US$14.3 billion by KPMG) consisting of a year-over-year increase of 12 per cent. This figure is still half of the deal volume estimated at US$22 billion in 2012, however the overall growth following the dramatic decrease in 2016 is indicating a generally positive outlook.

Mergers and acquisitions have been impacted not only by the pandemic measures but also by recent geopolitical and global developments; Turkey has been at the centre of numerous conflicts and economic crises. While the location of the country in the middle of Eurasia provides certain advantages, its economy remains uncertain because of the fluctuating economic conditions of the region. On the other hand, country-specific problems, such as the coup attempt in 2016 and the sudden decrease of the national currency's value, have both limited and increased deal flow owing to the unique opportunities created.

Considering all the facts, 2021 and 2022 were years of recovery for mergers and acquisitions in Turkey, led by a more diverse investor portfolio, and we saw the first decacorns in Turkish start-up ecosystem following significant deal values in single transactions.

Benan Ilhanli

2 Which sectors have been particularly active or stagnant? What are the underlying reasons for these activity levels? What size are typical transactions?

The e-commerce sector has been particularly active: Trendyol and Getir have created a total volume exceeding US$3 billion in 2021 and 2022, bringing these two e-commerce giants to the decacorn level. Insider, operating in the software as a service (SaaS) sector, also reached the decacorn level with its last investment round in Q1 of 2022. The dominance of a 'new' economy has been evident in Turkey in the recent years, with e-commerce, SaaS and gaming companies receiving significant investments. The gaming sector was a leading force in 2020 with the acquisition of Peak Games by Zynga for a total value of US$1.8 billion and other smaller deals. Technology (including gaming and e-commerce) and telecommunications deals have been

the driving force in these trends. While the number of transactions is quite high in these sectors, the typical sizes of transactions are still relatively small (varying usually between US$100,000 and US$5 million) except for the megadeals, such as with Trendyol and Getir, or a few deals varying between US$10 million and US$30 million. The new economy created in Turkey has been the work of by numerous entrepreneurs over many years, who have brought and adapted US and European models in the region, and created new models from scratch and exported those abroad. Following the success of Trendyol and Getir in e-commerce, Peak Games and Gram Games in gaming, and iyzico in payment systems, numerous entrepreneurs are following in their footsteps and are creating successful and global companies in e-commerce, software development, gaming and other tech-first sectors. The deal flow is constant in these sectors, and it would not be a surprise to see new megadeals in the near future.

On the other hand, the conventional sectors such as financial services, manufacturing, retail, infrastructure and energy have been active as well, and the typical size of deals exceeds US$50 million. While not being a typical merger and acquisition transaction, the highest-valued transaction in Turkey for 2021 was an infrastructure and transportation project concerning the transfer of operating rights and the construction of additional investments of Antalya Airport between 2027 and 2051 by a joint venture established by TAV (Turkey) and Fraport (Germany). This transaction was signed for a total value of US$8.2 billion, exceeding all other transactions in Turkey for 2021. Further, Elif Holding, active in manufacturing, was acquired by Huhtamaki Oyj (Finland) for almost

QUESTIONS

> "The keynote deals for 2021 and 2022 to date were Trendyol and Getir."

3 What were the recent keynote deals? What made them so significant?

The keynote deals for 2021 and 2022 to date were Trendyol and Getir. They gathered an aggregate investment amount exceeding US$3 billion and caused the e-commerce sector to lead the merger and acquisition charts by a hefty margin. The female-founded Trendyol is a success story as a result of it developing its userbase and services dramatically in recent years, following the investment of Alibaba and the last mega round of US$1.5 billion attracted investment from Softbank, General Atlantic, Princeville Capital, ADQ, Qatar Investment Authority and Chimera Investments.

Getir is a Turkish powerhouse that introduced fast delivery to many markets in Europe. While they are criticised by many for their depot systems and pressure for the fastest delivery possible, they are disrupting numerous developed markets and the established retail sector. Their investment rounds in 2021 (for an aggregate of

US$850 million) and in 2022 (for an aggregate of US$768 million) attracted significant players such as Sequoia Capital, Tiger Global Management, Silver Lake Partners, Goodwater Capital and Mubadala. These deals are important not only for their significant size but also for these companies' primary activity being in Turkey.

These deals also mark the return of General Atlantic and Tiger Global to the Turkish market, where they exited previous investments with significant multipliers, and the entry of Softbank for the first time. Sequoia Capital is known for investing in another Turkish and female-founded company, Insider, and we can still see the influence of Middle Eastern private and state funds in the Turkish ecosystem. Insider reached decacorn level with an investment round of US$121 million by international and local investors such as Sequoia, 212 and Qatar Investment Authority.

4 In your experience, what consideration do shareholders in a target tend to prefer? Are mergers and acquisitions in your jurisdiction primarily cash or share transactions? Are shareholders generally willing to accept shares issued by a foreign acquirer?

The primary preference for the consideration in merger and acquisition deals in the Turkish market is a cash consideration. However, while transactions based solely on share considerations are rare, this does not exclude mixed transactions where the shareholders get a part of the consideration in cash and the remaining in shares. Mixed considerations are usually used in higher-level transactions where the consideration amount is higher, the acquirer is a public company and the shareholders have the possibility to ensure a share value defined by the market rather than a valuation based on the last investment round. However, we may also encounter share-per-share mergers in smaller entities where

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neither of the merging companies has the financial force to acquire the counterparty but where they feel obliged to proceed with a merger to survive in a difficult market. Due to some famous precedents where the share value of the acquirer decreased dramatically shortly after the closing of an acquisition, there is significant awareness of the shareholders in the market for share value protection mechanisms. Hence, in transactions where there is a share-based consideration, we may expect to see these mechanisms heavily negotiated in Turkey. In our experience, shareholders' willingness to accept shares does not depend on nationality or location but mostly on the economic status (and the shareholding structure) of the acquirer. We may speak of a widely accepted and developed foreign investment in Turkey and, as long as the shareholders receive adequate assurances, there would not be a specific problem if the acquirer is foreign based. As many entrepreneurs opt to flip up their companies in the US or Europe, there is a significant number of share exchange agreements and similar structures that might resemble share-per-share deals and that may appear as a false indicator in the statistics.

5 How has the legal and regulatory landscape for mergers and acquisitions changed during the past few years in your jurisdiction?

Turkish legislation has been subject to harmonisation processes for the European Union, amended numerous times and readied for foreign investments. The Turkish Commercial Code and the Code of Obligations, which are adapted from Swiss Code of Obligations, were renewed in 2011. The law on direct foreign investments of 2003 replaced the precedent law dated 1954, and the law on industrial property (trademarks, patents and designs) was enacted on 2o16. Further, a regulation on Turkish data protection has been enacted following the General Data Protection Regulation. In substance, foreign investments are possible – even as a sole shareholder or sole administrator – and are protected as per the law on development finance institutions (DFIs). In addition, share transfers are not subject to prior government authorisation, except for licensed activities, such as financial services (banks, payment systems, etc).

An important aspect in mergers and acquisitions in Turkey is compliance with competition law and, more specifically, with merger control regulations. Communiqué No. 2010/4 on mergers and acquisitions subject to the authorisation of the Competition Authority provides that transactions resulting in a definitive change of control are subject to the Competition Authority's authorisation if:

- the transaction parties' aggregate turnover in Turkey exceeds 750 million Turkish lira and, separately, (at least of two parties) 250 million Turkish lira; or
- at least one party's turnover in Turkey exceeds 250 million Turkish lira and at least another party's global turnover exceeds 3 billion Turkish lira.

The Communiqué was amended on 4 March 2022 to provide a stricter regime for tech companies. As per amended article 7 of the Communiqué, the threshold of 250 million Turkish lira stated above is not sought for transactions related to the acquisition of the technology companies operating or conducting research and development activities in the Turkish market or providing services to the users in Turkey. Further, 'technology companies' is defined as: undertakings or related entities operating in the fields of digital platforms, software and gaming software, financial technology, biotechnology, pharmacology, agricultural chemicals and health technology. The direct result of this amendment is the potential prolongment of transactions owing to the requirement of requesting the Competition Authority's authorisation in the case of an acquisition of a Turkish technology company even if the turnover criteria set forth in the article is not met. Therefore, it became quite important to plan the transaction accordingly by taking into consideration the obligation of such authorisation even in relatively small transactions if a Turkish technology company is involved.

Another important aspect to be considered in acquisitions is the latest amendment made with the Communiqué to Decree No. 32 on the Protection of the Value of the Turkish Currency. Article 8 of the Communiqué limits the transactions that may be completed in foreign currencies. Although the Turkish legal system does not impede foreign currency contracts, following the decrease of the Turkish lira's value against foreign currencies, the Turkish Ministry of Treasury and Finance created exceptions for such transactions and prohibited the use of foreign currency in those transactions if the parties were Turkish citizens or residents in Turkey. The sale of movables except for the vehicles were not listed among these exceptions; therefore, the transactions related to acquisitions of shares could be made in foreign currencies. In accordance with the amendment made on 19 April 2022, transactions related to the sale of movables, including the shares, are made subject to a restriction where the value of the

> "Developments in the commercial landscape are mostly shaped by the geopolitical developments in Turkey."

acquisition may be determined in a foreign currency, but the payment must be made in Turkish lira. This restriction is valid if all parties involved in the transaction are persons or entities resident in Turkey; if one of parties is not considered resident in Turkey, this specific exception would not be applicable.

6 Describe recent developments in the commercial landscape. Are buyers from outside your jurisdiction common?

Developments in the commercial landscape are mostly shaped by the geopolitical developments in Turkey. As of 2022, the economic structure is under the influence of the low interest rate-high inflation model applied by the government, the conflict in Ukraine and soaring immigration from Syria and other conflict zones (including Ukraine and Russia). However, the neutral position of the country provides a safer position in the energy crisis, and therefore, especially the manufacturing industry, helped also by the low currency, is gaining momentum for production and exportation. Consequently, developments usually occur in conventional sectors such as industrial manufacturing, transportation and logistics. On the other hand, tech-first sectors such as gaming and software development are expected to lead with the number of deals, while e-commerce deals might be slowing down owing to the rapid expansion and decrease in turnover following the pandemic. As of Q1 and Q2 of 2022, foreign investors accelerated their sell positions in the Turkish stock markets; however, merger and acquisition transactions still involve numerous foreign investors. The acquisitions and investments in the Turkish companies are predominantly made by buyers outside the Turkish jurisdiction.

7 Are shareholder activists part of the corporate scene? How have they influenced M&A?

Although the Turkish Commercial Code does not regulate shareholder activism in a specific way, it grants certain rights to the shareholders regardless of their share ratios and further rights to shareholders exceeding predefined thresholds.

As each share grants at least one voting right in Turkish companies, except where organised otherwise in publicly traded companies, and voting rights cannot be suspended or cancelled unless for a reason specifically provided in legislation, each shareholder, even with a non-significant share ratio, is entitled to participate in a shareholders' meeting, cast their vote and make their reserve, and consequently file a lawsuit for the cancellation of a shareholders' resolution. The voting right per share may also be increased in the articles of association for certain share groups, entitling their holders a further right for steering the company. In addition, shareholders are entitled to receive detailed information on the company, unless the disclosure might constitute a material risk for the company's interests, and to request an audit if deemed necessary.

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In addition to the rights mentioned above, the Turkish Commercial Code defines shareholders holding at least 10 per cent of a company's share capital (5 per cent in the case of a publicly traded company) as a minority and grants further rights, such as requesting additional agenda items in the general assembly meetings, appointment of a board member if granted as a minority right in the articles of association, requesting postponement of the approval of the balance sheet and dissolution of the company.

Accordingly, a shareholder activist has numerous tools in hand, but shareholder activism is not very common practice in Turkey. While there are numerous litigious cases involving a group of shareholders against other shareholders, these are mostly related to family-owned companies and rarely caused by shareholder activists. Further, the articles of association of the companies may be redacted to grant certain share groups superior rights (in the form of preferences) to avoid shareholder activism to a certain degree. Another protection is the squeeze-out right provided to the majority of 90 per cent if that is not used widely but taken into consideration by the shareholders as a possible tool for majority protection.

8 Take us through the typical stages of a transaction in your jurisdiction.

The typical stages of a merger and acquisition transaction in Turkey are similar to those in continental European transactions. Depending on the necessities and volume, contact may be initiated by one of the numerous international and local M&A consultants or, in certain cases, it may also be initiated between CEOs. Another typical first contact is initiated by an investor of one of the parties to the CEO or an investor of the counterparty. This pattern is significantly visible in start-up deals where many angel investors or venture capital

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firms invest and create synergy between two companies or different investors.

Following first contact, the next usual step is drafting and executing a term sheet (or letter of intent, memorandum of understanding, etc) between the parties to summarise the terms and create an exclusive period, if any. The term sheet, if the parties do not wish to execute a binding document, may in any case constitute a step creating a culpa in contrahendo liability deriving from the Code of Obligations; hence, it should be taken into consideration with due care.

The usual second step in the transaction is the due diligence process, where the acquirer conducts a thorough examination of the seller side's records – which is usually conducted on a red-flag-only basis. While the findings in a due diligence process may potentially have an effect on the valuation, it also has a significant effect on:

- the evaluation of material adverse effects and change of control clauses in the seller side's agreements;
- the liabilities on defects of the seller;

- the assumption of liability in the case of asset transfer;
- assumption of liability on public debts by the acquirer or the administrators appointed by the acquirer; and
- assumption of liabilities on the administrative and criminal charges for, for example, data privacy and employee-related matters.

Owing to the nature of the different records, the process must be carried by legal and fiscal advisers to evaluate records and findings and, depending on the nature and volume of the transaction, further advisers for technical processes may be involved. We usually recommend sealing a copy of the data room provided by the seller side to be used in the case of controversy and, if the case will be heard by a Turkish court, a signed copy of the medium would have more effect as a proof.

The third stage of the transaction is the drafting and negotiation of the transaction documentation. Except for the share transfers in limited liability companies, the notary's involvement is not required. Hence, the transaction documentation may be freely drafted and signed between the parties. Share transfer agreements in Turkey provide the usual clauses, such as the mechanism of the closing, representations and warranties, indemnification, and choice of law and forum. Turkish legislation recognises the national or international arbitration or different laws and forums for share transfer agreements; hence, the selection of a foreign jurisdiction and court or arbitration is possible. Considering the fact that most of the disputes arising out of a share transfer are related to the qualities of the company or transferred shares or breach of the seller side's obligations, a local forum and legislation is usually preferrable for a swifter action, and the Istanbul Arbitration Centre provides an international arbitration procedure that is increasingly attractive for the merger and acquisition transactions.

As per the closing, the transfer of the share certificate (if it has been issued), the approval of the board of directors and registration of the transfer in a company's share ledger is essential for a successful transfer in a joint stock company; hence, advance preparation for the closing might be necessary in certain transactions. For limited liability companies, a share transfer agreement executed before a notary public, a shareholders' resolution approving the transfer and the registration of the share transfer before the relevant trade register constitute a condition for validity of the transfer. As the parties may wish to keep certain aspects of the transaction confidential, common practice is the execution of a share transfer agreement, including the financial conditions of the transfer before a notary public and a second intra-party agreement for specific terms and conditions. The closing procedure for the financing rounds based on the capital increase require a shareholders' meeting to convene and resolve on the capital increase, and if a full quorum (100 per cent) is not met, all shareholders shall be called for a meeting and then for their pre-emption rights (if the pre-emption right has not been limited by the articles of association and legislation). This call for a meeting and pre-emption right may require planning the closing four to five weeks prior; the transaction documentation may need to include interim period clauses if the signing and closing will not be simultaneous. Finally, the obligation to request the authorisation of the Competition Authority shall be evaluated and made if deemed necessary for a due closing. Even if the Competition Authority accepted pre-final documents in the past, the final and executed agreement might be required for releasing the necessary authorisation – it is also crucial to check these aspects with a competition law expert prior to planning for a closing.

> "Turkey is a fast moving and always changing country, and we can always expect new regulations and amendments when necessary."

9 Are there any legal or commercial changes anticipated in the near future that will materially affect practice or activity in your jurisdiction?

The legal framework has recently been amended and renewed in Turkey, meaning we do not expect material changes in this regard. However, Turkey is a fast moving and always changing country, and we can always expect new regulations and amendments when necessary (such as for the protection of Turkish currency). A foreseeable future change in legislation is related to the amendment of the Law on the Protection of Competition, for which a draft has been published. As this competition law was substantially amended in 2020 and a major merger control was established for technology companies in April 2022, the new amendment is not expected to have a major effect on most sectors but to provide more details on digital platforms and e-commerce activities. The Turkish Ministry of Commerce enacted significant legislation on e-commerce, and the amendment of the above competition law is expected to close the circle.

10 What does the future hold? What activity levels do you expect for the next year? Which sectors will be the most active? Do you foresee any particular geopolitical or macroeconomic developments that will affect deal sizes and activity?

While there has not been an official call for general elections, Turkey has entered in election period that is expected to be concluded in May or June 2023. This election period, as usual, creates an expected decrease in merger and acquisition transactions until the new president and members of the parliament are elected. We expect a significant increase in transactions in the infrastructure, financial services and transportation sectors following the conclusion of the elections and a strong DFI flow in Turkish capital markets and private investments. However, should Turkey continue to stay neutral in the Ukraine-Russia conflict, we may also expect an increase in defence and infrastructure-related transactions in the short to medium term. Another historically strong sector in Turkey that might be regaining traction is the construction sector, and related companies may have a strong demand for numerous projects and investments during restructuring in conflict zones when the conflicts end.

This chapter was accurate as at January 2023

Benan Ilhanli
benan@ilhanlibaser.com

ILHANLI/BASER
Istanbul
https://ilhanlibaser.com

QUESTIONS

The Inside Track

What factors make mergers and acquisitions practice in your jurisdiction unique?

The M&A transactions in Turkey are usually familiar and comfortable for foreign investors and their legal advisers since the deal structure, documentation and legislation are similar to continental European countries. The transactions where foreign investors are involved are drafted and negotiated in English and there are also numerous Turkish lawyers fluent in other languages, such as Italian, French, German and Chinese. While being similar, an acquirer should seek an a tailored advisory service to have a better understanding of the risks and benefits in Turkey in a comprehensible way.

What three things should a client consider when choosing counsel for a complex transaction in your jurisdiction?

A client should consider a counsel who can conduct a thorough examination and planning of all matters arising out of the transaction, who has a competent, diverse and agile team with different expertise areas to cover the transaction in a holistic way and who has a specific knowledge of the sector related to the transaction.

What is the most interesting or unusual matter you have recently worked on, and why?

Each project in an M&A transaction is unique and interesting putting together parties from different countries, cultures and investment backgrounds. Primus inter pares, one of the most interesting deals that we recently worked was related to a flip-up of a Turkish start-up to USA while receiving investment from investors based in five countries spread over three continents.

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United Kingdom

Clare Gaskell advises clients on private M&A and public takeovers as well as equity capital markets transactions and other corporate matters, including minority and preferred equity investments, consortium transactions, restructurings and management equity plans, with a focus on private equity and other financial sponsor clients. Based in the firm's London office, she has particular experience in law and regulation applicable to UK-listed companies. Her most recent M&A experience includes advising KKR on its sale of a majority stake in A-Gas and acquisitions of ContourGlobal plc, John Laing Group Plc, a majority stake in Wella and Unilever's spreads business, HIG Capital on its acquisition of KPMG's restructuring business and CBRE on its acquisition of a majority stake in Turner & Townsend.

Jiaying Zhang advises a range of clients through all stages of the investment cycle within the energy and infrastructure industry. She counsels infrastructure funds on a wide range of complex domestic and cross-border M&A, joint venture and consortium transactions, management equity plans, GP-led secondaries and restructurings across the infrastructure sector. Jiaying was named a finalist in the 'Rising Star' category at Law.com International's 2022 British Legal Awards. Jiaying's recent work highlights include advising TPIH in the sale of a 49 per cent stake in CSP Spain Ports to CMA CGM, KKR in its investment in Greenvolt and acquisitions of ContourGlobal plc and John Laing Group plc, and Stonepeak in its acquisition of a stake in Inspired Education Group.

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1 What trends are you seeing in overall activity levels for mergers and acquisitions in your jurisdiction during the past year or so?

It was recently reported that the value of M&A deals with UK involvement has fallen to a 14-year low in 2023, with a total value down 45 per cent on 2022 levels. However, UK companies remain attractive targets for bidders. In public M&A, 2022 was a quieter year than 2021, with 46 firm offers announced for companies traded on the London Stock Exchange Main Market or AIM (compared to 55 in 2021). In addition, a lower proportion of the bids announced in 2022 were by companies backed by private equity or other financial sponsors than in 2021, and only 13 had a deal value of over £1 billion (compared to 21 in 2021).

The volume of activity remained steady in 2023, with 25 firm offers for Main Market or AIM companies in the first half of 2023 (compared to 27 in the first half of 2022), of which seven had a deal value of over £1 billion. However, there has been a resurgence in the number of private equity or other financial sponsor-backed bids in the first half of 2023 compared to 2022, with 14 announced offers (compared to 19 in the first half of 2022).

2 Which sectors have been particularly active or stagnant? What are the underlying reasons for these activity levels? What size are typical transactions?

The year 2022 was a turbulent one for the British economy. At the beginning of the year, we saw the further escalation of the conflict in Ukraine. The economy later suffered from investor backlash to a calamitous mini budget delivered by the Truss government in September. The aftershocks to these historic events have been rising interest and inflation rates, leading to choppier M&A activity. Buyers and sellers continue to grapple with increased market volatility, capital constraints and a mismatch in pricing expectations.


Clare Gaskell

Jiaying Zhang

While UK M&A deal activity has been affected across the board by the troubled markets, segments of the infrastructure sector have remained more active than other sectors. The digital infrastructure segment remains active, as investors rush to buy essential infrastructure to support the digitalisation of business and society and the expansion of AI technology. Renewable energy and energy transition investments remain active, given the focus on net zero targets. Technology, media and telecoms (TMT) and financial institutions have seen a reasonable level of M&A activity. There have also been an increased number of restructurings of distressed assets and investments by the direct lending arms of private equity firms.

QUESTIONS

"In private M&A, the overwhelming majority of deals are cash only."

By comparison, investment teams have been less active in certain sectors such as consumer goods and retail – other than in a distressed context.

In recent years, we have seen a greater volume of mid-market deals (this typically includes deals of £25 million to up to £1 billion or more), which are less reliant on debt financing than large-cap transactions. According to KPMG's 2022 review, UK mid-market private equity investment grew by 13 per cent to £46 billion compared to 2019.

However, there is no 'typically sized' transaction in the UK, with a wide variation in deal sizes up to values in the multiple billions of pounds sterling. The UK market is somewhat unique in Europe inasmuch as professionals based here tend to cover financing and M&A across multiple European geographies. This can be either because cross-border deals happen under English law, because the relevant professionals on the buy or sell side are based in London or simply because of the expertise of the advisers who live and work in the UK. Invariably, the financing of pan European deals uses debt under English law and/or capital markets financing under New York law. Hence, even when UK M&A itself is quiet, the M&A professionals based in London tend to be busy dealing with global or pan-European deals (whether the relevant assets are wrapped in a UK corporate).

3 What were the recent keynote deals? What made them so significant?

We have advised on a number of significant sales this year, including KKR's sale of a majority stake in A-Gas to TPG Climate Rise, KKR's sale of a 50 per cent stake in X-Elio to Brookfield and TPIH's sale of a 49 per cent stake in CSP Spain to CMA CGM. Transactions involving stake sales often require careful navigation of existing pre-emption regimes, management equity plans and/or regulatory requirements.

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In the current economic climate, certainty of funds is also critical, so understanding buyers' sources of funding – both on the debt and equity side – is essential to structuring a successful transaction.

Our London Corporate team also represented Melrose Industries plc in the demerger of the GKN Automotive, GKN Powder Metallurgy and GKN Hydrogen businesses from the Melrose group into a new independent holding company, Dowlais Group plc. The transaction was significant because demergers of large cap listed companies such as this one are rare and require careful planning and stakeholder management.

Other keynote deals included EQT's £4.5 billion recommended offer for Dechra, a global developer, manufacturer and supplier of products relating to the companion animal, equine, food producing animal and nutrition categories. EQT overcame a challenging financing market to raise debt from direct lenders (including credit funds advised by Blackstone, CVC, KKR and Permira) and equity from ADIA and various passive co-investors.

QUESTIONS

4 In your experience, what consideration do shareholders in a target tend to prefer? Are mergers and acquisitions in your jurisdiction primarily cash or share transactions? Are shareholders generally willing to accept shares issued by a foreign acquirer?

In private M&A, the overwhelming majority of deals are cash only, although on secondaries transactions (where one financial sponsor buys from another), management will often be required and the selling financial sponsor will sometimes choose to roll over a portion of their existing target securities for securities in the buyer entity.

In the case of public takeovers, unlisted securities or loan notes are rare and typically offered only as an alternative to cash. Overseas bidders without an existing UK listing generally do not tend to offer share consideration (unless as an alternative to cash) because overseas securities tend to be unattractive to UK shareholders. Those that do offer stock tend to be listed in the UK already or offer a UK listing as part of the transaction (see, for example, the quasi-hostile offer by Hong Kong Exchanges and Clearing (HKEX) for the London Stock Exchange, though this was not a feature of the merger of equals between Elemental Royalties Corp and Altus Strategies plc). Having said that, a bidder company offering liquid securities that are listed on an overseas investment exchange (such as the TSX Venture Exchange, in the case of Elemental Royalties Corp) should be appealing to a UK PLC shareholder base – especially since those shareholders tend to have a global outlook.

5 How has the legal and regulatory landscape for mergers and acquisitions changed during the past few years in your jurisdiction?

The Digital Markets, Competition and Consumers Bill (DMCC) was introduced to the UK Parliament on 25 April 2023. While it is still uncertain when the DMCC will enter the statute book, the bill heralds significant reforms for national competition rules, including by empowering the CMA to designate businesses as having 'strategic market status' (SMS) in respect of a digital activity, enabling (amongst other things) the CMA to impose conduct requirements and requiring enhanced M&A reporting. It also introduces a new jurisdictional basis for merger control, under which the CMA will gain oversight where (1) at least one party has £350 million in UK turnover and at least a 33 per cent UK 'share of supply' (without any need for a target increment); and (2) the other party has a 'UK nexus' (broadly defined to be satisfied where the party has any activity, legal entity or supply of goods or services in the UK).

Following commencement of the National Security and Investment Act 2021 (NSI Act) on 4 January 2022, the Cabinet Office published the first annual report covering a full 12-month period on 11 July 2023. This report provides valuable insights into the operation of the UK's foreign direct investment regime. The UK government reviewed 766 notifications from 1 April 2022 to 31 March 2023, of which 617 (81 per cent) were mandatorily notified, and 65 (8 per cent) were subject to call-in notices. This reflects a significantly lower number of notifications than anticipated (the expectation being 1,000–1,830 each year), and a slightly lower number of call-in notices (the expectation being 75–90 each year), which might be partly due to fluctuations in overall M&A activity.

Out of the 65 notifications called-in under the NSI Act, 10 transactions were subject to conditions, ranging from relatively light-touch interventions (such as restrictions on the sharing of sensitive information) to more onerous requirements (such as due diligence of all new customers of sensitive products). These conditions were imposed on acquirers from jurisdictions including China, France, Germany, Switzerland, the UAE, the UK and the US, serving as a reminder that the NSI Act can be still be relevant for deals in sensitive sectors regardless of the acquirer's nationality. In contrast, out of 65 notifications called in, only five were prohibited (all involving acquirers of Chinese or Russian origin). Activities in the sectors of advanced materials, defence and military and dual-use were most commonly subjected to call-in notices.

6 Describe recent developments in the commercial landscape. Are buyers from outside your jurisdiction common?

Yes. In public M&A, 68 per cent of the firm offers announced in the first half of 2023 for London Stock Exchange Main Market or AIM companies involved at least one non-UK bidder, including bidders from the US, Canada, Sweden, the UAE and Japan. A large portion of our private M&A clients are financial sponsors headquartered outside the UK and Europe; however, most have London offices and local deal teams who execute the transactions and monitor the portfolio companies after closing.

7 Are shareholder activists part of the corporate scene? How have they influenced M&A?

Shareholder activism has had an increasing impact on UK M&A since the covid-19 pandemic. The year 2022 was particularly busy

for shareholder activists on public deals, particularly investors opposing specific M&A transactions and those agitating for ESG-driven changes.

A prominent example of shareholder activism against specific deals has been the ongoing row between Capricorn and its activist shareholders in relation to its failed mergers with Tullow Oil and subsequently NewMed. Major shareholders opposed both deals, leading the board to abandon both and ultimately resign. We have also seen a number of high-profile examples of ESG-driven activism: for example, ClientEarth, an environmental group, has filed a derivative action claim against the directors of Shell, alleging they had failed to prepare the company for the impacts of climate change, and that this amounted to a breach of their directors' duties.

8 Take us through the typical stages of a transaction in your jurisdiction.

The M&A process very much depends on the parties involved. In the case of a big strategic deal, for example, most of the contact from the early stages tends to be at a principal-to-principal level. On the other hand, auction processes are usually run by financial advisers who coordinate with potential bidders and feed information back to their clients.

A typical auction process involves the circulation of a 'teaser' containing limited, often publicly available, information about a target and a non-disclosure agreement is then entered into before more information is made available. Bidders are invited to submit non-binding offers at the end of a first phase that typically lasts four to six weeks. Selected bidders are taken through to a second phase during which they are given access to a data room, management and sometimes experts such as vendor due diligence providers, and the opportunity to ask follow up questions. At the end of the second phase bidders must submit what is referred to as a final 'binding' offer – although it invariably remains subject to negotiation and signing of definitive transaction documents, at least. If due diligence has been completed before submission of the final offer and the buyer is otherwise ready to proceed, then signing can occur within 24–48 hours of the final offer deadline. In other cases, particularly where the target business is being carved out from a larger group, it can take longer – sometimes weeks – for the parties to enter into a legally binding contract.

The extent of due diligence also depends on the parties involved and the type of transaction. In public M&A, due diligence tends to be very limited – partly driven by the Takeover Code requirement that any due diligence information given to one bidder must be given to any other bona fide potential bidder on request. Due diligence is also typically limited in secondary buyouts, where financial sponsor buyers focus on big value items and take comfort from the fact that the target will have been the subject of due diligence in the fairly recent past. In contrast, a strategic buyer is more likely to want a detailed due diligence process, partly so that it can fully understand and test potential synergies that may underlie its price.

9 Are there any legal or commercial changes anticipated in the near future that will materially affect practice or activity in your jurisdiction?

The tightening of debt financing markets and mismatch in pricing expectations between buyers and sellers has led to many parties rethinking how they structure and finance M&A transactions.

For example, more parties are seeking to use earn-outs to bridge valuation gaps. For a buyer, an earn-out can be helpful in reducing

its funding requirements at closing; and a seller can ensure that any short- to mid-term uplift in performance or value in the target is returned to it.

Financial sponsors have also been focused on portfolio company add-on deals: these investments tend to be less risky from a valuation standpoint given their size, and enable sponsors to price in synergies to help bridge pricing gaps.

More sellers are exiting their investments through stake sales, particularly on larger deals in the infrastructure sector where the sheer size of the business means there is rarely one buyer who can buy the entire asset alone.

We have also seen more interest from financial sponsors in providing financing to companies through convertible preferred investments. This gives them downside protection with a fixed rate return acting as a floor, while they retain the potential for sharing in the equity in an upside scenario. There has been increasing demand from companies to raise financing in this manner, particularly from those that would have completed an IPO in healthier capital markets.

Finally, investors continue to see opportunities in the public markets, whether through take-privates or private investment in public equity, as a result of lower valuations of UK-listed companies.

10 What does the future hold? What activity levels do you expect for the next year? Which sectors will be the most active? Do you foresee any particular geopolitical or macroeconomic developments that will affect deal sizes and activity?

It seems likely that the downturn in the UK economy will lead to more distressed M&A, restructurings and corporate defaults in late 2023 and through 2024. Financial sponsors, with their ready access to large and flexible pools of committed capital, should be well positioned to take advantage of these opportunities, notwithstanding the tightening of debt financing conditions. In other cases, however, continuing differences of opinion between buyers and sellers regarding valuations may result in an extended slowdown in M&A activity until those sellers have an urgent need for cash and are forced to lower their expectations.

QUESTIONS

Clare Gaskell
cgaskell@stblaw.com

Jiaying Zhang
jiaying.zhang@stblaw.com

Simpson, Thatcher & Bartlett LLP
London
www.stblaw.com

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QUESTIONS

The Inside Track

What factors make mergers and acquisitions practice in your jurisdiction unique?

The shareholder base in the UK is generally more capitalist than elsewhere in Europe (inasmuch as we do not have many family-owned or majority-owned businesses). This, together with the lack of works councils and Takeover Code prohibition on poison pills and other 'frustrating action', has traditionally made for an M&A-rich environment. Also, most financial sponsors headquarter their European operations in London, which means that M&A should continue apace here (even if UK M&A itself slows down). On current evidence, while some dealmakers and back-office operations have relocated to the continent or Ireland, the vast majority remain in London and some financial sponsors are actually ramping up their London operations.

What three things should a client consider when choosing counsel for a complex transaction in your jurisdiction?

There's no 'one size fits all' approach – clients should choose counsel with the insight and experience to master complexity and make judgement calls but with the flexibility to collaborate with other advisers, in the UK and elsewhere, to achieve the best possible result. Experience is especially important in relation to public company deals in the UK. The rules are very 'principles' based and require a detailed knowledge of practice and precedent. As law firms and legal practice continue to disaggregate, partner judgement is what will be key on complex and fast moving M&A deals.

What is the most interesting or unusual matter you have recently worked on, and why?

We advised on KKR's investment in convertible bonds issued by Greenvolt, a renewables business listed in Portugal. It was an interesting matter because convertible instruments are becoming an increasingly popular form of instrument for investments. Also, where the instrument holder has co-investors, the co-investment terms may need to also be tailored to those in the underlying bond instrument, factoring in matters such as the impact of any underlying governance rights, convertibility of the instrument, and transfer restrictions into the arrangements upstairs. We have led on a number of multi-layered consortium arrangements recently where such considerations have arisen. Ensuring that the mechanics across different shareholder arrangements or instruments is key.

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United States

Eric Swedenburg is a partner at Simpson Thacher & Bartlett LLP, where he is the global head of the firm's mergers and acquisitions practice and a member of the executive committee. Eric focuses on representing companies in a wide range of mergers, acquisitions and divestitures, spin-offs, joint ventures and other significant corporate transactions. He also regularly counsels clients on shareholder activism, corporate governance and general corporate and securities law matters. In addition to his work with public companies and special committees of boards of directors, Eric has extensive experience in advising non-public corporations, private equity firms and financial advisers in both US domestic and cross-border M&A transactions across a number of industry verticals. Some of his recent transactions have included representing SiriusXM in its US$3.5 billion acquisition of Pandora, Mars in its strategic partnership with KIND, Dover in the spin-off of Apergy, Genesee & Wyoming in its US$8.4 billion sale to affiliates of Brookfield Infrastructure and GIC, and The Mosaic Company in its US$2.5 billion acquisition of Vale Fertilizantes. Other clients of his have included Ingersoll Rand, La Quinta, McKesson and Vodafone Group. Among other recognitions of his work, in 2009, *The American Lawyer* named him 'Dealmaker of the Year.' He is a frequent commentator on M&A issues.

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1 What trends are you seeing in overall activity levels for mergers and acquisitions in your jurisdiction during the past year or so?

In the first half of 2023, M&A deal volume in the US came at just over US$560 billion. This reflected a 40 per cent decline from the first half of 2022 (US$950 billion). It was also lower than the record setting first half of 2021 (US$1.3 trillion) as well as the pre-pandemic levels of the first halves of 2018 and 2019 where US M&A deal volume was approximately US$900 billion and US$1.1 trillion, respectively. Whether the US M&A market rebounds in the second half of 2023 and into 2024 remains to be seen, as a number of the headwinds that first appeared in the fourth quarter of 2021 persist.

As the world recovered from the global pandemic, US M&A activity hit record levels in 2021, largely driven by the low cost of capital, the loosening and conclusion of many covid-19 restrictions, surging private equity activity and the completion of a backlog of deals created by the pause in M&A activity at the start of 2020. However, in the fourth quarter of 2021 and continuing into 2023, the following headwinds tempered activity: inflationary pressures that have been absent in the US for decades, increasing interest rates, rising global geopolitical tensions, volatile equity markets that saw major indexes fall by over 20 per cent and supply chain issues. Moreover, the regulatory climate in the US (and globally) began taking a decidedly more aggressive approach to challenging deals on antitrust grounds, which has also complicated what had been a red hot 2021 deal market. As a result, US M&A activity softened notably from its 2021 highs.

Eric Swedenburg

2 Which sectors have been particularly active or stagnant? What are the underlying reasons for these activity levels? What size are typical transactions?

The sectors that have been particularly active in the US so far in 2023 have been healthcare, energy and power and technology. Healthcare deals were a notable contributor to US M&A activity in the first half of 2023, up 78 per cent from the first half of 2022. Energy and power deals also increased, up 3 per cent from the first half of 2022. Tech deals, long a large share of US M&A activity, saw a dramatic decline in the first half of 2023, down 76 per cent from the first half of 2022. This decline, driven in part by increased conservatism at tech companies coming out of the pandemic, is also due to an absence of large tech deals that punctuated the first half of 2022 (the acquisition of

Activision by Microsoft (US$69 billion), Broadcom by VMware (US$68 billion) and Twitter by Elon Musk (US$40 billion).

3 What were the recent keynote deals? What made them so significant?

In the US, no announced deal in the first half of 2023 exceeded US$50 billion, compared to the prior year where there were two such deals. The largest is the pending acquisition of Seagen by Pfizer for US$43 billion. Pfizer's proposed acquisition of Seagen is the largest M&A deal in biopharma since AbbVie acquired Allergan for US$63 billion in June of 2019. The second largest is in the energy infrastructure sector: Magellan Midstream Partners pending acquisition of ONEOK for US$19 billion. The third largest deal was Extra Space Storage's acquisition of Life Storage for US$16 billion, which closed on 20 July 2023.

4 In your experience, what consideration do shareholders in a target tend to prefer? Are mergers and acquisitions in your jurisdiction primarily cash or share transactions? Are shareholders generally willing to accept shares issued by a foreign acquirer?

In the United States, consideration can be composed of stock, cash or a combination of both, and which form of consideration shareholders prefer is very much dependent on the circumstances. For a target's shareholders, receiving cash has the benefit of locking in a value certain, often at a premium price to current value. Obtaining shares as a portion of the consideration, however, allows the target's shareholders to benefit from the synergies resulting from the transaction. Additionally, if a majority of the consideration is composed of shares, then the receipt of shares may be free of taxes.

> "In the US, no announced deal in the first half of 2023 exceeded US$50 billion, compared to the prior year where there were two such deals."

Acquisitions by non-US buyers of US public companies are generally entirely for cash. In situations where the non-US buyer is truly under non-US control, US shareholders may be reluctant or even not permitted by their investment guidelines to hold shares of non-US entities. Furthermore, under the US federal securities laws, public company shareholders in the United States may only receive shares as consideration if the shares are issued by a company registered with the Securities and Exchange Commission (SEC) and that are publicly tradable. This means that a non-US company that is not already a SEC-registrant must become registered in the US prior to the closing of a purchase of a US public company if shares are used as part of its consideration. The time and expense of this process is a limitation on the ability and desire of non-US purchasers to use shares as consideration for purchasing a US public company.

5 How has the legal and regulatory landscape for mergers and acquisitions changed during the past few years in your jurisdiction?

Key legal and regulatory developments in the United States in the past few years include:

- the increase in scrutiny of non-US buyers by the Committee on Foreign Investment in the United States (CFIUS) as to whether a potential purchase of a US company by a non-US company creates any concerns from a US national security perspective, with the full expansion of the scope of CFIUS now being implemented following a pilot programme during 2019;
- a noticeably heightened level of scrutiny by US antitrust authorities' of transactions across a number of sectors, together with an increased willingness of US regulators to challenge transactions in court, with 10 mergers challenged in court in 2022, up from six in 2021 and eight in 2020;
- the increase of US Securities and Exchange Commission focus on special purpose acquisition companies include new proposals related to disclosure, standards for marketing practices, and gatekeeper and issuer obligations; and
- changes to US corporate tax law, which make it far more acceptable for a US corporation to be the corporate parent of a global enterprise, which introduces greater flexibility into structuring cross-border transactions.

6 Describe recent developments in the commercial landscape. Are buyers from outside your jurisdiction common?

Buyers from outside the United States have typically been an important part of the US M&A market. The amount of inbound activity in the first

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half of 2023 was approximately US$75 billion, lower than the activity in the first half of 2022 (approximately US$115 billion), but consistent with the overall decline in US M&A activity.

Chinese buyers, who by 2015 had become an important participant in the US M&A market, have stepped back almost entirely from the US market, with little activity in the first half of 2023: approximately US$200 million, down from US$3.1 billion in the first half of 2022. This is due to increasing restrictions imposed by the Chinese government on acquisitions by Chinese companies and due to the increasing level of scrutiny by US regulators of Chinese buyers. It is safe to assume that there is a tension on the part of potential non-US buyers coming into the United States seeking to balance the general uncertainty around the political and regulatory climate in the United States, on the one hand, against a relatively attractive American economy, on the other hand. The significant uncertainty around US trade and foreign investment policy and the increase in scrutiny of non-US buyers by CFIUS, among other things, has no doubt deterred some degree of M&A activity in the United States and inbound cross-border M&A in particular.

7 Are shareholder activists part of the corporate scene? How have they influenced M&A?

Shareholder activism in 2023 continues to be a regular part of the corporate landscape in the United States, with 29 campaigns initiated in the first quarter of the year by activists at US companies that have a market capitalisation over US$500 million, around the average of 27 campaigns for the past four years in Q1.

Activism in the US takes a variety forms, as is the case in other geographies, and the activist campaigns typically include one or more of the following themes: M&A actions, board representation, strategy and operations reviews and capital allocation. With respect to M&A actions, one regular aspect of the activist playbook in the US is the urging of companies to put themselves up for sale or to put up for sale portions of their business. In addition to the transactions directly stimulated by activists, many companies have engaged in transactions even before an activist has acquired a stake in that company to forestall such an appearance by an activist. Regardless of your view as to the tactics and merits of shareholder activists, they have certainly contributed to M&A activity over the years, and that is expected to continue in the US market.

Also of note regarding activism in the US is that shareholder activists have become increasingly sophisticated in their approach to board composition, with many proposing high-quality nominees to their slate of board directors. Further, as institutional investors continue to adopt explicit qualifications for diversity in board representation, whether through skill, ethnic or gender diversity, shareholder activists are provided with an opportunity to enhance the quality of a board's composition through diverse nominee selections using networks not accessible or otherwise not efficiently utilised by companies.

8 Take us through the typical stages of a transaction in your jurisdiction.

First contact regarding a possible transaction can either take place between intermediaries or from CEO to CEO. Who makes the initial approach really depends on the particular situation, the nature of the industry and whether there is a pre-existing relationship between executives of the two companies involved.

Diligence of non-public information is permissible if a confidentiality agreement is entered into between the parties. Typically under US law, no disclosure of discussions regarding a possible transaction needs to be made until a definitive agreement with respect to a transaction is executed by the parties, so long as the parties have maintained a position of not making any public comment about a possible transaction while negotiations were taking place.

One issue that often arises at the state of entering into a confidentiality agreement is whether the potential seller will agree to grant to a prospective buyer the exclusive rights to negotiate for a period of time. US sellers have the right to grant a period of exclusive negotiations. However, the boards of directors of most US public companies being sold have a fiduciary duty to show that they engaged in an appropriate process intended to obtain the highest price reasonably available for that company. Some kind of check of the market by the prospective seller is a common way to fulfil that duty. Thus, there is a tension between granting an exclusive right of negotiation and being able to fully assess the market for potential purchasers.

Any potential purchaser of a US public company needs to be aware that lawsuits are frequently filed in connection with acquisitions of US public companies. These lawsuits can be filed in the court of the state where the company is incorporated to allege either that the target

company's directors have violated their fiduciary duties in connection with agreeing to a sale of the company or, in the case of cash transactions, to initiate an appraisal action in which a shareholder seeks a judicially determined fair value for its shares. Alternatively, a lawsuit can be filed in a US federal court alleging inadequate or misleading disclosure in the documents concerning transactions that have been filed with the SEC. The majority of US companies are incorporated in the state of Delaware, and the Delaware courts have sought to severely limit the number of lawsuits filed making specious claims that directors have violated their fiduciary duties, as historically the overwhelming number of these suits were simply nuisance suits. Appraisal claims had risen sharply a few years ago, but recent Delaware court decisions have similarly curbed such suits.

9 Are there any legal or commercial changes anticipated in the near future that will materially affect practice or activity in your jurisdiction?

The regulatory climate in the US, particularly with respect to competition regulation (known in the US as 'antitrust' regulation), has become decidedly more hostile to deal-making in recent years. In a 2021 executive order, US President Biden articulated a broad view of antitrust regulation that, among other things, instructed the US antitrust agencies to increase enforcement to prevent a rise in consumer prices and competitive harm in labour markets and to seek to preserve nascent competition. In what the order calls a 'whole-of-government competition policy', it charged more than a dozen agencies, in addition to the US antitrust enforcement agencies, to protect competition using their authority under a range of US laws.

The Federal Trade Commission (FTC) and Antitrust Division of the Department of Justice (DOJ), as the principal US antitrust regulatory bodies, have responded as expected and have been taking a notably more aggressive approach to reviewing and challenging deals on antitrust grounds. For example, historically, vertical combinations between suppliers and customers were not given much scrutiny. Now, however, the antitrust agencies have been applying increasing scrutiny of vertical mergers, considering, in particular, potential harms in the context of 'modern firms', as well as harms to labour markets. The FTC also adopted other policies making it more challenging on merging parties, including modifications to second-request requirements (the process whereby the FTC can request additional information with respect to the merger) that make the antitrust review process lengthier and give the FTC more time and leverage to challenge deals. Although recent high profile FTC legal defeats, including Microsoft's acquisition of Activision and Meta's acquisition of a virtual reality start up, suggest that courts are not persuaded by these new policies and theories of harm, the overall pro-enforcement approach to antitrust has dampened US M&A activity.

"The regulatory climate in the US, particularly with respect to competition regulation, has become decidedly more hostile to deal-making in recent years."

With respect to regulation in the area of foreign investment, the US continues to take a close look at many deals involving a foreign acquirer. The CFIUS pilot programme installed in 2019 remains in place and is focused on what it refers to as the protection of national security from existing and emerging risks through the expansion and strengthening of CFIUS. Among other things, this programme expanded the overall scope of foreign investment review, including with respect to non-controlling investments in 27 critical technologies, ranging from semiconductors to aircraft engines, all of which are now subject to national security evaluations provided certain benchmarks are satisfied.

10 What does the future hold? What activity levels do you expect for the next year? Which sectors will be the most active? Do you foresee any particular geopolitical or macroeconomic developments that will affect deal sizes and activity?

With the current uncertainty in the US around geopolitical tensions and the high interest rate environment, it is challenging, at this time, to predict how activity levels will look for the next 12–24 months. Facing the current headwinds, US M&A activity has fallen, but there are reasons to think that it may rebound later this year and into the next as parties adjust to the new normal. Many corporate buyers are continuing to execute on their M&A objectives, as M&A remains a vital component of staying competitive and growing, and there remains a significant amount of dry powder that private equity has accumulated and will continue to look to deploy. Some of the sectors that are most likely to remain relatively active in the US M&A market include:

- technology, continuing the constant series of combinations of older and newer businesses in the range of fields comprising the sector;
- healthcare, including hospitals, outpatient facilities, medical device manufacturers and pharmaceutical companies all continuing the ongoing consolidation and convergence in those fields; and
- energy, mining and utilities, continuing this sector's current run of activity.

Making a prognostication as to potential geopolitical or macroeconomic developments could have an effect on M&A activity in the coming year is obviously highly speculative. The potential list of developments range from the impact of higher interest rates and inflation on the economy, how the increased regulatory scrutiny being applied to deal-making evolves, the impact of Russia's war in Ukraine and whether other current geopolitical tensions escalate dramatically. Finally, China seems to be reorienting its economy towards one with greater government control of areas such as technology, banking and real estate, and the global consequences of this internal activity by the Chinese government remains to be seen. In many ways, the crystal ball as to future events and their impact on the US M&A market in the coming year or two is more cloudy than it has been for a while.

Eric Swedenburg
eswedenburg@stblaw.com

Simpson Thacher & Bartlett LLP
New York
www.stblaw.com

QUESTIONS

The Inside Track

What factors make mergers and acquisitions practice in your jurisdiction unique?

The size and complexity of many transactions in the US market, together with the highly developed corporate law governing change-in-control transactions of US companies, make the M&A market here unique. Helping boards of directors properly fulfil their fiduciary obligations in connection with a sale of a company is challenging in the litigious environment of the United States. In addition, the depth, experience and creativity of the private equity deal market in the United States remains a dynamic and distinctive factor in US M&A.

What three things should a client consider when choosing counsel for a complex transaction in your jurisdiction?

First, does the counsel listen and communicate well with the client? Second, is there a complete team of specialist and colleagues who work together seamlessly to help the client achieve its goals? Third, does the counsel have deep expertise with the kind of transaction under discussion? Successfully guiding complex multinational transactions is not for a novice.

What is the most interesting or unusual matter you have recently worked on, and why?

Representing Change Healthcare in its proposed sale to UnitedHealth for approximately US$14 billion (including assumption of debt) has proven to be an enormously interesting transaction that has now spanned three calendar years. In addition to many of the unique elements associated with representing a US public company in a sale process, the Change Healthcare deal became a sort of bellwether of the US government's more aggressive antitrust enforcement posture. Following the production of millions of documents by the merging parties, the US DOJ filed a lawsuit to block the transaction in February 2022. After negotiating and agreeing to an extension of the merger agreement, which was originally executed and announced in January 2021, the DOJ trial took place in August 2022. In a recent period that saw an enormous number of highly interesting deals, the potential sale of Change Healthcare stands out.

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